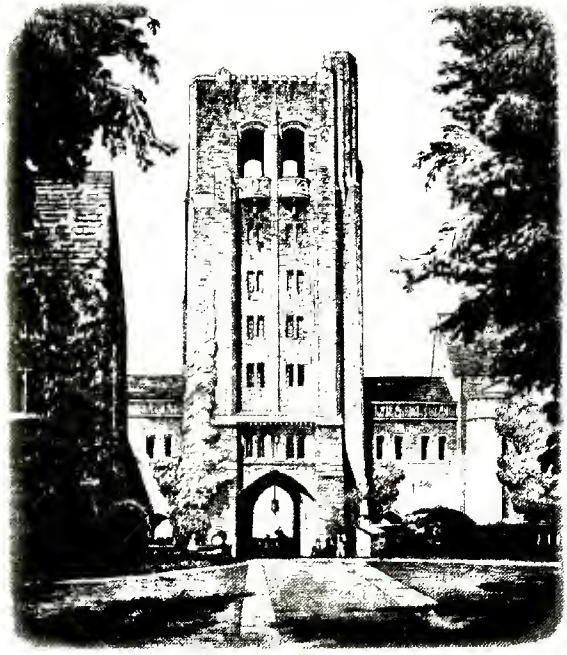

A TREATISE

ON

LAND TITLES

IN THE

UNITED STATES

By LEWIS N. DEMBITZ
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Author of a Treatise on Kentucky Jurisprudence

VOL. 1

ST. PAUL, MINN.
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TO MY WIFE,

Whose help, counsel, and encouragement have enabled me to bear up under long and wearisome labor, this work is

AFFECTIONATELY DEDICATED
BY THE AUTHOR.

PREFACE.

The following two volumes on Land Titles in the United State are laid by the author before his brethren of the legal professio with a painful knowledge of their shortcomings.

The American law of real estate is, in all its practical working the creature of statute:—little else but names and underlying idea is "common law," and not much more is traditional equity. Th American statutes have, indeed, a great family resemblance. Bu the lawyer, in opening a text-book, does not look for the broad out lines. They are common to the whole country. He looks for thos details that will fit the case which he has then in hand, and th state in which that case is to be tried. The law writer must there fore seek to make himself fully acquainted with the statutes of eac state, in all their details; in the points, great and small, in whic they diverge from each other; and with the decisions in each stat which bear upon and interpret these statutes. Among the forty odd states, several must, of necessity, agree on almost every ques tion, as it cannot be answered either by their legislatures or by thei courts in as many different ways as there are states; and, fortunate ly, there has been much borrowing among law makers and law con struers. Yet the variety between state and state seems interminable, and is much aggravated by frequent changes,—statutes amend ed and repealed, decisions overruled or ignored. The work of ar rangement is overwhelming.

The writer is fully conscious that he has missed many of th modern statutes which were enacted since the last revisions in thei respective states. Even Kent, in the fourth volume of his Commen taries, in which he treated the law of Real Estate when the numbe of states was so much smaller than it is now, and when changes i general laws were much rarer, overlooked legislative acts of prett long standing. Why should his humble follower, dealing with twic as many states and territories, and with the infinitude of new ex periments in legislation, fare any better? In fact, no attempt ha been made to embody in his work the substance of the acts passed b the state legislatures during the winter or spring of 1895, for th

simple reason that towards the end of June, when the manuscript of this work went into the hands of the publishers, hardly any of the "sessions acts" were accessible. Indeed, those for the state of New York had not been published in pamphlet or other book form at the end of August.

A leading article based on the address delivered by Mr. Carter before the American Bar Association in August, 1895, says: "Recently the law [of New York] affecting dower was changed in a revolutionary manner, without the knowledge of the profession; and within a few weeks the legislature was compelled to repeal the act, in response to the chorus of complaints that arose from the bar. Last year an alteration was made in the law relating to the legitimacy of offspring. It was accomplished in what may be fairly called a surreptitious manner. We venture to say that the people of the state are to-day ignorant that the alteration has been effected." Similar changes, affecting the title to land, are continually made, in one state or another, not in response to a public demand coming either from the people, or from bench and bar, but brought about simply by the whims of a few members, or even of a single member, in the legislative body. It is pretty hard, if not impossible, for even a careful and painstaking man to keep up with all these changes, and to bring a text-book "up to date."

But the mass of judge-made law, in its yearly growth, is even more appalling than that of new statutes. The old decisions are never repealed. They are as often ignored as they are expressly overruled, and, even after a decision of the supreme court in any one state has been expressly overruled and thrown aside by the tribunal which first pronounced it, that same decision may be blindly followed by the courts of other states. The raw material of precedents not only grows, but it grows at an ever-accelerated pace. Michigan takes only the ninth rank among the states, in point of population, but it publishes in each year six volumes of law reports, which, indeed, are among the very best. During the two months during which these volumes passed through the hands of the printer, two volumes of the United States Reports (157 and 158) were published, and though the supreme court deals mainly with constitutional questions, and with patent, revenue, and admiralty law, these two volumes contained no less than eleven cases which could be profitably

quoted in a text-book on American Land Titles, namely: Last-Chance Min. Co. v. Tyler Min. Co., 157 U. S. 683, 15 Sup. Ct. 733 (mineral lands); Frost v. Wenie, 157 U. S. 46, 15 Sup. Ct. 532 (public lands); Orchard v. Alexander, 157 U. S. 372, 15 Sup. Ct. 635 (same); Bardon v. Land & River Imp. Co., 157 U. S. 327, 15 Sup. Ct. 650 (tax sale); De Sollar v. Hanscombe, 158 U. S. 216, 15 Sup. Ct. 816 (tax deed, cancellation in equity); Teall v. Schroder, 158 U. S. 172, 15 Sup. Ct. 768 (laches in claim for land, letter of attorney); Abraham v. Ordway, 158 U. S. 416, 15 Sup. Ct. 894 (laches); Harter v. Twohig, 158 U. S. 448, 15 Sup. Ct. 883 (same); Whitney v. Taylor, 158 U. S. 85, 15 Sup. Ct. 796 (public lands); Catholic Bishop of Nesqually v. Gibbon, 158 U. S. 155, 15 Sup. Ct. 779 (same); Rich v. Braxton, 158 U. S. 375, 15 Sup. Ct. 1006 (tax sale); besides the great income tax case of Pollock v. Farmers' Loan & Trust Co., 158 U. S. 601, 15 Sup. Ct. 912, with its incidental remarks on the identity of the "rents and profits of the land" with the land itself, of which the author has availed himself.

While the author craves forgiveness for having, of necessity, rejected much of the material in statutes and authorities; for having, in fact, during the three years consumed in the preparation of the work, not found time to find and to read, let alone to sift and to digest, the greater part of this material,—yet he must also ask pardon for a literary blemish in the opposite direction: that of repeating many statements, both in text and notes. Some of these repetitions are unavoidable, as the propositions of law stated can and must be attacked from several sides. Others can only be excused on the ground that the author was worn out by the constant and intense labor of three years, and could not subject his work to that patient course of revision by which alone this fault of repetition, along with other literary blemishes, could have been removed. But, at worst, no more than twenty pages have been added to the bulk of these two volumes by all the repetitions, avoidable and unavoidable.

With the exception of a local law book (Kentucky Jurisprudence, 1891), this is the first appearance of the author before the legal profession; and considering that in years, at least, if not in spirit, he is far from young, it may not improbably be his last.

LEWIS N. DEMBITZ.

Louisville, September 9, 1895.

TABLE OF CONTENTS

VOLS. I. AND II.

VOL. I.

CHAPTER I.

INTRODUCTION.

CHAPTER II.

DESCRIPTION AND BOUNDARY.

CHAPTER III.

ESTATES.

CHAPTER IV.

TITLE BY DESCENT.

CHAPTER V.

TITLE BY GRANT.

CHAPTER VI.

TITLE OUT OF THE SOVEREIGN.

CHAPTER VII.

TITLE BY DEVISE.

CHAPTER VIII.

INCUMBRANCES.

NOTE. When incumbrances are created by deed, the principles, rules, and distinctions set forth in the chapter on "Title by Grant," as to the execution, form, and delivery of deeds, and the capacity of the grantor, apply in nearly all cases, as much as to deeds made in the way of sale and conveyance. Indeed, many of the illustrations given in that chapter were taken from mortgages.

VOL. II.

CHAPTER IX.

TITLE BY MARRIAGE.

CHAPTER X.

POWERS.

CHAPTER XI.

THE REGISTRY LAWS.

CHAPTER XII.

ESTOPPEL AND ELECTION.

CHAPTER XIII.

JUDGMENTS AFFECTING LAND.

CHAPTER XIV.

TITLE BY JUDICIAL PROCESS.

CHAPTER XV.

TITLE BY PRESCRIPTION.

CASES CITED.

INDEX.

LIST OF STATUTES REFERRED TO.

NOTE. This work was begun in October, 1892. The references to Statutes were made to the revisions then out. A number of states have put out new revisions, either official or unofficial, in the year 1893, 1894, or 1895. An effort has been made to correct the statements of the work as to statute law in accordance with the changes made since the last revision, even while the work progressed; but it was impracticable to change all the statute references so as to adapt them to the new numbering of the sections in the new revisions now in the hands of the public. But as the old numbers are generally placed in brackets, behind the new section numbers, but little inconvenience can arise from the omission.

June 24, 1895.

ALABAMA. Code of 1886.
ARIZONA. Revised Statutes of 1887.
ARKANSAS. Mansfield's Digest of 1884; Sandels & Hill's Digest of 1894.
CALIFORNIA. Civil Code; Code of Civil Procedure.
COLORADO. General Statutes of 1883.
CONNECTICUT. General Statutes of 1888.
DAKOTAS. Territorial Codes.
DELAWARE. Revised Laws of 1874; Revised Laws of 1893.
FLORIDA. Revised Statutes of 1892.
GEORGIA. Code of 1882.
IDAHO. Revised Statutes of 1887.
ILLINOIS. Revised Statutes of 1889 (Cothran's Ed.).
INDIANA. Revised Statutes of 1888 and 1894.
IOWA. Code of 1880.
KANSAS. General Statutes of 1889.
KENTUCKY. General Statutes of 1888; Statutes of 1894; Code of Civil Practice of 1877.
LOUISIANA. Revised Civil Code.
MAINE. Revised Statutes of 1883.
MARYLAND. Public General Laws of 1888.
MASSACHUSETTS. Public Statutes of 1882.
MICHIGAN. Howell's Annotated Statutes, volumes 1, 2, and 3.
MINNESOTA. General Statutes of 1878 and 1888.
MISSISSIPPI. Code of 1892.
MISSOURI. Revised Statutes of 1889.
MONTANA. Compiled Statutes of 1888.
NEBRASKA. Consolidated Statutes of 1891.
NEVADA. General Statutes of 1885.
NEW HAMPSHIRE. Public Statutes of 1891.
NEW JERSEY. Revision and Supplement.
NEW YORK. Revised Statutes (Ed. 1889), Code of Civil Procedure.
NORTH CAROLINA. Code of 1883.
OHIO. Revised Statutes of 1890.
OKLAHOMA. Statutes of 1890.
OREGON. Hill's Annotated Laws.
PENNSYLVANIA. Brightly's Purdon's Digest of 1700–1883.
RHODE ISLAND. Public Statutes of 1882.
SOUTH CAROLINA. General Statutes of 1882; Revised Statutes of 1893.
TENNESSEE. Code of 1884.
TEXAS. Revised Statutes of 1893; Paschal's Digest of Statutes (1875).
UTAH. Compiled Laws of 1888.
VERMONT. Revised Laws of 1880.
VIRGINIA. Code of 1887.
WASHINGTON. Hills' Statutes of 1891.
WEST VIRGINIA. Code of 1891.
WISCONSIN. Revised Statutes of 1878 (Sanborn & Berriman's Ed., 1889).

LAND TITLES

IN THE

UNITED STATES.

CHAPTER I.

INTRODUCTION.

§ 1. Scope of the Work.

The first treatise written on the land law of the United States, as distinct from the law of England, is the fourth volume of Chancellor Kent's Commentaries on American Law. The second edition, published in 1832, combines the original draft of the work with an account of sweeping reforms which the Revised Statutes of New York, going into effect on the 1st of January, 1830, introduced into the jurisprudence of that state. Kent was, beyond comparison, the greatest American jurist who ever expounded the law, either from the judicial bench, or the lecturer's chair. None has ever equaled him in perceiving the true grounds on which the law proceeds, and in thus following it out to its just conclusions. But he debars himself from treating the subject in its full compass by leaving out of view everything that pertains to the remedy; for on this ground alone he can have failed to treat of the statute of limitations, that last and surest basis of all titles in land. It is not even mentioned in the fourth volume. It is only alluded to in a preceding volume, as furnishing by its analogy the presumption of a grant for certain easements in land. The judgment lien, and derivation of title from sale

or extent under execution, are spoken of by the father of American jurisprudence, and with nearly as much fullness and detail as was proportioned to their importance at the time; but all details as to practice in the courts, though the validity of the title depends upon them, are carefully avoided, as lying outside of the great writer's plan. He left it to others to teach the student and practitioner when to sue, so as to avoid limitations; how to sue, to obtain a valid judgment; how to proceed with his execution, to have a lawful sale, and to vest a good title in the purchaser. In Kent's time already the land law of the United States had diverged very far (much further than the law of personal property) from its English prototype. Primogeniture had been abolished in all the states; estates tail, in most of them. Jointures and family settlements were rare. Conveyances of land were registered everywhere, while in England the registry of deeds was confined to two or three counties. The strict foreclosure of mortgages, which for many years longer prevailed in England, had been driven out of the American states, other than those of New England. The intricate contrivances of the British conveyancers, such as "attendant" terms, which Kent still faithfully describes, were even in his day unknown to American practice. Thus the fourth volume of Kent, even in its first edition, before the great reforms made by the New York revisers, differed very broadly from any corresponding work which a great English lawyer could have written at the same time. However, when the first and second editions of Kent appeared American precedents were not abundant. Printed reports, which in our days multiply with frightful rapidity, were then few in number, made up in greater part of arguments of counsel, and yet of slender bulk. Of the 16 states which the Union comprised at the beginning of the nineteenth century, only 7 had entered upon the publication of printed reports before that time, namely, Connecticut, New York, Pennsylvania, Maryland, Virginia, and the Carolinas. Massachusetts and Kentucky opened their series of reports in 1805; Tennessee, in 1813; New Jersey, in 1816; New Hampshire, in 1819; Vermont (where Nathaniel Chipman had, in 1792, published a little volume, of about 100 pages, under the name of "Debates & Decisions"), in 1824; Delaware followed in 1837; Georgia, in 1838; Rhode Island, as late as 1847. The supreme court of the United States, and some of the federal circuit courts, whose de-

cisions were reported by private enterprise, or through the love of fame entertained by the judges, supplied the lack of American authority to a slight extent only, as these courts dealt mainly with maritime, international, and constitutional questions.

The lawyers in each state consulted English reports much more than those of sister states. The opinions of Lords Mansfield, Kenyon, or Eldon were better known than those of Chief Justices Tilghman, Parsons, or of Kent himself, outside of their own states. Hence, in Kent's treatise on American Land Law, as contained in the fourth volume of his first and second editions, the citation of English cases rather predominates over that of cases decided in our own state or federal courts.

The conditions are vastly changed in our days. We are overwhelmed by a stream of hundreds of thick volumes every year, giving, at great length, some very flimsy, and some thoroughly well-considered, decisions of innumerable American courts, from the supreme court of the United States down to those of surrogates and county courts. The difficulty the text-book writer has to cope with is not to find material, but to select and to reject. An American decision, even if hasty, and not well founded in reason or authority, is at least authority for the state in which it was decided, and is thus of importance to the American practitioner. Meanwhile, since the days of Kent, American land law has diverged further and further from the ancient English model; and the reforms carried out in the mother country, while sometimes on the same, in many other cases have moved on lines opposite to our own. Hence, in a modern work, like that which is now laid before the American practitioner, the positions of the text must rest almost entirely on American authorities, very many of these construing American statutes; and few English cases can be cited, except those known as "leading cases" in the several heads or branches of jurisprudence.

The present treatise assumes that a reader has some knowledge of the English antecedents of our land law, and undertakes to trace its growth and changes only on the western side of the Atlantic. While the land law of Louisiana, which differs fundamentally from that of all other states, cannot be treated in connection with the latter, attention will be given to the statutes and doctrines which have been drawn from a source other than English,—from that Spanish

and Mexican law which at one time governed all the territory west of the Mississippi, now embraced in the United States, and which prevails in many of the states formed out of that vast territory.

For many years, Prof. Washburne's work on Real Property has been the standard text-book on the land laws of the United States. It is, in a great measure, an expansion of the fourth volume of Kent, together with so much of the third volume as treats of incorporeal hereditaments. Like Chancellor Kent's Commentaries, Washburne's treatise has little or nothing to say on the statute of limitations, and even less about titles based on judgment or executions.

The writer believes that proceedings at law, on the one hand, and the repose from legal pursuit gained by lapse of time, on the other hand, enter so frequently into the question of land ownership, or of incumbrance, that he will set aside one chapter of this treatise to the validity of those judgments, on which title to real estate is likely to depend, against collateral attack; another to the manner in which title to or liens on land may be derived under the judgment of a court,[1] and still another to the workings of the statute of limitations in actions for the recovery of land, or for the enforcement of liens thereon. He will also expound briefly the theory of tax titles, in its several phases. The treatise is, however, confined to land, and will not discuss the mode of acquiring or losing easements, or other in-

[1] The writer of this treatise made his first appearance in legal literature as the author of "Kentucky Jurisprudence," in 1890; a book intended to teach those features or branches of the law of Kentucky, whether statutory or judge made, which a lawyer cannot know by simply studying American law,—exclusive, however, of criminal law and of the law of procedure. But, notwithstanding the latter exception, he devoted a long chapter to "Judicial Titles," dividing it into 11 sections: "Service of Notice"; "Constructive Notice"; "Unknown Heirs"; "Execution Sales"; "Judicial Sales"; "Commissioners' and Sheriffs' Deeds"; "Infants' Lands, &c., before 1852"; "Infants' Lands, &c., 1852 to 1876"; "Infants' Lands, & Kindred Subjects, since 1876"; "Division and Dower"; "Jurisdiction of Matter & Parties." He had found in his practice, in examining titles, that questions of doubt arose oftener upon the validity of judgments, and of proceedings under them, than from any other cause. Three of the sections show, by their very names, the historical plan which is also pursued in the others. He states, with regret, that it will be impossible to carry this plan out fully in this treatise; that is, to state not only the present law of each state, but also that in force at any preceding period at which a change of title by execution or judicial sale took place.

corporeal hereditaments. It deals only with the title, or incumbrances upon it, not with the personal obligations that may arise between owner and possessor, landlord and tenant, dowress and heir or terre-tenant, mortgagor and mortgagee, warrantor and warrantee. While the steps leading to a judgment from which a title to land flows, or the steps after judgment by which it is finally acquired, fall within its scope, the remedy by which the owner may regain possession lies entirely outside of it.

The writer will be careful not to obtrude his own sentiments too often, as between contending views on questions of justice or of the true policy of the law. He cannot, however, conceal his strong feelings on one point,—that is, the sacredness of land titles resting on recorded deeds; the impolicy of allowing such titles to be shaken by any evidence coming by word of mouth, except as against claimants guilty of actual fraud; the danger of allowing such titles to be overthrown by judicial guesses at intention. Like Chancellor Kent, the writer of this treatise believes that the English law took a step backward when unenrolled deeds were, through the astuteness of conveyancers, put in the place of notorious livery of seisin, or of the deed of bargain and sale enrolled in the court of chancery. The peace and welfare of the community are better safeguarded when the ownership of lands is certain and undisputable, and determined by public records and rules on which lawyers and judges can hardly ever disagree, than when it is made to depend on the recollection of witnesses, the caprice of juries, and the discretion of chancellors.

§ 2. Development of English Land Law in America.

The feudal system, as a living factor in society, was never brought to the English colonies. No lands in these colonies were ever held "from" the English king by tenants in capite doing knight's service. No one in this country ever did homage for his lands, or owed any greater duty or fealty to the king by reason of his possession of land than he owed simply as a subject. There never was a guardian in chivalry. No lord had the privilege of giving the orphan daughter of his tenant in marriage. If there ever was a real manor, in the old English sense of the word, with its court baron and court leet, and the freeholders attending as suitors and jurors, it never was kept up

successfully for a single year. In Pennsylvania a few tracts of 100,000 acres were set aside to the lord proprietary as "manors," but they were such only in name; the only distinction between them and the other lands of the proprietary being that these latter were sold to all comers at a fixed, very low price, while he might sell the land comprised in the former upon his own terms. The great "patroon estates" in New York, held under royal grant by the Livingstons and the Van Rensselaers, bore the name of manors. The farms were let on freehold leases, subject to many arbitrary restrictions. But even these manors lacked the distinctive element of feudality in its lower strata,—the manorial court, held by the landlord or his deputy. In fact, long before the English conquest of the New Netherlands this court had dwindled down to an office for registering the transfers of copyhold lands, or, as they were technically called, "estates at will, held after the custom of the manor."

What were the relations between the landowner—even between the first and greatest landowners, the lord proprietors, or colonizing companies—and the king? The charter granted by Charles the Second to William Penn on the 4th day of March of the three and thirtieth year of his reign (1681) gives and grants to him the land and waters out of which Pennsylvania and Delaware were afterwards constituted, "to Have and to Hold, &c., to be holden of us our heirs and successors, Kings of England, as of our Castle of Windsor in our County of Berks, by free and common socage, by fealty only for all services, and not in capite or by Knight's Service, yielding and paying therefore to Us, our heirs and successors, Two Beaver Skins to bee delivered at our Castle of Windsor on the first of January of every year." Whether this is to be regarded as an "ordinary rent," or as "petit sergeanty," is not very material; but such a tenure presents to us, at all events, the merest shell and shadow of feudalism.[2] The charter of 1664, embracing the states of Maine, New York, and New Jersey, grants these territories to the duke of York "to be holden of us our heirs and successors as of our manner [manor] of Greenwich, in free and common socage." The yearly rent is fixed at 40 beaver skins, payable every year, within 90 days after

[2] Poore, Const. pp. 1509, 1510. The fifth part of all gold and silver that may be found is also reserved to the crown.

demand; which demand was certain never to be made.[3] The first charter of Virginia is dated in 1606. By it, James, by the grace of God, of England, Scotland, France, and Ireland, king, gives and grants to Sir Thomas Gates and others, knights, gentlemen, merchants, and other adventurers, who are incorporated as a body politic, "that part of America commonly called Virginia, and other territories, not now actually possessed by any Christian Prince or People, between four and thirty degrees of Northern Latitude, and five and forty degrees of the same Latitude, and the islands thereunto adjacent," etc., "to be holden of Us, our heirs and successors, as of our Manor of East Greenwich, in the County of Kent, in free and common socage only, and not in Capite."[4] This charter was granted when the military tenures, with all their galling incidents of marriage and wardship, were in full force; when these tenures, in the absence of parliamentary grants and subsidies, furnished an indispensable part of the king's revenue. The charter of the New England Company followed in 1620. It grants to Sir Ferdinand Gorges and his associates, mainly of Plymouth, Bristol and Exon [Exeter] the lands between 44° and 48° North Latitude, from sea to sea, "to be holden of us, our Heirs and successors, of our manor of East Greenwich in our County of Kent, in free and common socage, and not in capite, or by Knight's service, yielding and paying therefore to us," etc., "the fifth part of the ore of gold and silver, which," etc., "may happen to be found," etc., —a return which was never realized.[5]

It would not be worth while to go through the charters of the remaining colonies, but for the curious exception in Carolina. A charter similar to the others, granting the territory to be holden of the king in free and common socage, reddendo one-fourth of the yield in gold and silver, passed the seals in 1665; thus cutting off the upper branch of the feudal system, if, indeed, the abolition of military tenures ordained by the Long Parliament, and affirmed by an act of 12 Car. II., had not done so effectually. But, to the amazement of mankind, in 1669 John Locke, the philosopher, having the ear of Ashley Cooper, earl of Shaftesbury, then high in power, drafted a "Fundamental Constitution" for the new colony, in which he instituted new orders of nobility,—landgraves and caciques,—con-

[3] Id. pp. 783, 784. [4] Id. pp. 1888, 1890. [5] Id. pp. 921, 926.

ditioned on the ownership of named quantities of land, and gave to them, as lords of manors, the power to establish a court leet in each manor.[6] It is needless to say that this attempt to found in the new continent feudality in its worst phase—the combination of the landlord and the judge in one person, which, even in England, had fallen into disuse, and survived on British soil only among the highland clans of Scotland—was a complete failure, and that landgraves and caciques, along with Carolinian manors and courts leet, were very shortlived. The charters of the New England and of the Virginia colony were afterwards surrendered and resumed; the soil of Virginia reinvested in the crown; but the principle which kept the new continent free from the burdens of knight's service upon the higher strata of society, or of manorial courts upon the lower, was always adhered to.

By the accession of the Duke of York, under the name of James the Second, to the throne, the provinces granted to him vested in the crown of England, and grants of vacant lands were thereafter made in the name of the king or queen. This may be considered a feudal form, the king being considered the owner of all the lands in his kingdom. But these grants were made by the governors, not as "benefices" to favorites, such as the kings of England, even after the Revolution of 1688, in true feudal style, made to their favorites, but either in return for a fair price in money, or by way of a bounty to worthy soldiers for services rendered in war which the colony was too poor to pay for in any other way.[7] But

[6] Id. pp. 1397–1408, in 120 articles. See the charter of Carolina, Id. pp. 1590–1597.

[7] This subject will be treated more fully in a chapter on "Title Out of the Sovereign." The city of Louisville is built in great part on land granted by Lord Dunmore, in the name of George the Third, to John Connolly and Charles Warmstorff in December, 1773, and to William Preston in 1774, in reward for services which had been rendered by them in the Seven-Years War. The laws under which the several states, at first, and afterwards the government of the United States, grant land, either by way of sale for ready money, in return for services of various kinds (such as the building of railroads), or in the pursuit of the policy of encouraging the settlement of wild lands or the opening of mines, have grown so manifold, and have given rise to so many fine distinctions, that, in the chapter on "Title Out of the Sovereign," we shall have to confine ourselves mainly to the decisions of the United States courts, for fear of becoming too prolix. The national laws on the survey of lands have intro-

in Massachusetts and Connecticut, at least, and at times in other colonies, even this fundamental form of feudality was rejected, and vacant lands were granted by votes of the "general court," or general assembly.

The New York act of October, 1787, is a fair sample of those by which the ownership and overlordship which had formerly belonged to the state was vested in the sovereign people, and the extent of its seigniorial rights defined. All tenures by knight's service, or by socage in capite, all wards, liveries, primer seisins, etc., were abolished, not as of the date of the act, but of the date of the charter of 1664, which meant simply a declaration that all these incidents had never existed on the soil of New York. The old English statute of quia emptores, which forbids subinfeudations, was re-enacted; no one can, for his land, bear duty to any one but to the sovereign state. The men of that day were perhaps too logical to declare the lands allodial (that is, free from all rights in any authority higher than that of the beneficial owner) as long as the state reserved the right of eminent domain, and the right of taking the land by escheat upon its coming into the hands of an alien, or upon the death of the owner intestate and without heirs.[8] And whatever might have been done then, or was done, at a later day, to declare the feudal system at an end, its language could not be rooted out; it still pervades the law of real estate, as will be seen in the chapter on estates. The very broad line between rights in land and rights in chattels or effects is a remnant of the feudal laws. How far this broad line still stands out visibly, how far it has been effaced by legislation in many of the states, will be shown in the chapter on Descent, which in many of the modern codes has been merged in "distribution" or in "succession"; the latter word being borrowed from the French law, in force in Louisiana.[9] The substitution of the allodium for the fief was rather a pretty phrase than a substantial change,

duced in this country a new system of "Boundaries and Descriptions," which make a chapter on that subject the fittest with which to open a treatise on land titles in the United States.

[8] Gerard, in his work on Titles to Real Estate in New York, gives full extracts from the act of 1787, which carried out in detail the objects of a shorter act of 1779.

[9] The reader will, throughout this treatise, find under this, and other branches of the law, the most important steps of historic development.

but it was soon followed by the abrogation of the privileges of the firstborn in those states (all but New Hampshire, Massachusetts, and Connecticut) which had adopted the British system of conferring the lands of an intestate on the eldest son, the eldest brother, or the eldest agnate. The breaking up of landed properties was alleged by the lawmakers of the time to be indispensable in order to prevent those gross inequalties in wealth and power which would undermine and overthrow the republic. Estates tail were also abolished in Virginia and in several other states,—a matter of very slight importance, as "strict settlements" were rather favored than discouraged; and the meaning given to the estate tail in Connecticut, since followed in Ohio and other Western states, made its restrictions much more effective than they had been before.

The period of deliberate law reform set in before the end of the century, beginning on the 19th of December, 1796, with a series of laws enacted by the Kentucky legislature on practice at law and in chancery, executions, with their bearing on the sale of lands, descents, land boundaries, and conveyances.[10] This reform movement spread from state to state, very slowly, however, in Pennsylvania, Delaware, Maryland, and the Carolinas. It culminated in the Revised Statutes adopted by the New York legislature in 1828, which went into effect on the 1st of January, 1830.[11] The drift and object of all these enactments was twofold: First, to pare away the asperities, and to fill up the gaps and defects, of the common law; secondly, to present a whole branch of the law in a connected or codified form. The Civil Code and Code of Commerce introduced by Napoleon into France, and into some of the countries which during the Empire were its parts or dependencies, undoubtedly gave some impulse to the movement of codification; but there was another and more practical motive, which was frankly avowed in that most excellent revision of the laws of Indiana prepared by Samuel Bigger, and adopted by the legislature of that state in 1843. The most important principles of the common law, which clerks, lay judges, or justices had to act upon every day, were to be

[10] 1 Littell's Laws Ky. pp. 481–573.

[11] Chancellor Kent, in the fourth volume of his second edition, speaks eloquently, and with a tinge of sadness, of the sweeping changes which the Revised Statutes made in the old landmarks of real-estate law.

as accessible to them as the changes which the legislature had found good to ingraft on the common law.[12]

The settlement of the West introduced a new feature in the development of American law,—especially of the land law. Ohio, being founded, so to say, by Ephraim Cutter, of Connecticut, borrowed from that state its definition of the estate tail, and its requirement of acknowledgment and attestation by witnesses to the validity of a conveyance. Michigan borrowed its canons of descent from Massachusetts; its law of uses and trusts, in the main, and its law of powers literally, from New York. With the scission of Michigan Territory these laws marched westward to Wisconsin and to Minnesota.[13] The Connecticut law of entail passed from Ohio to Illinois, thence to Missouri. The statutes peculiar to Missouri were transferred almost literally to Colorado and to Wyoming. An example is furnished by the Field Code. David Dudley Field, of New York, the author of the Code of Procedure of that state, and thus the father of modern pleading and practice, undertook to codify the laws of that state pertaining to substantial rights, hoping that his plan would find as ready assent as his Code on Remedies. The radical changes which he sought to introduce made his work distasteful to the New York bar, and all attempts to pass the Field Code into law failed in one or the other house of the legislature at Albany. But it found ready reception in California. It passed thence through the Territorial Civil Code of Dakota into the two states formed from the territory, and many portions were transferred from the California statutes to those of Nevada, Idaho, Montana, and Washington. In some of its parts, the Field Code is copied from the New York Revised Statutes, while in other features

[12] Among the older states, the desire to codify—that is, to cover the whole ground—is found most thoroughly developed in the Georgia Code. After the war, and during or after reconstruction, law reform and codification reached the Carolinas, also. Maryland has legislated with great detail on some subjects, while as to others, such as the statute of limitations, regarding actions for land, it still relies on the old British statutes. The Revised Statues of New York declared all titles to land within the state allodial, and were imitated therein by the revisions of most of the Western and Southwestern states.

[13] The exact agreement in the law of "Powers," of New York, Michigan, Wisconsin, Minnesota, and the Dakotas, will be shown in the chapter on that subject.

(for instance, that of resulting trusts) it runs directly counter to it.

Lastly, we must not omit the example of the mother country among the sources of American law reform. The will act of the first year of Victoria, copied in small part from the New York revision, has, in most of its features, been followed by many of the American states, including some, like Virginia, who have never been in the habit of following the lead of New York.[14]

§ 3. Other than English Sources of Law.

By far the greater part of the territory now embraced by the United States was never, or was only during the short interval between 1763 and 1783, subject to the dominion of the English crown. The Old Northwest, bounded by the Pennsylvania state line, the Ohio, the Upper Mississippi, and the Lakes, was always, before the Seven Years' War, treated by the French as part of their province of Canada; and they had settlements at Detroit, at Sault Ste. Marie, at Fond du Lac, at Vincennes and Terre Haute, at Kaskaskia, and Cahokia. Virginia claimed all, or nearly all, of that country, under the vague words of the charter of 1609, which extended her borders west or northwest. The colonies of New York, Connecticut, and Massachusetts laid claim to strips between their own parallels of latitude, under the "from sea to sea" clauses of their own charters. But as the English king could not grant what he neither owned nor possessed,—as, indeed, any lands possessed by any other Christian prince or people were excluded from their charters,—these claims were alike shadowy. But in the Seven Years' War the king of Great Britain conquered all Canada, including the country between the Ohio and Lakes, from the French king, and it was ceded to him in the treaty which closed that war. The British government included this vast region, in which there were hardly 5,000 white persons of all ages and sexes, in the new province of Quebec, which was to be governed by its ancient French laws, ignoring the claims set up by the colonies under their charters. During the

[14] The will act of 1 Vict. c. 26 (July 3, 1837), being printed as an appendix to Jarman on Wills, became thus well known to the bar and bench of the United States. In the chapter on "Title by Devise," many of its reforms in the old law of wills and of testamentary powers will be referred to.

war of the Revolution, George Rogers Clarke, a citizen of Virginia, started with a few hundred men from the falls of the Ohio (now Louisville), and captured several of the French settlements in the present states of Indiana and Illinois. This lucky stroke gave the American negotiators of the peace of 1783 a basis for demanding the lakes as the boundary of the new republic, and, in a fit of generosity, the British negotiators assented. Thus the "Old Northwest," containing now a population of more than 15,000,000, in which, until then, the French law (as far as there was any law) had prevailed, became American. But the French settlers were so few in numbers, and, moreover, so poor, so illiterate, so lacking in spirit and enterprise, that they left no trace whatever of their institutions among the teeming millions who crowded into the great West after the Ordinance of 1787 opened it to the settlement of American citizens.[15]

While in England and America the language of feudality remained to plague the distant grandsons of lords and vassals, long after the substance of the medieval relations had withered and died, in Spain, France, and other European countries which had drawn their jurisprudence from the Justinian Code, events had taken the contrary course. Laws and customs truly feudal were given names from the imperial Roman law: thus the relation between the great landowners, and the half-enslaved peasants, who tilled the soil as their tenants, was named the "emphyteusis" or "planting right." In the Spanish grants within the limits of the present United States, there are but few, made in large tracts to nobles or royal favorites, that contain traces of the feudal gift in their language.

Louisiana, when acquired by the treaty of 1803, was then, with the exception of small tracts near the mouth of the Mississippi, and a few unimportant settlements within the present states of Missouri and Iowa, given over to the Indian and the buffalo; but wherever, within this vast half continent, white men lived, they obeyed the laws of Spain. The only community with enough wealth or industry to

[15] Cases of titles accruing during the French occupation—very few of them—will be mentioned in connection with the much more numerous Spanish and Mexican titles west of the Mississippi, or in Florida; but no traces of French law entering into the laws of the states.

render laws important was collected around New Orleans. It was French in language and sentiment, and had looked upon its subjection to Spanish law between 1763 and 1803 as a humiliation. Being erected by congress first into the territory of Orleans, and in 1812 into the state of Louisiana, this community, having, to some extent, converted the Anglo-American newcomers to its own sentiments, adopted a code of laws known as the "Code of Louisiana," taken almost bodily from the Code Napoleon, which, even to the present day, with few changes in its provisions, is the kernel of the laws, and more especially of the real-estate laws of that state. In the other portions of the great Louisiana purchase, the old settlers were too few to exert any permanent influence upon legislation. The Americans who came into the region now forming the state of Missouri, superior to the old French settlers in wealth and enterprise, had, on their side, the judges sent out by the federal government, lawyers bred in the common law of England who could not, if they had wished to do so, have administered the old Spanish law, as they did not know nor understand the language in which the books containing it were written. In 1807 the governor and judges, to whom the law-making power in the territory then belonged, abolished the "community" of property between husband and wife, and put the English institution of dower in its place. In 1816 the territorial legislature of Missouri abolished the Spanish law entirely, and put the English common law, mainly in the form in which it was understood in the neighboring territory of Illinois, in its place.[16] Florida, annexed in 1819, took this step more promptly, though it contained at San Augustine, at Tampa, at Pensacola, and on some of the islands, a compact Spanish-speaking population. The law adopting the common law of England and the statutes of the realm down to 1606 (that is, to the year of the first charter of Virginia) was passed by the territorial legislature on the 2d of September 1822, and was re-enacted in 1823 and in 1829.[17] Texas went through the changes from Spanish to English law while still a separate republic. The change was fully accomplished by an act which the congress of the republic passed on the 20th of January,

[16] Lindell v. McNair, 4 Mo. 380; Reaume v. Chambers, 22 Mo. 36. As to the introduction of dower, see Wall v. Coppedge, 15 Mo. 448.

[17] Hart v. Bostwick, 14 Fla. 173.

and which went into force March 16, 1840.[18] In California the native Spanish population might have sustained itself longer in the use of its old laws, but for the enormous inrush from the states, which was attracted by the gold discoveries of 1849. The convention which met to frame a constitution ratified the changes which custom had already brought in, and, from 1850 on, California was a common-law state.[19] In New Mexico the change is nearly, but not quite, complete, though many so-called "common-law statutes" have already been enacted, and Spanish law will undoubtedly be dropped when the state enters the Union.

But it will be shown in the proper part of this treatise that an important institution borrowed from the French and Spanish law—the community of property between husband and wife—is found, not only in Louisiana, Texas, and California, who have never parted with it, but also in Idaho and in Washington, who have borrowed it; not, however, in its full vigor, for this régime of the household is not only ill understood by the English-American lawyer, but its justice and fairness is not apparent to the American layman, and under late statutes and decisions, outside of Louisiana, it is evidently losing ground.

The abolition of private seals, even in the form of a scroll, has been aided in some measure by the example of the Spanish law.[20] The Field Code, already mentioned,—rejected in New York, but adopted in California, and to a great extent in other states of the Western slope,—diverged very far from common-law ideas, especially in throwing the lands and effects of the decedent together in one mass, which is called "his succession," after the fashion of France and of Louisiana, and is treated much like the hereditas of

[18] Whiting v. Turley, Dall. (Tex.) 454; Moore v. Harris, 1 Tex. 36.

[19] St. 1850, p. 219; Johnson v. Fall, 6 Cal. 359; Panaud v. Jones, 1 Cal. 488. The latter case also discusses the civil law, as established in Spain and its colonies, in its bearing on wills; the office of the escribano, or scrivener; the nature of an escritura publica; the community rights of the wife in the acquisitions of herself and husband; the rights of the children, after the death of a parent, in the community property, etc.

[20] Seal unknown to Spanish or Mexican law, Hayes v. Bona, 7 Cal. 156; Steinbach v. Stewart, 11 Wall. 578; while a parol agreement to convey land was void, Hoen v. Simmons, 1 Cal. 119.

the Roman law. It was, perhaps, the Spanish element, still lurking in the California laws, which made that state less averse than New York had been to adopt such innovations.[21]

The Spanish measures of length—the vara, a very short yard, the league, of 5,000 varas; and, as a measure of contents, the square league; also the "league and labor," an area of 26,000,000 square varas—are often met with in boundary disputes arising from Spanish or Mexican grants, and come to remind us that the Anglo-Saxon was not alone in wresting the Western continent from savage men and wild beasts.

[21] It will be seen, in the chapter on "Descent," that the state of Georgia, without any contact with sources of law other than English, has always held to this system of making lands assets in the hands of the administrator for all purposes.

CHAPTER II.

DESCRIPTION AND BOUNDARY.

§ 4. Description in General.

Under the laws of the United States, the lands granted by the national government, directly or indirectly, as they belong to the several land districts, are divided into townships, which run in ranges east or west of some "principal meridian." The townships within the range are numbered from north to south. Each full township is six miles from east to west, and as many from south to north, by the true meridian, and is divided into 36 sections, each of a square mile; each section is divided into 4 quarter sections (northwest, northeast, southeast, and southwest); and each quarter section, again, into halves or fourths. Whenever a navigable river or stream, a lake, or considerable pond, intervenes, the township, section, or other "lot" becomes fractional; the lines are not carried beyond such river, lake, or pond.[1] The rights of the purchasers of fractional lots will be discussed under the head of "Riparian Owners."

[1] The land districts are enumerated in section 2256 of the Revised Statutes of the United States. Section 2395 provides (clause 1) for the laying out of the land by the "true meridian," by north and south lines and others crossing them at right angles; (clause 2) for marking the corners of township and square miles; (clause 3) for the subdivision of the township into sections, the lines to be marked every second mile; (clause 4) for the marking of corner trees; (clause 5) for the noting and marking of deficiencies or

Where a tract is described according to the national surveys, but few disputes as to boundary can arise. It is otherwise in the original states, including with them Maine, Vermont, Kentucky, and Tennessee,[2] all of which communities disposed of their soil in tracts of very irregular shape. The same difficulties arise under the Spanish and Mexican grants in Louisiana, Missouri, California, and New Mexico, and under these and the "republic" and state grants in Texas. The patent granted by the United States, which alone confers the legal title, is always preceded by a survey, and the description in the patent refers to the field work of the survey,—that is, to the visible marks on the ground (in New England they say "on the face of the earth"), by which the lines and corners are denoted; and the same process is ordained by the laws of the several states that

excesses in the township; (clause 7) for the noting of water courses; (clause 8) for the return of field books and plats. Section 2396 provides for the subdivision of sections into halves and quarters, and regulates fractional townships and sections. Section 2397 provides for the further division of quarter sections into halves (by north and south lines) and quarters. The law on mineral lands (sections 2330 and 2331) provides for the further subdivision of the 40-acre lots (quarter quarter sections) into 10-acre tracts. The platting of town sites on the public land is regulated by sections 2382–2386. The author is indebted to the United States surveyor general for Minnesota for the following explanation of the manner in which the convergence of the meridian from south to north is taken into account in laying off townships under the congressional land system: "The deficiency in a township caused by the convergence of the meridians at the north is obviated in the survey of each township separately. The south boundary of each township is just six miles, but because of this convergence the north boundary is less. This deficiency falls on the one-half mile nearest the western boundary of the township. The amount of this deficiency, of course, depends on the latitude. In latitude 46° north the north boundary of a township is about 75 links shorter than the south boundary. The south boundary being six miles in length, that boundary will necessarily extend to the west beyond the township just south of it the amount of the convergency."

[2] Kentucky west of the Tennessee river is platted into townships, sections, and quarter sections under state law. Act Feb. 14, 1820; Morehead & B. St. p. 1040. See Johnson v. Gresham, 5 Dana, 542, as to the inaccuracy of the surveys. Some parts of Ohio, Indiana, Illinois, and Michigan, and important Spanish grants in Missouri, did not pass through the "gridiron" process of the United States surveys. A description by range, township, and section is good without naming the state or territory and county. Raisback v. Carson (Wash.) 13 Pac. 618.

have sold their own lands, though these state laws have not been nearly as faithfully carried out as those of the United States. The monuments on the ground, the trees "blazed" or otherwise marked, are the "survey"; the map and field notes on paper are only the report or return of the survey. The patent is understood to refer to the lines actually run out on the ground, rather than to the courses and lines named in the return; [3] and the same rule holds good where lots are sold by a map which is known to correspond to marked lines on the ground.[4] Hence great uncertainty arises when the marked lines, and still more when the "corners," are lost; that is, when they are effaced by time, or when it turns out that the lines and corners recited in the survey have not really been marked on the ground. When they have been marked, but "lost," it has been held in the majority of cases, that these lines or points, when restored by the recollection of witnesses, or even by reputation, are still the best evidence for settling the position and boundaries of a tract.[5]

[3] "The original marks and living monuments constitute the survey." Clement v. Packer, 125 U. S. 309, 327, 8 Sup. Ct. 907; Goodman v. Myrick, 5 Or. 65; Kronenberger v. Hoffner, 44 Mo. 185; Whitehead v. Ragan, 106 Mo. 231, 17 S. W. 307; and many cases in almost every state. The date of a survey is when the field work is done, not when the written description is returned. Hickman v. Boffman, Hardin, 356, 358. Marked lines rule as against field notes. Hubbard v. Dusy, 80 Cal. 281, 22 Pac. 214. This is so with surveys which precede a grant. Where, however, a judgment or agreement of division orders a survey, an inaccurate survey made in pursuance thereof cannot overide it. Thomas v. Patten, 13 Me. 329. In Pennsylvania an instruction by the trial judge was held erroneous, which limited the preference for the marked lines of a survey on which a patent issued, by requiring that they "must be in harmony with the bearings as near as may be," the supreme court recognizing no such limitation. Riddlesburg Iron & Coal Co. v. Rogers, 65 Pa. St. 416.

[4] Marsh v. Mitchell, 25 Wis. 706. See, also, Knowles v. Toothaker, 58 Me. 172, where the survey preceded the partition; Watrous v. Morrison, 33 Fla. 261, 14 South. 805. It is the same with state surveys. Machias v. Whitney, 16 Me. 343.

[5] Dimmitt v. Lashbrook, 2 Dana, 2; Hall v. Davis, 36 N. H. 569; Gerald v. Freeman, 68 Tex. 201, 4 S. W. 256; Herbert v. Wise, 3 Call, 209; Lewis v. Lewis, 4 Or. 177. As to proof of boundary, and especially of boundaries by reputation, see Boardman v. Reed's Lessee, 6 Pet. 328, 341 (the American rule allows such proof, unlike the English, where the private do not coincide with political boundaries); Huffman v. Walker, 83 N. C. 411, quoting from

Land is often described by mere reference to a plat, generally one which is of record in a public office. This is, in effect, done in every deed issued by the United States for a quarter section, or other greater or smaller lot, under their land laws, and by all those who afterwards convey the land by these divisions. In other cases the description of land starts out with a "point of beginning." Then come the lines compassing the land, the last of which leads "back to the point of beginning." The area or quantity of the land conveyed is sometimes also expressed in acres. Land may, however, be granted or devised by a popular or descriptive name, as the "Metropolitan Hotel," the "Arlington Estate," "my dwelling house," etc.[6]

A call for a tree or rock, for a road, or nonnavigable stream, means the center of the former, the middle line of the latter. The rule as to roads and streams, with its modifications, will be treated separately. In the case of trees, rocks, etc., not only other parts of the description, but facts appearing on the ground, may show that another point than the center was meant.[7]

The point of beginning, or "first corner," is of the highest importance, when the other lines start from it, and are defined only by way of "course," i. e. direction according to the points of the compass (such as north; northeast; N., 22° 30′ E.), and "distance," ex-

other North Carolina cases; reputation that a certain tree was a corner admitted; and proof may be by the declarations of a dead slave, Whitehurst v. Pettipher, 87 N. C. 179; or recitals in deeds more than 30 years old, Hathaway v. Evans, 113 Mass. 264; admissions of opposite party, Shook v. Pate, 50 Ala. 91; recognition by surveyors and by opposite party, Kramer v. Goodlander, 98 Pa. St. 353. But witnesses cannot prove that a certain stump is the post named in a survey; see Pollard v. Shiveley, 5 Colo. 309.

[6] One line of a survey or description, straight or meandering, given either in direction and length, or either, or by reference to a road or stream or line of other lands, along which it runs, or in both ways, and with or without the monument, if any, from and to which it runs, is known as "one call" of the survey or description. Where one grants the northern half of his farm, "now occupied by A.," this is a call for the division fence, north of which A. occupies. Pritchard v. Young, 74 Me. 419.

[7] Stewart v. Patrick, 68 N. Y. 450, states both rule and exception. A road is often called a "monument"; e. g. Frost v. Angier, 127 Mass. 212. A passageway between A.'s and B.'s lots, referred to in A.'s deed to a stranger, does not necessarily end at the corner of B's lot. Ganley v. Looney, 100 Mass. 359.

pressed in chains and links, rods and fractions of rods, or feet and inches (in Texas, and other Spanish surveys, in varas). But where each line is run, not merely "to a point" from which the next line again starts, but to a "monument," or, as the phrase goes, when there are "calls for monuments," either natural or artificial, other corners are established besides the first; and then the first corner has no greater sanctity than the others, and if it be lost, or become doubtful, it may be restored by "reversing the courses," and running the distances back from some one of the other corners.[8] When one of the lines passes along a stream or other body of water, it is said to run "with its meanders"; and to set stakes along the bank of the water, and to draw its contour by the position of such stakes, is to "meander" the stream. A broken or curved line may also be made by following a highway or fence, or the boundary line of another owner's land.[9] Generally speaking, a reference to a property line means the true line, not one erroneously assumed by third parties, unless the circumstances, such as a length of time during which the erroneous line has been acted on, indicate that the parties, in referring to a line, meant that of actual occupation.[10] When the courses

[8] Beckley v. Bryan, Print. Dec. 97; Pearson v. Baker, 4 Dana, 323; Thornberry v. Churchill, 4 T. B. Mon. 32 (where the first corner being lost was restored from the second); Orena v. City of Santa Barbara, 91 Cal. 621, 28 Pac. 268; Hough v. Dumas, 4 Dev. & B. 328; Duren v. Presberry, 25 Tex. 512. Equal dignity of corners, Luckett v. Scruggs, 73 Tex. 319, 11 S. W. 529. Second corner a monument, need not be sought from the first, Scott v. Pettigrew, 72 Tex. 321, 12 S. W. 161. Also, Rand v. Cartwright, 82 Tex. 399, 18 S. W. 794. Contra, Ocean Beach Ass'n v. Yard, 48 N. J. Eq. 72, 20 Atl. 763. Often the lines of a tract are made to begin at a point at a given distance in a certain direction from a monument. The latter then is the "first corner." This reversing of courses has been applied to surveys made under the laws of the United States, in Ayers v. Watson, 137 U. S. 584, 11 Sup. Ct. 201, and Simmons Creek Coal Co. v. Doran, 142 U. S. 417, 12 Sup. Ct. 239.

[9] Thus, "southerly with A.'s line" may include several lines along A.'s lot, which, taken together, lead southwardly. Jawett v. Hussey, 70 Me. 433.

[10] White v. Jones, 67 Me. 20 (in favor of the true line). So, also, Umberger v. Chaboya, 49 Cal. 526. Still stronger in Wiswell v. Marston, 54 Me. 270, where the true lines prevailed over stakes called for as marking them (an extreme case); Cleaveland v. Flagg, 4 Cush. 76, where it was said that only an occupation long enough to give title could put the de facto in place of the true lines. But see cases in note 4, as to the markings of a survey

are given along the cardinal points, such as "north" or "northerly" or "northward," nothing else appearing, it means exactly in that direction,—due north, due south, etc.; and so "northeast" or "northeastwardly" means N., 45° E.[11] These words have no element of uncertainty in them. But the context may show that a course diverging from the cardinal points is intended; for instance, where the side lines of a town lot, on a city street which diverges a few degrees from an east and west line, are made to run to the north or to the south.[12]

Where a deed or other written instrument refers to a plat, the courses, distances, and names of the monuments on the plat are considered as if written out in the deed or writing;[13] and though the

being preferred over the survey on paper. Also, De Veney v. Gallagher, 20 N. J. Eq. 33, where a deed to line of street was said to mean to the street as opened and built upon. If it was laid out at the wrong lines, the location can only be corrected by bill in equity for the purpose. But a conveyance to A., bounded by B.'s land who then had title by recorded deed to one tract, and had bargained and paid for another tract, was construed to bind on the former only. Crosby v. Parker, 4 Mass. 110. A. conveys to B. a tract "bounded on land of T." means correct line, though a mistaken line had been staked off by parol agreement of A. and T. Cornell v. Jackson, 9 Metc. (Mass.) 150.

[11] Jackson v. Reeves, 3 Caines, 293; Brandt v. Ogden, 1 Johns. 156 (construing an old colonial patent). And the words "about north," when there is nothing to show the divergence, will be construed "due north." Shipp v. Miller's Heirs, 2 Wheat. 316. But a northerly or easterly direction will satisfy the calls "north" or "east" when other parts of the description or when circumstances demand it. Faris v. Phelan, 39 Cal. 612. A word like "northeast" has been supposed to indicate the exact course more strongly than one of the principal points would.

[12] In Louisville the courses of town lots are always "north," "east," etc., though as the city is laid out the streets run about 2° east of north. The words are tacitly construed accordingly.

[13] McIvor v. Walker, 4 Wheat. 444; Davis v. Rainsford, 17 Mass. 211. When a deed or survey refers to a preceding deed or survey, and makes it part of itself, the calls of the instrument thus referred to are read as they were in the one referring to it. But distances marked in the plat are subordinate to those written out in the grant itself. Hallett v. Doe, 7 Ala. 882. A reference to the "United States Survey" of lands still unsurveyed was construed to refer to the official survey made thereafter, not to an experimental survey already made, but unknown to the parties. Fratt v. Toomes, 48 Cal. 28.

scale of distances and measurement of angles on the plat cannot always be relied on, even these have been recognized as of some importance.[14] The reference to a previous description, generally one which is contained in a recorded deed to the grantor, or to one from whom he derives title, is also almost always a part of the description in any conveyance, incumbrance, or levy, and often it alone constitutes the description. Such a reference will be benignly construed; that is, where the intent to adopt the former description appears, it will be adopted.[15] The statement of contents or area is generally deemed of less importance than any other part of the description, yet it is often resorted to, to help out an uncertainty or ambiguity in the other elements of the description.[16]

It is often said that a "survey must close." This means that, running out all the lines (at least those of them which are not determined by visible objects or monuments) by their courses and distances, the line last called for must run back to the point of beginning. Where all the lines are given in course and distance only, this is a mere matter of trigonometry: The sums of the northings and southings must be equal to each other; the sum of the eastings must be equal to that of the westings.[17] But it is rare that the description does not close on paper. It happens oftener that while some of the calls are run out on the ground by marked lines, or along

[14] Land Co. v. Saunders, 103 U. S. 316, where, however, other things concurred.

[15] Thus, the words "described and conveyed by" will have their effect, though the writing referred to by them could not operate as a conveyance. Central Pac. R. Co. v. Beal, 47 Cal. 151.

[16] Oakes v. De Lancey, 133 N. Y. 227, 30 N. E. 974, where the quantity was an element to show that a deed was to embrace the flats below high-water mark; Rioux v. Cormier, 75 Wis. 566, 44 N. W. 654, where the quantity was used to remove an ambiguity. Other instances will be given in the sections on "Certainty" and on "Conflicting Description."

[17] Where the whole outline is given in courses and distances, every line running northwardly must be multiplied with the cosine of its deflection. The sum of these products are the "northings." The lines running southwardly multiplied with the cosines of deflection when summed up give the "southings." The lines tending eastward or westward multiplied with the sines of deflection from the meridian give, respectively, the eastings and westings. The sums of the two former and of the two latter must be equal, in order to bring the outline back to the place of beginning.

streams, or to stakes or trees, the remaining lines, perhaps two or three, are either lost, or have in fact never been marked, and, if laid down as directed, will not meet, but will either leave a gap, or cross each other, because the true location of the monuments was not known by the surveyor who gave the courses and distances, or at least was not correctly stated.

The distances must be measured on the level, not up and down with the unevenness of the ground.[18] The course ought always to be given by the "true meridian,"—that is, the line in which the sun or other heavenly bodies stand highest above the horizon, or culminate, is the true south (and such is, and always has been, the rule for the surveys of the United States),—not by the magnetic needle, with its daily and yearly variations; and courses in deeds and other documents should be construed accordingly. However, in the wilds, far away from astronomic instruments, and from the seats of scientific knowledge, the early surveyors under the state governments had no other guide than the needle. They made their surveys by the magnetic meridian, and often, but not always, marked in the margin of their report the variation at the time and place; and such is even now the custom in Tennessee and some other states. In Virginia, an act of 1772 directed that all surveys should be made and reported by the true meridian.[19] In the very teeth of that statute, the court of appeals of Kentucky decided in 1811, and again in 1813, that, as a matter of fact, all surveys, public and private, were made by the magnetic meridian, and that, therefore, all deeds and contracts which contain courses must be construed by the variation which the needle showed at the date of the deed or contract.[20]

When, in the United States survey, the section lines are found, but

[18] The statutes in many states call this a "horizontal measurement"; and the rule is one of the first elements of the surveyor's art.

[19] See 8 Hen. St. p. 526, reprinted in Morehead & B. St. Ky. p. 1494. Virginia, and some of the older Kentucky, surveys bear the legend: "Variation of Needle ——° East." And see sections 920–922, Code Va. 1887, providing a true meridian line for each county, and requiring each surveyor to test his compass by it.

[20] Finnie v. Clay, 2 Bibb, 351, where an old contract to convey a tract bounded by east and west, north and south, lines, was construed by the line of variation at the date of the contract. Vance v. Marshall, 3 Bibb, 150. Rev. St. Ky. 1852, c. 98 (now Gen. St. c. 105, art. 2, § 3), provides that sur-

the quarter-section lines, or still smaller subdivisions, are lost, and the section lines are either too far apart or too close together, the inner lines must be restored by prorating.[21]

The "blocks of surveys" under the Pennsylvania land system must be treated similarly. It often happened, under the laws of that state, which limited the purchase of public lands by any one person to a small area, that one man would locate a number of warrants,—issued to himself, to his children, to his servants, etc.,—sometimes more than 60 in number, together, in one "block," of which the surveyor would run out on the ground the exterior lines, in which alone the owner was interested, quite carefully, but omitting some of the inner lines between the separate lots, in whole or in part; and, when these lots had passed into the hands of several owners, it would be difficult to find and trace the boundaries.[22]

Great legislative grants sometimes speak of the country between two rivers. Each river must then be traced from its mouth to its source. When no branch is named the source is to be sought at the head of the main branch. The two sources are then connected by an air line; the mouths by the course of the larger river into which both streams flow.[23]

§ 5. Conflict in the Description.

The confusion from loose descriptions and faulty surveys has been the bane of all colonial and state grants. It was perhaps worst under the law passed by Virginia in 1779 for the sale of her

veys shall be made by the magnetic meridian, and the variation shall be marked on the survey, if it can be done.

21 Eshleman v. Malter, 101 Cal. 233, 35 Pac. 860; Miller v. Topeka Land Co., 44 Kan. 354, 24 Pac. 420.

22 The system is fully explained in Bloom v. Ferguson, 128 Pa. St. 362, 18 Atl. 488, and cases there quoted.

23 Doddridge v. Thompson, 9 Wheat. 469 (under the reservation by Virginia of the soil between the Scioto and Little Miami). See Cavazos v. Trevino, 6 Wall. 773, for the Spanish method of running surveys along rivers. In Hays v. Steiger, 156 U. S. 387, 15 Sup. Ct. 412, it is rather said arguendo than decided that where, in Mexican grants, hills or mountains are given as the exterior boundary, the foot of the hills nearest to the land is meant, not the ridge.

western lands, of which the most valuable fell to Kentucky.[24] The early Reports in the latter state are full of cases in which contradictory surveys and descriptions are passed upon. At present the richest crop of such cases comes from Texas.

The order of importance of the elements is generally the following: First. Natural and permanent objects, such as a river, lake, or pond, creek or spring; a ridge or ledge of rocks; a tree that has, without being marked, its own identifying aspect. Second. Artificial monuments, marked trees, etc. We have shown already, in the preceding section, how the marks of a survey on the ground are preferred to the report of the survey. Third. Courses and distances.[25] Fourth and last. Quantity. But, as everything in the construction of a deed must yield to the intention, this order may sometimes be broken in upon, when an intention to that effect can be gathered from the whole instrument.

I. The supreme court has strongly expressed its reliance on "natural and permanent" objects, which are less perishable than posts or marked trees, and are more likely to have been in the minds of the parties, as boundaries, than imaginary lines and corners, to be found by the compass and chain. Such objects are to be preferred to lines of latitude. They have "absolute control."

[24] Code Va. 1779, p. 90, or Hen. St., reprinted in 1 Litt. Laws Ky. pp. 420, 422.

[25] For the general statement, see George v. Wood, 7 Allen, 14; Opdyke v. Stephens, 28 N. J. Law, 86; and cases in almost every state. In Titherington v. Trees, 78 Tex. 567, 14 S. W. 692, the order of importance first, second, and third was given as in the text in an instruction of the trial judge, with the limitation, that none of these calls absolutely control the other when there is good reason in the case why the monuments should not prevail over course and distance. For this restriction (it was not justified by the facts) the judgment was reversed. For cases of "contrary intention," see Jones v. Burgett, 46 Tex. 285; and compare Linney v. Wood, 66 Tex. 22, 17 S. W. 244. Courses and distances prevailed against monuments, as in better harmony with the intention, in Higinbotham v. Stoddard, 72 N. Y. 94. See, for preference of natural over artificial objects, Baldwin v. Brown, 16 N. Y. 359. A full list of the New York authorities is found in Ger. Tit. Real Est. p. 513. See, also, Bruce v. Morgan, 1 B. Mon. (Ky.) 26; Bruce v. Taylor, 2 J. J. Marsh. 160. So, also, a location by latitude will be rejected, if incompatible with references on a map (Mayo v. Mazeaux, 38 Cal. 442), latitude being "an imaginary line."

The most "material and certain" calls must control those that are less material and certain.[26] Where, from a point on the edge of a stream, a course is given along that stream, say to its confluence with some river, the land borders on the water courses, though the course given is incorrect; nay, even if it is altogether the other way.[27] It must not, however, be forgotten that rivers are not always permanent, that their channels may change, and that not only monuments set up by the surveyor, but courses and distances also, may be profitably used, to find the shore line along which a stream may have run at the time when that stream was "called for." [28] It has happened that the intent to grant within a certain measurement, or to convey a certain acreage, is so clearly expressed that both natural and artificial monuments must give way to it, especially when the distance was only a few feet on level ground, about the measurement of which it was not easy to make a mistake; and this intent will be best shown by a separate clause added at the end of the ordinary description.[29]

II. Where the survey on the ground precedes the written description, and the marks or "surveyor's footprints" are found, these must

[26] Newsom v. Pryor's Lessee, 7 Wheat. 10; Brown v. Huger, 21 How. 305, 308. Mistakes in courses are corrected by the calls. Heck v. Remka, 47 Md. 68.

[27] Brown v. Huger, supra; Shepherd v. Nave, 125 Ind. 226, 25 N. E. 220. The boundary will follow all the meanders of the stream, though the single course would indicate a straight line. Bailey v. McConnell (Ky.) 14 S. W. 337; French v. Bankhead, 11 Grat. (Va.) 136. An island granted by its name passes, though courses and distances fall short. Lodge v. Lee, 6 Cranch, 237.

[28] This is best exemplified by the case of Missouri v. Kentucky, 11 Wall. 395, as to Wolf Island, in which the evidence turns on the question where the channel of the Mississippi river had been at a given former date. And so a location on a road means such as it was at the time of the deed. Atwood v. Canrike, 86 Mich. 99, 48 N. W. 950.

[29] Buffalo, N. Y. & E. R. Co. v. Stigeler, 61 N. Y. 348, where in a deed to a railroad company a strip of defined length and width in the direction of its line was given to it. These calls, of course, and distance, were preferred to a call for the lands of another road. Higinbotham v. Stoddard, 72 N. Y. 94. Lines of city lot, very short, and readily measured and agreeing with quantity, preferred to call for line of mill race. Jones v. Smith, 73 N. Y. 205. "Land called the cross lot now in possession of A. B." too vague to override a description. Oushy v. Jones, Id. 621, where the closing words "the premises being intended," etc., giving a named farm, of which the

prevail, though the land system under which the surveys are made prescribes the size and shape of the lots to be surveyed, and the marked lines fail to produce these.[30] The question arises generally when some of the marked lines or corners are lost or obliterated, and are located by the evidence of witnesses; sometimes even by reputation and hearsay.[31] The matter must then be put to the jury thus: "If the evidence as to location of the monuments or marked lines is conflicting, you must form your own conclusions; but when you have, on all the evidence, found where the monuments or marks were put, these will prevail over the courses and distances." But it seems that if the evidence is conflicting or weak the very courses and distances of a patent must have some weight in locating the lost monuments.[32]

Highways, especially streets, and the walls of houses, are often called for in deeds, and hold an intermediate place between "natural objects," on the one hand, and the marks of the surveyor, on the other. A call for the center of a party wall as a starting point prevails over the accompanying words, requiring this point to be at a certain distance from a given street.[33]

boundaries were on record, were held to control. The shortness of the lines is made a point in favor of correctness in Tyler v. Hammond, 11 Pick. 193, 211.

[30] The section lines and corners that are actually marked are controlling, and cannot be corrected by an experimental survey. Conn v. Penn, Pet. C. C. 496, note, Fed. Cas. No. 3,104; Buel v. Tuley, 4 McLean, 268, Fed. Cas. No. 2,101.

[31] See preceding section, note 3, as to reputation and hearsay.

[32] When the proof of marks or monuments is vague and slight, it should not, it has been said, overcome courses and distances (see Hall v. Mayo, 97 Mass. 416; Bruckner v. Lawrence, 1 Doug. [Mich.] 19; Budd v. Brooke, 3 Gill. [Md.] 198); though, more logically, it is matter for the jury, if the proof is competent, to say whether it is enough to locate the monuments. In Robinson v. Kime, 70 N. Y. 147, 154, lost corners, of which the location was proved by parol, prevailed over distances. And unmarked lines must not control corners marked or found. Randall v. Gill, 77 Tex. 351, 14 S. W. 134; Kellogg v. Mullen, 45 Mo. 571 (if the lines can be ascertained, they prevail).

[33] Muhlker v. Ruppert, 124 N. Y. 627, 26 N. E. 313, distinguishing Smyth v. McCool, 22 Hun, 595. But where a house was identified only by street number, and another house answered the distance, the latter was preferred. Thomson v. Wilcox, 7 Lans. 376. Where one owner sells parts of a common lot to A. and B. by corners, and then courses and distances, and the re-

A very important "artificial object" is a tract of land. It may be a town, or other political division; it may be a parcel named in a previous grant. If the nearest line or corner is marked, it is the ordinary case of a call for a monument;[34] but suppose it is not. There is a line of cases in North Carolina, approved by the supreme court of the United States, in which it is settled "that the call for the line of another tract of land, which is proved, is more certain than, and shall be followed in preference to, one for mere course and distance.[35] This is especially so where the older tract is a political division, or has a great and ancient notoriety, and its boundaries are laid down on public maps. Where the same party (e. g. the crown or the state) has granted both tracts, describing tract B as running over a line, with given course and distance, to tract A, he and his subsequent grantees are estopped from claiming a strip or gore between tracts B and A by reason of the shortness or wrong direction of the line by which the grantee of tract B is to reach tract A.[36]

Where a line is directed towards a pond, a river, or a defined tract of land, and will not touch it at any point, the course may be

mainder to B., the latter is not restricted by the fence round his yard, which is not named in the deed, from claiming a narrow strip between it and the named boundary. Thompson v. Kauffelt, 110 Pa. St. 209, 1 Atl. 267. And where a man sells part of a large lot by exact boundaries, and adds "being the piece of land employed as a garden," these words were not deemed clear enough to make the partially misplaced fence override the measurement. Harris v. Oakley, 49 Hun, 605, 2 N. Y. Supp. 305. But such words as "by the fence as it stands to the beginning" will overrule the location of the "first corner" by measurement. Needham v. Judson, 101 Mass. 155. A street laid out on paper in an embryo town is not a monument. Saltonstall v. Riley, 28 Ala. 164.

[34] Well established corners in an adjoining survey, neither plaintiff's nor defendant's, may control. Griffith v. Rife, 72 Tex. 185, 12 S. W. 168. When there is need for monuments, those in the nearest survey should be sought. Noble v. Chrisman, 88 Ill. 186. But "a tree at the mouth of a creek," when the tree can no longer be found, is too vague a location, and course and distance will prevail over it. Budd v. Brooke, 3 Gill. (Md.) 198.

[35] Land Co. v. Saunders, 103 U. S. 316, quoting Campbell v. Branch, 4 Jones (N. C.) 313. This, in turn, follows Carson v. Mills, 1 Dev. & B. 546; Gause v. Perkins, 2 Jones (N. C.) 222; Corn v. McCrary, 3 Jones (N. C.) 496.

[36] Land Co. v. Saunders, ubi supra.

saved if a shortened or extended distance will reach the object.[37] But if the line would at any rate pass by the large object by which it is controlled, the rule is to abandon both course and distance, and to draw instead the shortest straight line which will reach the object aimed at.[38]

When the survey in dispute joins another and older survey, of which the lines have already been run out on the ground, these, as far as they are common lines, may be adopted, with as much force as if they belonged to the survey in dispute. This is especially clear when the same surveyor made both surveys within a few days of each other, and has often been applied to the "blocks of surveys," already explained, found in Pennsylvania.[39]

The rule that calls must be preferred to courses and distances has this exception: that when the deed refers to the former in a doubting way, qualifying them by such words as "supposed," the latter will prevail, as expressing the intention of the draftsman more certainly.[40] So where a tract is first denoted by its popular name, and described by metes and bounds, or courses and distances, which show some mistake or doubt on their face, the known boundaries of the named tract will prevail over a construction which might otherwise be given to the ill-expressed boundaries; while otherwise, a specific reference to metes and bounds, or to a plat giving courses and distances, would prevail over and limit such a general designation as "my farm."[41] Courses and distances are sometimes

[37] Standen v. Bains, 1 Hayw. 238; McPhaul v. Gilchrist, 7 Ired. 169; Literary Fund v. Clark, 9 Ired. 58.

[38] Campbell v. Branch, ubi supra, overruling a dictum in Literary Fund v. Clark, supra, which suggests that the shortest distance line should be drawn from the end of the line that will not reach the object.

[39] Pruner v. Brisbin, 98 Pa. St. 202, discusses the whole subject of these "blocks." In Pennsylvania there is presumption de jure after 21 years from date of survey that it has been actually made. Grier v. Pennsylvania Coal Co., 128 Pa. St. 79, 18 Atl. 480. See, however, Magowan v. Branham, 95 Ky. 581, 26 S. W. 803 ("within the D. T. survey" rejected).

[40] Mizell v. Simmons, 79 N. C. 182, and older cases in the same state. A fortiori does the line of a third person that is called for prevail over course and distance stated with "more or less." Howell v. Merrill, 30 Mich. 283.

[41] Haley v. Amestoy, 44 Cal. 132; Breck v. Young, 11 N. H. 485 ("about 61°"); Stewart v. Davis, 63 Me. 539. Thus, in Shipp v. Miller's Heirs, 2 Wheat. 316, a call for a buffalo road in an entry under the Virginia land act of 1779

made to yield to the combined effect of quantity and natural objects, such as a call for crossing a river with one of the lines, and at the same time inclosing a named quantity, the latter being material when the land is sold by the acre.[42]

III. Courses and distances rank after artificial monuments, but it is yet an open question how they rank among themselves. In an early Kentucky case it was said: "(1) Nothing but a necessity will justify a departure from either course or distance. (2) When a departure from either course or distance becomes necessary, then the distances ought to yield." As expressed elsewhere, when a corner is lost, "it will be put at the intersection of the lines leading to it."[43] But this doctrine, which seemed to be in vogue at the beginning of the century, was soon withdrawn by the Kentucky court of appeals, which now says that courses and distances are of equal dignity, and in construing surveys the doubt must be solved in favor of the commonwealth; hence the angle will rather be lessened, if running it out according to the description would lengthen a distance, and thus increase the contents of the grant.[44] And this equal rank of course and distance is now the more general rule, though in Texas course is preferred over distance, as formerly in Kentucky.[45] In a hilly—still more in a mountainous—country there is good reason for distrusting the distances more than the courses;

was rejected as in conflict with a distance supported by a natural monument, the ridge between two forks. See, also, Johnson v. Hughart, 85 Ky. 657, 4 S. W. 348. So, in Texas, the distance leading to a marked line is preferred, unless the marks on the ground are proved to be those of the survey which is referred to. Fagan v. Stoner, 67 Tex. 286, 3 S. W. 44.

[42] Newsom v. Pryor's Lessee, 7 Wheat. 7, a strong case, for a 5,000-acre tract was laid off in the description of the grant, as a square of 894 poles, and had to be drawn out into a rectangle. A square league along a river had to be drawn out into an unusual shape in Williamson v. Simpson, 16 Tex. 435.

[43] Bryan v. Beckley, Litt. Sel. Cas. 93 (s. c., Print. Dec. 93, and Litt. Sel. Cas. 100). A slight discrepancy to be explained by change in variation. Scott v. Yard (1890) 46 N. J. Eq. 79, 18 Atl. 359.

[44] Preston's Heirs v. Bowmar, 2 Bibb, 493; Pearson v. Baker, 4 Dana, 324 (doubt to be solved against grantee). No universal rule as between courses and distances. Loring v. Norton, 8 Greenl. 61. "One or the other preferred according to the manifest intent of the parties." Smith v. Chapman, 10 Grat. 445.

[45] Such is the common rule in Texas.

and while the old Kentucky case above quoted says, further on, that allowance should be made for the variation of the needle and for the unevenness of the ground, it is clear, that the allowance for the former can be made with much more ease and certainty than the latter.[46] Courses and distances have been postponed, not only to monuments, but also to the general description of some well-known tract, though it is not there marked by visible monuments, nor bounded by fences. The parties are supposed to have had a known tract in their minds, and, if the lines by which their tract is to be either reached or measured do not reach or measure it, a mistake is presumed to lie rather in the length and direction given to those lines than in the designation of the tract.[47]

IV. That the lines, as run, inclose a surplus above the named area, is of no import, except as circumstantial evidence.[48] This principle has been applied to grants obtained from the state of Virginia, and still more unblushingly in Tennessee, where lands sometimes exceeding the number of acres paid for three or more times were surveyed as being the quantity paid for, and the state was held to be without remedy.[49] A deficiency would stand upon the same ground as a surplus. We are not here dealing with the right of either party to obtain redress for the loss resulting by fraud or mistake, or with the apportionment of the deficit or overplus among several purchasers, but simply this: that at law boundaries are, if otherwise certain, and whether fixed by monuments and marked lines or by courses and distances, not affected by the statement of contents or acreage inconsistent with the description.[50] The quantity named as part of a description is, however, often looked to where the other elements of the description leave room for ambiguity, or seem to be in conflict with each other, or where, by their awkward wording, they indicate a mistake of the draftsman; just as, in a similar case,

[46] Scott v. Yard, 46 N. J. Eq. 79, 18 Atl. 359.

[47] Thomson v. Thomson, 115 Mo. 56, 21 S. W. 1085, 1128; Rutherford v. Tracy, 48 Mo. 325; Lodge's Lessee v. Lee, 6 Cranch, 237; Keith v. Reynolds, 3 Greenl. 393.

[48] Mercer v. Bate, 4 J. J. Marsh. (Ky.) 338; Sanders v. Godding, 45 Iowa, 463. But quantity is made available in Scott v. Pettigrew, 72 Tex. 321, 12 S. W. 161, to control doubtful lines, not actually run out.

[49] Fowler v. Nixon, 7 Heisk. 719.

[50] Pope v. Hanmer, 14 N. Y. 240.

courses and distances given positively are preferred to monuments stated in uncertain words.[51]

When elements of the same rank are in conflict, the court must, upon the whole survey or description, decide the dispute as well as it may: as between two monuments, both of which could not have been meant as corners;[52] and, if need be, not only all parts of the description, but the whole deed, must be read to reconcile the conflict.[53]

Besides the conflict between monuments, natural and artificial, courses and distances, and quantity, there is sometimes the conflict between a full and fair description or designation of the conveyed or devised lot, and a subsequent reference or redescription. It is very difficult to give any general rules as to the comparative force of the one and the other, as the language and surrounding circumstances must in each case show whether the first or the second designation most fully expresses the will and intent of the parties. When one description is complete in itself, and the other only a reference to other documents, it is said, "Falsa demonstratio non nocet," [54] and that parties rely more on the first description, un-

[51] Field v. Columbet, 4 Sawy. 523, Fed. Cas. No. 4,764.

[52] Fitzgerald v. Brennan, 57 Conn. 511, 18 Atl. 743. In Field v. Columbet, supra, the description wound up with the remark that two springs were included. To solve a doubt in the meaning, the court used this remark in favor of a boundary which would barely include the springs.

[53] Mott v. Mott, 68 N. Y. 246 (question of including a way); Hussner v. Brooklyn City R. Co., 96 N. Y. 18 (rather a weak case).

[54] "So, according to the maxim of Lord Bacon, 'falsa demonstratio non nocet,' when the thing itself is correctly described; as in the instance of the farm A., now in the occupation of B., here the farm is designated correctly as farm A. But the demonstration would be false, if C., and not B., was the occupier, and yet it would not vitiate the grant." 4 Kent, Comm. p. 467, quoting Blague v. Gold, Cro. Car. 447, 473; Jackson v. Clark, 7 Johns. 217; Howell v. Saule, 5 Mason, 410, Fed. Cas. No. 6,782. Where land correctly described in a deed is mistakenly said to be the "dower tract" of a named widow, this does not weaken the effect of the description, nor estop the parties from showing it to be another tract. Doane v. Willcutt, 16 Gray, 368. "My dwelling house on the ridge of the beach" identifies the place, and the added words "occupied by J. S.," being untrue, may be rejected. Stone v. Stone, 116 Mass. 279. A 40-acre lot identified by township, section, etc., will pass, though located by mistake in an adjoining county. Wilt v. Cutler, 38 Mich. 189. Or where a description, otherwise correct, calls for the north-

less it be defective, than on an attempted redescription. Yet the reference to a former deed may be most important, as the grantor is likely to convey by the same boundaries by which he owns the land. And, where the second description gives definite boundaries, these ought to prevail over general terms that are used first. If there are several descriptions, the court may interpret them in a way that will satisfy each of them.[55]

While an unopened street, to be found merely by continuation of one in actual use, cannot be said to present any monument, built by either nature or art, yet it will prevail, when in conflict with a distance leading to it, at a right or other angle to it, as it can with certainty be found from monuments, or bodily features of the ground.[56]

While, as shown elsewhere, a description altogether uncertain conveys nothing, yet where the description can only bear two meanings the rule is to construe it against the grantor, as the deed is supposed to be his language; [57] and if one grants a larger tract, subject to exceptions or reservations, a doubt as to their meaning will also be

east corner of lot 11, instead of lot 12, this mistake was disregarded. Chandler v. Green, 69 Me. 350. And several such mistakes were ignored in Hathorn v. Hinds, Id. 326. But in Jennings v. Brizeadine, 44 Mo. 332, it was held that "block 46" on a map could not be recovered under a conveyance of "lot 46," unless the deed was corrected by decree in equity. All "water and beach lots" within defined outer lines being conveyed, numbered 1 to 32, it was held that lot 33 would also pass, being a "water and beach lot," and within the line. Friedman v. Nelson, 53 Cal. 589. A full and consistent description by metes and bounds, with a reference to a previous instrument, having no description in it, but merely showing an intention to convey certain other lands, cannot be corrected at law so as to reach such other lands. Prentice v. Northern Pac. R. Co., 154 U. S. 163, 14 Sup. Ct. 997.

[55] This whole matter is fully discussed upon the New England cases in Hathorn v. Hinds, 69 Me. 326, where the following cases, each supporting points in the text, are quoted: Crosby v. Bradbury, 20 Me. 61; Melvin v. Proprietors of Locks & Canals on Merrimack River, 5 Metc. (Mass.) 15, 29; Weller v. Barber, 110 Mass. 44, 47; Haynes v. Young, 36 Me. 557; Stewart v. Davis, 63 Me. 539; Whiting v. Dewey, 15 Pick. 428, 434; Sawyer v. Kendall, 10 Cush. 241 (general description controls where the metes and bounds are impossible); Law v. Hempstead, 10 Conn. 23; Madden v. Tucker, 46 Me. 367.

[56] St. Margaret's Memorial Hospital v. Pennsylvania Co. for Insurance on Lives & Granting Annuities, 158 Pa. St. 441, 27 Atl. 1053.

[57] Ganley v. Looney, 100 Mass. 359, 364.

solved against the grantor, so as never to enlarge these exceptions or reservations. [58]

§ 6. Certainty in Description.

A deed or will, in order to pass an estate, must denote it with certainty. In wills the testator often devises "all of my lands," or even "all of my estate"; and, in assignments for the benefit of creditors, words of equally sweeping import are generally used, and in many states must be used. But in ordinary deeds of sale, of gift, or of mortgage (the latter known as "blanket mortgages"), such general words as "all my lands," or "all my lands within the state of ———," are good and effectual, between the parties, as to all those lands situate in a state, to the laws of which the deed conforms in its form and execution.[59] Such sweeping language has, however, in Connecticut been held insufficient in a mortgage, and is everywhere held bad in a sheriff's deed, on grounds variously given, but really because the levy of an execution on "all the lands of the defendant"

[58] Wyman v. Farrar, 35 Me. 64.

[59] Gen. St. Conn. 1888, § 501, dating back to 1843; Connecticut being the first state which regulated general assignments. Many others have followed; and, in those which have not done so, it is usual to use words which seek to embrace everything subject to execution; and the courts always construe such a deed, if possible, so as to reach and pass to the assignee all the assignor's interest in land, of whatever description. Knefler v. Shreve, 78 Ky. 297. In Moore v. Magrath, Cowp. 11, Lord Mansfield held that such general words, when following the grant of one named tract, must sometimes be disregarded as a blunder of the draftsman. But in the absence of mistake, as in Cox v. Hart, 145 U. S. 376, 380, 12 Sup. Ct. 962, a deed "conveying all the grantor's estate in Texas or elsewhere" is effective. It is there so treated, as of course. So, also, Jackson v. Delancy, 4 Cow. 427 ("all other lands not heretofore conveyed"); Sanders v. Townshend, 89 N. Y. 623; Wilson v. Boyce, 92 U. S. 320. See, however, Wilson v. Beckwith, 117 Mo. 61, 22 S. W. 639, arising under the same private act, reserving a lien to the state over a railroad. The word "property" was construed, a sociis (tracks, depots, shops, etc.), not to include the land grant, in accordance with Whitehead v. Vineyard, 50 Mo. 30, in which the equities were somewhat different. St. Louis, I. M. & S. R. Co. v. McGee, 115 U. S. 469, 6 Sup. Ct. 123, excluded the land grant. Alabama v. Montague, 117 U. S. 602, 6 Sup. Ct. 911, excluded town lots in another state. "All my farm land and wood land" carried the grantor's undivided share in a large tract. Drew v. Carroll, 154 Mass. 181, 28 N. E. 148.

would be bad, and the sheriff's deed must be supported by a good levy, and must follow it.[60] The description in a deed of particular lands need not be "direct." It need not, in express words, set out all the boundaries, either by calls or courses and distances. If it is certain by the construction which the law works out from its words, that is enough.[61]

Where a deed purports to convey a part of a larger territory, it must contain something by which the smaller area can be segregated from the larger. The principle is pretty much the same as in the sale of chattels, where a sale cannot take effect till the one or more articles bargained for, out of a larger mass, are selected and set apart. Until then, in either case, though the deed or bill of sale should be drawn in the present tense, there is only a contract to sell, or a contract to convey.[62] Yet it seems that when the grantee has, by an un-

[60] De Wolf v. A. & W. Sprague Manuf'g Co., 49 Conn. 282; Jackson v. Delancy, 13 Johns. 542 (all of defendant's land in Ulster county); Simonds v. Catlin, 2 Caines, 65. The reason is pointed out in McGuire v. Kouns, 7 T. B. Mon. (Ky.) 387.

[61] Webber v. Webber, 6 Greenl. 127 (enough if the description can be made out by construction); s. p., Laub v. Buckmiller, 17 N. Y. 620. In Gresham v. Chambers, 80 Tex. 544, 16 S. W. 326, "the league granted to M. B. by C., commissioner of Milam's colony," was held clearly good, there being only one league grant to M. B. That the name of the village or township is badly misspelled (Lington for Lincoln) is immaterial, if the place meant can be made out. Armstrong v. Colby, 47 Vt. 360. The S. W. ¼ of N. ½ of section 14, etc., is a good description, not void for uncertainty. It means 80 acres,—the S. ½ of W. ½ of N. ½ of the section. Bradley v. Rees, 113 Ill. 327. "My interest in B.'s estate," where B. owns only his homestead, deemed enough Ryder v. Loomis, 161 Mass. 161, 36 N. E. 836; Atwood v. Cobb, 16 Pick. 227; Nichols v. Johnson, 10 Conn. 192; Lorick v. McCreery, 20 S. C. 424 ("all my right, etc., as legatee of G.").

[62] Dull v. Blum, 68 Tex. 299, 4 S. W. 489, where a deed otherwise in the usual form gave to the grantor the power to select. In Smith v. Bradley (Ky.) 11 S. W. 370, the point was not decided, as both parties held under the same defective deed. "One-third of the league of land purchased by me of P. N." gives no title. Harkness v. Devine, 73 Tex. 628, 11 S. W. 872. So, also, "3,788 of the M. F. league" is void; Tram Lumber Co. v. Hancock, 70 Tex. 312, 7 S. W. 724. In Fuller v. Fellows, 30 Ark. 657, a deed giving quarter and section, but neither township nor range, was held void, though the exceptions of "G.'s homestead" would have identified it. This is not in keeping with the run of authority. In Pinkerton v. Ledoux, 129 U. S. 346, 9 Sup. Ct. 399 (ejectment upon a Mexican grant), the jury was told, if they

equivocal act, with the assent of the grantor, made his selection, as by taking full possession by a marked boundary, or conveying the selected tract by metes and bounds, the uncertainty is removed, and the title within such boundary vests under the first grant.[63] And a deed is valid which does not by itself identify the land conveyed, but only furnishes the means for identifying it; and, moreover, the court must use all its ingenuity in reconciling contradictions, and in correcting mistakes in the boundaries, rather than let it fall to the ground for uncertainty.[64] Thus, where the smaller quantity is to be taken off one side, according to the points of the compass, which is very frequent in sheriff's or tax collector's sales, and in the deeds made in pursuance thereof, there is no uncertainty. So many acres "off the east side" or "off the west side" of a tract require the

cannot from the documents arrive at the true boundaries, they must find for the defendant.

[63] Corbin v. Jackson, 14 Wend. 619, in the court of errors of New York, an important case, where 600 acres had been conveyed out of several thousand, with power of selecting it in 200-acre lots, it amounted to a sort of parol partition. In Armstrong v. Mudd, 10 B. Mon. (Ky.) 144, the general rule is quoted from 14 Vin. Abr. p. 49, that, of everything uncertain which is granted, election remains to him to whose benefit the grant was made, to make the same certain. Here 200 acres were granted, to bind on a given line, and to be laid off in a parallelogram, not more than twice as long as wide. The grantee having sold and conveyed 200 acres out of the first grantor's land, answering this description, it was held that he gave a good title; quoting 1 Shep. Touch. p. 250. The supreme court of Wisconsin, in 1881, in the well-considered case of Messer v. Oestreich, 52 Wis. 684, 10 N. W. 6, held that where a strip of five rods in width through a tract was conveyed to a railroad company, without locating it otherwise, the subsequent location and laying of the track would identify it; relying on Georgia Railroad v. Hart, 60 Ga. 550, and running into the line of cases of Agreed Boundaries, for which see hereafter.

[64] Alexander v. Lively, 5 Mon. (Ky.) 159 (where in the report of survey a line had been omitted, and the court undertook calculations to supply it); Smith v. Crawford, 81 Ill. 296 (deed void for uncertainty only when proof by parol exhausted). So "block 52, in De Kalb county" was held sufficient, a tract being known as such (though the plat was not recorded), and had been delivered to grantee and occupied. Tetherow v. Anderson, 63 Mo. 96. Where the county would identify the land, that wherein the deed is recorded, presumed. Butler v. Davis, 5 Neb. 521, referring to Harding v. Strong, 42 Ill. 149. Whether the description does identify is in most cases a question of fact. Patterson v. Evans, 91 Ga. 799, 18 S. E. 31.

drawing of a north and south line between such points in the outline of the larger tract, that the segment east or west of the line thus drawn will contain the quantity conveyed.[65] And here, if the larger tract be a rectangle, of which the sides do not run exactly with the points of the compass, as is usually the case with city lots, the line which cuts off a named quantity at the east end or at the north end, etc., must be drawn parallel to the lines of the lot, such as they are; for lines running obliquely to the street would, if intended, have been more clearly indicated.[66] And as the greater tract is very often rectangular—say a quarter section, or a town lot—the rule is sometimes expressed that the conveyed smaller quantity is laid off in a rectangular strip. When the quantity conveyed is to come out of a corner, it must be laid off in a square;[67] and, where it was de-

[65] The officer asks the bidders: Who will pay the execution or the tax bill for the smallest amount of land taken off [say] the northern end? Missouri and Mississippi have in the last few years offered many examples of such deeds. Thus, "107 acres in south part of S. E. ¼ of section 22 (naming township and range)" held good, in Enochs v. Miller, 60 Miss. 19, "20 acres off east part of S. W. ¼," etc., in McCready v. Lansdale, 58 Miss. 879, where the court says: "Lay off 20 acres east of a line!" So, "the south part of section 5, etc., being 225 acres," is good. Tierney v. Brown, 67 Miss. 109, 6 South. 737. See, for Missouri cases, note 69. In Iowa, "west part of N. E. ¼ of N. W. ¼, being 20 acres," of a named section, is sufficient; the quantity identifying the west part as the west half. Soukup v. Union Investment Co., 84 Iowa, 448, 51 N. W. 167.

[66] Thus, "land at the corner of Congress and Exchange streets, extending through to Market street," was held (in a tax deed) to be no description. Bingham v. Smith, 64 Me. 450.

[67] "One acre being the S. E. corner of N. E. quarter section," etc., means a squared acre. Smith v. Nelson, 110 Mo. 552, 19 S. W. 734. So, as to 14 acres, in Bowers v. Chambers, 53 Miss. 259; "one and a half acres," Bybee v. Hageman, 66 Ill. 519. In a will the devise of a messuage and 10 acres of land surrounding it (the tract being larger) is said to mean to give to the devisee the choice of 10 acres. Hobson v. Blackburn, 1 Mylne & K. 574. To same effect 8 Vin. Abr. "Devise," p. 48, pl. 11. The court of appeals of Kentucky under the Virginia land act of 1779, went very far in deeming a preliminary entry "certain," and thus sustaining it as an equitable title against a patent; and it was followed therein by the supreme court of the United States. See Shipp v. Miller, 2 Wheat. 316, where an initial point, the quantity in acres, and the words "north for quantity," were held sufficient. For other examples, see the introduction to the first volume of Bibb's (Ky.) Reports. Thus, an entry of 400 acres, containing A. B.'s cabin, means a square with

scribed as the south and west part of a quarter section, it was said not to be uncertain, for it might be taken off in strips on its southern and western sides, though a quadratic equation would have to be solved to get at the width of the required strips.[68]

Generally speaking, the quantity stated in a deed, though followed by the words "more or less," may be resorted to to solve any uncertainty which might otherwise arise. For instance, where the deed grants "the east half and the northwest quarter of the northeast quarter of section 7," this might mean the east half of the whole section 7, and the northwest quarter of the northeast quarter, or the east half might also be taken only of the quarter section. The quantity will solve the doubt.[69]

The deeds made by sheriffs upon execution sales—and tax deeds, even more—contain often very short descriptions, and these are couched mainly in figures and abbreviations, such as "¼ S." or "¼ §" for "quarter section," "Tp." for "township," etc.; the points of the compass being expressed only by the initials, "N. E., S. W." This concise mode of description, so long as it can be plainly understood by persons acquainted with conveyancing, is good enough to pass the title.[70] And so, also, if the meaning of the description can be made out as a matter of fact, in the light of all the surrounding circumstances.[71] But the words "part" or "corner" or "fraction," though located in some side or corner of a greater tract, if not aided by quantity, are wholly uncertain. The court cannot say that "part,"

the sides running north, east, south, and west, with the cabin in the center. And in a very recent case, in accordance with possession taken and held for some time, a similar construction was put on a contract for 1,000 acres "around, circumjacent and adjoining said mine." Santa Clara Min. Ass'n v. Quicksilver Min. Co., 8 Sawy. 330, 17 Fed. 657.

[68] Goodbar v. Dunn, 61 Miss. 618.

[69] Davis v. Hess, 103 Mo. 31, 15 S. W. 324, quoting Burnett v. McCluey, 78 Mo. 676; Prior v. Scott, 87 Mo. 303; Wolfe v. Dyer, 95 Mo. 545, 8 S. W. 551. In Illinois a part of an 80-acre lot, containing 64 acres, and denoted as the execution defendant's property, was passed by the sheriff's deed on proof that the defendant owned a certain tract of 64 acres. Colcord v. Alexander, 67 Ill. 581.

[70] Nearly all the descriptions in cases quoted in notes 4 and 8 are in abbreviations.

[71] In Reed v. Proprietors of Locks & Canals, 8 How. 274, this instruction was held free from error: "If the jury believe from the evidence, looking at

in such a connection, means half, or that "corner" means one-fourth and the deed which gives no better description must be treated a void; location unaided by quantity being insufficient, just as quantity alone, without location, will not identify the thing conveyed.[71] It is also destructive to the certainty of the deed to name as the thing conveyed a well-defined tract, excepting therefrom undefined parts that are to be excluded from it,—for instance, such parts as may have been previously granted,—unless such parts can be identified by proof outside of the deed. Should the claimant under the deed with the undefined exclusions bring his ejectment, he must fail, unless he can show what parts are excluded; for otherwise, until he does, he has not shown title to any one spot of ground.[73] But this doctrine has been much assailed, with the contention that the grant is valid, and only the exception void.[74]

monuments, length of lines, and quantities and actual occupation, that it was more probable that the parties intended to include the demanded premises than otherwise, they may give their verdict for [the grantees]."

[72] "S. E. part of S. E. ¼," bad. Tierney v. Brown, supra. So is "S. E. corner" of a named quarter section, and "the S. W. fractional part of the N. ½" of another quarter section. Morse v. Stockman, 73 Wis. 89, 40 N. W. 679. "Part of lot 285, square 59, Vicksburg," void. Cogburn v. Hunt, 5 Miss. 675. In short, when the location is wholly uncertain, the conveyance is void. Glenn v. Malony, 4 Iowa, 515. "About 100 acres" out of a described tract of 400 acres was held void in Peck v. Mallans, 10 N. Y. 509. Boardman v. Reed, 6 Pet. 328, is often quoted as to deeds becoming void by uncertainty. So "752 acres, including the land I now live on," was held to convey only the home farm of the grantor, but to be void for uncertainty as to the rest, as he owned much more adjoining land than that quantity. Robeson v. Lewis, 64 N. C. 734. There was "incurable uncertainty" in La France v. Richmond, 5 Sawy. 601, Fed. Cas. No. 8,209; the first call starting from a creek several thousand feet long, and nothing in the description identified it. So "the S. W. quarter sec., being 40 acres," one-fourth of a quarter section must be meant, and the uncertainty is insoluble. Campbell v. Johnson, 44 Mo. 247.

[73] Chandler v. Green, 69 Me. 350. Grantee of "lot 10, except what has been conveyed out of it to J. S.," can recover no part until he shows a deed to J. S. conveying part of that lot, but can recover the residue if he does. So, "my home place, except so much as may be laid off as a homestead," is within certum est, etc. Ex parte Branch, 72 N. C. 106. The reservation of a strip not fully defined for a right of way does not defeat a grant for uncertainty. Torrey v. Thayer, 37 N. J. Law, 339.

[74] Mooney v. Cooledge, 30 Ark. 640.

And here is the place to speak of "inclusive grants," popularly known as "blanket patents," which have caused so much confusion in the land system of Virginia, North Carolina, Kentucky, Tennessee, and West Virginia. The land grants in these states were made, under the laws dating from 1777 down to very late times, in tracts of any size or shape for which the purchaser would offer either military warrants, treasury warrants, or money. Already before 1788, speculators in Virginia lands found it convenient to take their patent for a large tract, out of which many smaller surveys had been cut without hunting up the returns of these surveys in the several counties, and reciting them in the patent; but by inserting the sum total of the exclusions in acres the purchaser saved the price of so many acres. A Virginia act of June 2d of that year legalized this course, and many of these "inclusive grants" were thereupon issued.[75] In Kentucky the true principle was applied: he who claims title under a grant has the burden of proof to show what has been granted; and the patentee of a large tract, from which two small surveys of named quantity were excluded, was cast in an ejectment, being unable to find or locate the two reserved surveys.[76] In subsequent Kentucky cases, patents granted under modern Kentucky laws for very large tracts, with exclusions stated only in acres, so as to get a saving on the price, but not giving even the names of the supposed owners of the reserved surveys, were held void in toto, as frauds on the commonwealth, and snares to other locators; with a tendency, however, in the later cases, to recede from this stern doctrine.[77] In Virginia, on the contrary, great and undeserved favor has been shown to the holder of an "inclusive grant,"

[75] Section 86. See Hen. St. Va., reprinted in 1 Litt. Laws Ky. p. 460 (Acts 1788): "Whereas sundry surveys have been made, * * * which include in the general courses thereof sundry smaller tracts of prior claimants, and which in the certificates * * * are reserved to such claimants; and the governor is not authorized * * * to issue grants upon such certificates: * * * Be it enacted * * * that it shall be lawful for the governor to issue grants with reservation of claims," etc.

[76] Madison's Heirs v. Owens, Litt. Sel. Cas. 281. In accordance with the cases quoted in note 73, Scott's Lessee v. Ratliffe, 5 Pet. 86, on the same patent, is decided in like manner.

[77] Hamilton v. Fugett, 81 Ky. 366; Hillman v. Hurley, 82 Ky. 626; Roberts v. Davidson, 83 Ky. 281. In the third of these cases the effect of declaring

even when the exclusions were stated in acres only, and when he could not identify the excluded parts either by the words of his patent, or by proof outside of it. An earlier Virginia case proposes to give to such a patentee everything within the outer boundary to which no good prior claim is shown, thus reversing the rule above stated, but later cases do not go so far.[78] West Virginia, and the supreme court of the United States, acting on patents in that state, have reprobated the older Virginia views, without, however, holding these patents, with unnamed exclusions, to be void.[79] In Tennessee, also, to which this crude mode of granting the public lands was transplanted from North Carolina, inclusive grants, by which large tracts could be fraudulently gotten for a trifle, the exclusions being feigned only to reduce the purchase money, have been sustained.[80]

But even where the principle of certainty in deeds is most firmly sustained the description need not be complete on its face. In the words of some judges "it is not the office of the description to identify the premises, but to furnish the means by which they can be identified," which is only an application of the maxim, "Certum est quod certum reddi potest." [81] Hence many descriptions have been held certain enough which contain neither natural objects, nor monuments, nor references to the national surveys, nor courses

the patent void was much weakened by the distinction that the land within the outlines of the patent was no longer vacant, and therefore not open to new purchasers from the commonwealth. In the later case of Hall v. Martin, 89 Ky. 9, 11 S. W. 953, in which the number of acres excluded was not stated, and the state price for the whole tract must have been paid, the patent was sustained, as the excluding clause amounted to no more than what the law would have implied.

[78] Hopkins v. Ward, 6 Munf. 38. Contra, Nichols v. Covey, 4 Rand. (Va.) 365.

[79] Armstrong v. Morrill, 14 Wall. 143; Bryant v. Willard, 21 W. Va. 65.

[80] Bowman v. Bowman, 3 Head. 47, a case arising within the strip south of Walker's line, over which the jurisdiction belongs to Tennessee; but the soil, by an agreement made in 1821 upon the settlement of boundaries, until sold, remained with Kentucky.

[81] Rucker v. Steelman, 73 Ind. 396. The phrase is repeated in Works v. State, 120 Ind. 119, 22 N. E. 127, and given also in the form, "Certum est quod certum reddi potest." In the former case it was held immaterial that land otherwise well described was said in the deed to lie in two named sur-

and distances, but speak of the premises only as "the home place" of the grantor, or as his "dwelling house" within a named city, or as the "farm occupied and cultivated by him," or designate it by some popular name.[82] Or, again, the land may be fully identified as being the lot surrounded by that of A., B., C., and D., if it turns out that the grantor does at the time own a tract of land which is really surrounded by the tracts of A., B., C., and D. The boundaries of these latter tracts may be ascertained from the patents or deeds under which they hold. Or the grant may embrace all of a known tract, "except the widow's dower," which is a sufficient reference to the legal proceedings in which dower was assigned. Some of the decided cases go to, or beyond, the verge of a sound distinction between what is certain and what is utterly vague. Thus, the deed of a master in chancery setting out metes and bounds, was sustained in North Carolina, though it had nothing better to stand on than a decree for selling the tract of which "J. B. died seised

veys, when in fact it lay in three; and the land lying within the third passed by the deed. Chief Justice Marshall, in Blake v. Doherty, 5 Wheat. 359, 362, says: "It is not necessary that the grant itself should contain such a description as, without the aid of extrinsic testimony, to ascertain precisely what is conveyed." Quoted in Cox v. Hart, 145 U. S. 376, 389, 12 Sup. Ct. 962. So, also, Slater v. Breese, 36 Mich. 77.

[82] "The 141½-acre lot known as the 'Old J. W. Farm,' " in a named township, being aided by parol evidence as to place of farm. Trentman v. Neff, 124 Ind. 503, 24 N. E. 895. A right of way through certain lots being granted to a railroad, "such line being along line as laid out by H. C. K.," with proof that it was already run. Thompson v. Southern California Motor-Road Co., 82 Cal. 497, 23 Pac. 130. So the "McLeod Wood ranch, about 45 miles north of," etc., is sufficiently certain. Paroni v. Ellison, 14 Nev. 60. But "lot and residence in Madison station" is too uncertain. Bowers v. Andrews, 52 Miss. 596. A lot located by block and lot number in a village by its popular rather than its legal name (Port Washington instead of Wisconsin City) is well described. Mecklem v. Blake, 19 Wis. 397. A popular name, such as the "Knapp House Property," will extend to all the land which goes by it. Goodenow v. Curtis, 18 Mich. 298. Reputation is admissible what such a name (e. g. the Mill spot), found in a deed, includes, and what not. Woods v. Sawin, 4 Gray, 322. Tract "containing ten rods, more or less, at D., with a house thereon, owned in common with R.," is sufficient to pass the house and lot, and one across the road, thus owned. Jeffers v. Radcliff, 10 N. H. 242. See, also, Falls of Neuse Manuf'g Co. v. Hendricks, 106 N. C. 485, 11 S. E. 568 ("land on which he now lives"); Farmer v. Batts, 83 N. C. 387.

and possessed, in the county of Guilford, on the waters of S. Q., adjoining the land of ———" (leaving a blank); the court holding that there was enough by which to identify the land, with the aid of parol evidence.[83]

And though a sheriff's deed can speak only by its own terms, and cannot, if unintelligible, be helped out by proof of intention, yet in such a deed, as well as in one inter partes, a tract of land may be denoted by the name which it bears in the community, and by which it is known, as well as by metes and bounds or courses and distances. Such a deed has also been held good when lines were stated which do not wholly surround the lot to be conveyed, but which, in connection with other proof, will identify it.[84] But, where the description in a sheriff's deed is so vague that it may apply equally well to either of two tracts (especially if both tracts were subject to be levied on and sold under the execution) the deed cannot be sustained, though a similar uncertainty in a private deed might be helped out by proof of outward circumstances bearing on the intention of the parties.[85]

[83] "Begins at a pine in R.'s line, thence running with K.'s line, thence binding on L.'s line, thence to first station, including 25 acres," was helped out by principle announced in Campbell v. Branch, 4 Jones, 313, as to mode of making line called for, and by parol proof. Allen v. Sallinger, 108 N. C. 159, 12 S. E. 896. So many acres "lying on the north and east of" "a named lot, subject to dower of" named widow, good both as to inclusion and exclusion. Parler v. Johnson, 81 Ga. 255, 7 S. E. 317. The uncertain description in the deed from one part owner to the other may be cleared up by boundaries of the whole tract and by the deed for the other part made in return. Fuller v. Carr, 33 N. J. Law, 157.

[84] Many cases in preceding notes grew out of sheriff's deeds. Also Hart v. Rector, 7 Mo. 532, where levy, sale, and deed were of an undivided part "of the Booneville tract, in Cooper county, on the south side of the Missouri river," on proof of the notoriety of the land under that name. Landes v. Perkins, 12 Mo. 239; Bates v. Bank of Missouri, 15 Mo. 309; Bank of Missouri v. Bates, 17 Mo. 583, where the court passes on what proof is necessary for identifying the named tract. Great looseness of description was formerly allowed in Kentucky, on the ground that the purchaser gained rights by his bid, which he could not lose by the subsequent neglect of the sheriff in writing the description. McGuire v. Kouns, 7 T. B. Mon. 387. For what is now deemed a sufficient description in that state, see Bell v. Weatherford, 12 Bush, 506.

[85] Dygert v. Pletts, 25 Wend. (N. Y.) 402.

Where the parties themselves make the conveyance, the "utmost liberality," it is said, should be applied to gather the intent, "ut res magis valeat quam pereat," and, if there be a conflict in the lines, to reconcile them in the best possible way, rather than treat the deed as a nullity.[86]

Though it is usual to begin the words of description in a deed, title bond, or other instrument concerning land, with the name of the state, county, and city or township in which the land lies, this is by no means necessary. Every state takes notice of the United States land laws, and of the principal meridians, ranges, townships, sections, quarter sections, and the halves and fourths of quarter sections, as they are laid out and surveyed under those laws.[87] But, even when the land is not thus described, it may be inferred from the evidence of the parties in what state or county the land lies; and, if the description fits some lot in such state and county, it will not be rejected as vague, because it might possibly fit some other and far distant locality.[88]

§ 7. Ambiguity.

As a general principle, a written document cannot be varied by parol evidence, and this applies as well to deeds and wills as to executory contracts. Parol—or, more generally speaking, extrinsic—evidence is, however, admissible in the interpretation of deeds and wills, and this in two classes of cases: The first when the writing uses a word or set of words, which, in its nature, can be "located" only by outside proof. For instance when a deed conveys the grantor's "dwelling house," extrinsic evidence must be brought forward to show where that house is, and what its boundaries are; and this, we have seen, may be done, on the principle of "certum est

[86] Mason v. White, 11 Barb. (N. Y.) 173.

[87] Ives v. Kimball, 1 Mich. 313; German Mut. Ins. Co. v. Grim, 32 Ind. 249. If the "monuments can be imagined" which will verify the description, it may be helped out by proof aliunde, is the language in Blake v. Doherty, 5 Wheat. 359, quoted in Bosworth v. Farenholz, 3 Iowa, 84, and Pursley v. Hayes, 22 Iowa, 11.

[88] Atwater v. Schenck, 9 Wis. 160; Russell v. Sweezey, 22 Mich. 235. And the omission of the land district is immaterial where no doubt about it can exist. Long v. Wagoner, 47 Mo. 178.

quod certum reddi potest." [89] The other case is that of a latent ambiguity.[90] Where the uncertainty appears openly on the face of the deed,—thus, if one should convey one quarter of a section, without stating which,—the ambiguity is said to be patent, because the section is bound to have four quarters. But if he should convey section 15 in a civil township which contains two congressional townships, or even in a county which very probably contains many of them, the ambiguity is said to be latent.[91] It does not appear

[89] This has been shown under the head of "Certainty." The seven rules of Vice Chancellor Wigram are much oftener applied in the interpretation of wills than of deeds, and much oftener in determining the party who is to receive a devise than to the description or identity of the land or other thing devised. The fifth rule of Wigram is stated in the following words: "For the purpose of determining the object of the testator's bounty, or the subject of disposition, or the quantity of interest intended to be given by his will, a court may inquire into every material fact relating to the person who claims to be interested under the will, and to the property which is claimed as the subject of disposition, and to the circumstances of the testator and his family or affairs, for the purpose of enabling the court to identify the person or thing intended by the testator, or to determine the quantity of interest he has given by his will. The same (it is conceived) is true of every other disputed point respecting which it can be shown that a knowledge of extrinsic facts can in any way be made ancillary to the right interpretation of the testator's words." Greenleaf in his Law of Evidence (volume 1, § 287), in a note to which Wigram's rules are quoted, says in regard to them that there is no material difference in principle between wills and contracts.

[90] Wigram's rule on this subject (No. 7) is worded thus: "Notwithstanding the rule of law which makes a will void for uncertainty where the words, aided by evidence of the material facts of the case, are insufficient to determine the testator's meaning, courts of law, in certain special cases, admit extrinsic evidence of intentions to make certain the person or thing intended, where the description of the will is insufficient for the purpose. These cases may be thus defined: Where the object of the testator's bounty or the subject of disposition (i. e. person or thing intended) is described in terms which are applicable indifferently to more than one person or thing, evidence is admissible to prove which of the persons or things so described was intended by the testator." The seventh rule dates back to Bac. Max. reg. 25: "Ambiguitas latens is that which seemeth certain and without ambiguity for anything that appeareth upon the deed or instrument, but there is some collateral matter that breedeth the ambiguity." And he says about such an ambiguity: "Quod ex facto (i. e. by matters not in the deed) oritur ambiguum, verefication̄i e facti (by averment of outside matter) tollitur."

[91] Stevens v. Wait, 112 Ill. 548, undoubtedly well decided, as a civil town-

on the deed itself, and, as it has been proved by facts outside of it, such facts may also be admitted to remove it, e. g. the fact that the grantor owns no land except in one township within the territory, or, if the deed speaks of any class of buildings, that such buildings are to be found only in one such township.[92] Thus, where the line between towns is given as one of the calls of a deed, this would, on its face, appear free from all ambiguity. But it may appear that, by a usage of long standing, a line different from that established by record is treated as the town line by the authorities of both towns, and is by the people of the neighborhood thought to be the true one. Here the ambiguity arises out of this outside fact, whether the parties to the deed meant the record, or the customary line.[93] In like manner, an ambiguity may arise, whether one-half of the highway is included in the grant of an adjoining lot; also whether the depth of the lot is to be measured from the side, or from the center line outward. The question is here not between latent and patent ambiguity, but between ambiguity and the certain meaning of the words of description; and the decisions on the point, even in the same state, are rather conflicting.[94]

ship oftenest coincides wholly or nearly with the congressional township, and the person reading the deed would not expect that the former contains two of the latter. But in Bybee v. Hageman, 66 Ill. 519, where the numbers of township and range were omitted, and the location of the subdivision was placed in McDonough county, the reasoning is forced, for a county must be supposed to contain more than six miles square. The general doctrine is recognized by the United States supreme court in Reed v. Proprietors of Locks & Canals, 8 How. 274, quoted elsewhere; and by the supreme court of Massachusetts in Miles v. Barrows, 122 Mass. 579. Compare Goff v. Roberts, 72 Mo. 570, where a sale, by the terms of a deed of trust, was to be made at the courthouse of a town; it appearing that two buildings were known as "the courthouse," further evidence was admitted to show which was meant.

92 Compare Bank of Missouri v. Bates, 17 Mo. 583, quoted elsewhere, as to proof to identify 35 acres described as lying in a named quarter section. Township, section, etc., in a tax deed, good without the county, as the name of the granting tax officer supplies it. Lewis v. Seibles, 65 Miss. 251, 3 South. 652.

93 Putnam v. Bond, 100 Mass. 58, distinguishing Cook v. Babcock, 7 Cush. 526, where, the true line having just been defined by act of the legislature, evidence aliunde was not admitted, but approving Hall v. Davis, 36 N. H. 569, which is to the same effect.

94 Or, generally, the circumstances under which the deed was made may be proved; Stanley v. Green, 12 Cal. 148.

Some descriptions which have been aided by outside evidence, as not being uncertain on their face, would appear so to the unprejudiced reader; and the decisions holding that the uncertainty was latent, and may be thus aided, must be studied separately, as it would be hard to classify them.[95] An effort has often been made, where a deed, and still more, where a will, defeats the supposed intention of the grantor or devisor, to carry a supposed uncertainty into the meaning, in order to remove it by proof of intention. This is tried oftener with wills than with deeds; for, while an error or omission in a deed may be corrected in equity for fraud or mistake, the chancellor has no competence to correct a mistake or to supply an omission in a will. The courts must, however, repress all attempts to set up the proof of intention against written deeds or wills. Thus, in a leading case, where a testator devised "the farm which I now occupy, with the crops on the land," evidence was not admitted that a part of his farm which he had leased out for a number of years before the date of the will was intended to be included, as the description is certain, and no ambiguity can be carried into it.[96]

The evidence which is most frequently and most properly used to clear up an ambiguity in the description is the action of the parties, at or near the time of the conveyance, in setting up their monuments, or in erecting fences or walls, each holding and occupying on one side thereof.[97] Such action comes, in effect, to pretty much the same as an agreement upon a disputed boundary, but is by no means the same thing. We have not to do here with the compromise of a dispute, nor with an endeavor to find the true position of a doubtful line, but with the unconscious construction which the par-

[95] In Lane v. Thompson, 43 N. H. 320, the court rejected part of a description to carry out the intent of the parties.

[96] Warren v. Cogswell, 10 Gray, 76 (deed); Jackson v. Sill, 11 Johns. 201; Brown v. Saltonstall, 3 Metc. (Mass.) 423 (under will, very similar to case in text). For the general principle that proof is allowed to explain, but not to contradict, see Stevens v. Wait, 112 Ill. 544, 548.

[97] Compare what is said as to contemporaneous construction in the two preceding and in the next following sections, and authorities there cited. But a previous memorandum was used in Lyman v. Gedney, 114 Ill. 388, 29 N. E. 282. All the circumstances must be considered. Bell v. Woodward, 46 N. H. 315.

ties give to the words of a grant or devise, without being conscious at the time that there is any room for dispute or uncertainty. If the words had two meanings, the choice between the two has once been made, and, being once made, must stand.[98]

We refer for a further discussion of the facts admissible to solve questions of ambiguity in denoting the land which is meant to be conveyed, or otherwise disposed of, to the note on the "Admission of Extrinsic Evidence in the Interpretation of Wills" (in the chapter on "Devise"), in which ambiguity in the boundaries, as well as in the person who is to take the land, will be dealt with.

§ 8. Agreed Boundaries.

Often neighboring landowners agree on a disputed boundary, drawing a line and marking it by a fence or otherwise, or they submit the dispute to a lawyer or surveyor, upon whose instructions, or by whom, the boundary is run, and is thereupon marked. The agreement is at any rate an admission that the line is the correct line, unless a new line is intentionally run, and such an admission is evidence.[99] Possession up to such a line is adverse, and will ripen into title under the statute of limitation, but so might possession without agreement. The question to answer is this: The agreement being made without a writing, or without one which satisfies the statute of frauds, and the possession having not lasted long enough to ripen into a title, will the agreed line hold good, if, upon a new survey, it turns out not to be the correct line? The decisions of the several states are not in harmony, though most of them profess to follow the same principles. To some extent, the fullness with which the statute of frauds has been re-enacted, and the spirit in which it is construed, have their bearing. In some states, e. g. in Kentucky, there is no provision that a trust other than a resulting or implied trust in lands cannot be raised, except by writing; and in these and some other states the law of conveyance, re-

[98] Linney v. Wood, 66 Tex. 22, 17 S. W. 244; Stone v. Clark, 1 Metc. (Mass.) 378; Dunn v. English, 23 N. J. Law, 126; Lego v. Medley, 79 Wis. 211, 48 N. W. 375.

[99] Wilson v. Hudson, 8 Yerg. 398 (decisive where the other evidence is contradictory); Boardman v. Reed's Lessee, 6 Pet. 328.

quiring a deed or will to transfer land, and which takes the place of another section of the statute of frauds, seems to be ignored, and that section which says "no action shall be brought on any contract" is construed narrowly, so that a defense may under some circumstances be maintained on the unwritten contract. Hence, in Kentucky, when an unwritten boundary agreement is carried out by running the line, and taking possession in accordance with it, such agreement becomes binding without regard to the length of the possession; but an agreement to change the established line, or to deliberately run one differing from that drawn by the law, if in parol, cannot be enforced.[100] In Pennsylvania, also, an agreement to run a boundary line, in the way of settling a dispute, is deemed binding, and, though by parol, is not deemed within the statute of frauds; and, when the line has been actually run, no particular length of possession in accordance with it seems to be necessary.[101] So in Missouri a verbal agreement for locating a division line, followed by possession and improvements, is not within the statute of frauds, and is binding on parties and privies, if the intention of the parties was that the agreed line should hold good, whether it be the true one or not.[102] In Texas the very large grants made in Mexican times, and during the days of the republic, upon hasty and inaccurate surveys, have made boundary disputes, and, with them, compromise lines, very frequent, and quite a number of them have lately come before the supreme court of the state. The agreed line is

[100] Brown v. Heirs of Crow, Print. Dec. 106, 108, not put upon the ground stated in the text, but relying on the decree of the chancellor in Penn v. Lord Baltimore, in 1 Ves. Sr. 444; also, Jamison v. Petit, 6 Bush, 670; Smith v. Dudley, 1 Litt. (Ky.) 67; Miller v. Hepburn, 8 Bush, 333, where an accretion from the river was divided otherwise than it would have gone by law. Contra, Robinson v. Corn, 2 Bibb, 125. In Atchison v. Pease, 96 Mo. 566, 10 S. W. 159, such an agreement was held not to be within the statute of frauds. It will be shown hereafter that the Kentucky court of appeals has receded from the distinction between actions and defenses in other than boundary disputes.

[101] Bowen v. Cooper, 7 Watts, 311; Perkins v. Gay, 3 Serg. & R. 327, quoted with other cases in Kellum v. Smith, 65 Pa. St. 86, 89, which restores an older compromise line in case a later one should be set aside for fraud.

[102] Taylor v. Zepp, 14 Mo. 488; Blair v. Smith, 16 Mo. 273, which has been followed in other states; and other cases cited in Kincaid v. Dormey, 47 Mo. 337. Secus, if the line is fixed upon as a temporary expedient.

here held binding, if it have been acquiesced in for some years, though for a time less than that of limitation, and the tendency is rather to shorten the time. Nor can one of the owners avoid the agreement on the ground that he had mistakenly thought the agreed line to be the true line.[103] In Ohio and Tennessee three conditions must concur, to give effect to the agreed line: First, both of the parties who concur in running it must be owners at the time,—that is, neither of them must be a simple occupant or a trespasser on the ground which he undertakes to define; secondly, the obligation must be reciprocal, which it would, indeed, hardly be, unless both parties were owners; thirdly, there must have been no previous and different line already established, otherwise the agreement would amount to a conveyance of the intervening strip of land. And even then it seems doubtful whether anything less than 21 years' possession will suffice in Ohio.[104] In Arkansas it has been said that the neighboring owners may, without a writing, establish an arbitrary line as a boundary between them, and that acquiescence will make such an agreement good; nay, that the agreement may be inferred from long acquiescence. So also in Florida.[105] In Delaware the court thought that an express agreement for running a boundary line, though without a writing, if followed by possession, was better than an acquiescence of 20 years, on the ground that the fact itself is better than presumption of the fact.[106] And in New Hampshire, when there is a dispute about the boundary, a line agreed upon, or run by a surveyor in pursuance of an agreement, is conclusive.[107] Many of the cases in which this doc-

103 Coleman v. Smith, 55 Tex. 254; Cooper v. Austin, 58 Tex. 494. And the line is binding in favor of purchasers in good faith, who have made improvements, even if it has been obtained by misrepresentation. Hefner v. Downing, 57 Tex. 576.

104 Walker v. Devlin, 2 Ohio St. 593. There was a call for a natural object; hence the line did not come within the rule. Otherwise in Lewallen v. Overton, 9 Humph. 76, and other Tennessee cases there cited. McAfferty v. Conover, 7 Ohio St. 99; Yetzer v. Thoman, 17 Ohio St. 130.

105 Jordan v. Deaton, 23 Ark. 704, quoting early New York cases, and Blair v. Smith, 16 Mo. 273, supra; Watrous v. Morrison, 33 Fla. 261, 14 South. 805 (quaere).

106 Lindsay v. Springer, 4 Harr. (Del.) 547.

107 Gray v. Berry, 9 N. H. 473; Orr v. Hadley, 36 N. H. 575, where other cases in the same state are quoted.

trine is laid down were actions of trespass. The defendant can always justify his cutting of timber, or other acts of ownership, between the agreed line and the supposed true line, by a license, and such the agreement would amount to, at any rate; but the license can, of course, be revoked, and this will bring into question the binding force of the boundary agreement, which is, in most instances, put upon the ground of estoppel, or of a promise not to sue.[108] In North Carolina the line run by agreement seems to serve only as a revocable license,[109] while in Maine and Rhode Island a possession for such time "as will give title by disseisin" seems to be required to give effect to the line.[110] In Massachusetts and Maine an agreed line made by neighbors soon after their deeds have been received is deemed binding, and not within the statute of frauds, upon the theory that it is but supplying by monuments the line to which the deeds refer, and which must have been in the minds of the parties at the time of the deeds. This would not authorize a parol agreement on a new line, where one was already visibly marked.[111] Nebraska also recognizes the agreed location of an "ambiguous" line as an estoppel.[112] In Illinois a similar rule is established by early cases.[113] But in order to reconcile the New York decisions, of which there are a great number, we must go into all the limiting details of the rule as recognized in the preceding states: First, the mere acquiescence of the parties in a "practical location" is not treated in New York as proof of an express agreement; secondly, there must have been a real uncertainty about the dividing line, and a dispute to be compromised, in order to render an agreement about it valid. When these two conditions—uncertainty and dispute—concur, there is a good consideration, and the statute of frauds is not in the way of an actual agreement, though unwritten, if followed by a marked line, and possession up to the line. But

[108] Kip v. Norton, 12 Wend. 127, 130, arguendo; following Jackson v. Ogden, 7 Johns. 245, and Rockwell v. Adams, 6 Wend. 467; and passim in cases quoted above.

[109] Palmer v. Anderson, 63 N. C. 365.

[110] Moody v. Nichols, 16 Me. 23; Wakefield v. Ross, 5 Mason, 16, Fed. Cas. No. 17,050.

[111] Makepeace v. Bancroft, 12 Mass. 469; Knowles v. Toothaker, 58 Me. 173.

[112] Trussel v. Lewis, 13 Neb. 415, 14 N. W. 155.

[113] Stuyvesant v. Tompkins, 9 Johns. 61; Jackson v. Douglas, 8 Johns. 286.

two lines of decision run side by side through the New York courts, and the distinction is not clearly set forth, though the results reached are diametrically opposed. In 1869 the court of appeals quoted from a somewhat older case, that "something more than agreement, and possession according to it for a few years, is necessary to confer a title or create an estoppel," and "in all cases in which practical locations have been confirmed upon evidence of this kind, the acquiescence has continued for a long period, rarely less than twenty years"; and cases are quoted, both from Illinois and from New York, where possession along an agreed boundary for four or five years, for eight years, for eleven years, for anything short of the bar of limitation, was deemed insufficient, and at last it was held that no shorter time would serve.[114] Yet in the older cases here relied upon, the doctrine is plainly laid down that where a line is uncertain, and in dispute, adjoining owners can fix it by agreement, which will work, not as a conveyance, but as an estoppel (especially where expense has been incurred in improvements), and be binding on parties and privies, and no particular length of acquiescence seems necessary, where the agreed line has been staked out, and possession taken in accordance with it, and these older cases have been followed up in late years.[115]

A division fence is not necessarily an agreed boundary. It may have been set up to keep out cattle, or merely for peace. Some of

[114] Perhaps the cases can be reconciled on this distinction. Where the parol agreement fixes the most likely position of the old line, which is uncertain, it will stand; while, where it avowedly fixes a new line, it is void under the statute of frauds. Vosburgh v. Teator, 32 N. Y. 561 (new boundary cannot be run by parol). The departure is made in Baldwin v. Brown, 16 N. Y. 363, while the preceding case of Jackson v. McConnell, 19 Wend. 175, demanded an acquiescence of 20 years only where no agreement or "actual location" had been shown. Reed v. McCourt, 41 N. Y. 435, 441, speaks of "probably not less than 20 years," as necessary to consecrate a compromise line; and the 20-year limit is reached in Jamison v. Cornell, 3 Hun, 557. On the distinction that there must have been a real uncertainty, see, also, Terry v. Chandler, 16 N. Y. 354; Teass v. City of St. Albans, 38 W. Va. 1, 17 S. E. 400; Watrous v. Morrison, 33 Fla. 261, 14 South. 805; Ferguson v. Crick (Ky.) 23 S. W. 668.

[115] Reed v. McCourt, 41 N. Y. 435. See cases quoted in note 108, and the older case of Jackson v. Dysling, 2 Caines, 198, where it is said to be immaterial whether the parties, when locating the line, knew or did not know

the older New York cases went off on this point. So does a Michigan case, in which the supreme court of that state avoids an opinion on the law of "practical locations." [116] Wisconsin demands possession for a "long time, though not exactly for the time barring an ejectment." [117]

Where boundaries are agreed upon in writing, all objection from the statute of frauds disappears, and, at least between parties who are sui juris, there is an "undoubted defense" to any attempt to recover the true limits as afterwards admeasured.[118]

As, generally speaking, the sovereign cannot be bound by estoppel, the limits of land held by the state for some special purpose (e. g. for schools) cannot be lessened by the attempt of a state or county surveyor to run a line which is to separate the lands so owned by the state from those of a neighboring private owner.[119]

§ 9. Incidents and Appurtenances.

The old form of a deed adds, after the description of the lands or tenements conveyed, words like the following: "with all the privileges and appurtenances thereto belonging or in any way appertaining," or simply "with the appurtenances." It is doubtful whether these general words do, in any case, enlarge the effect of the deeds.[120] The primary meaning of "appurtenances" is the easements and other incorporeal hereditaments enjoyed with the land

their rights. The principles laid down in these older New York cases have been followed out in other states (e. g. in Arkansas) to their legitimate results. The more recent cases upholding a compromise location are Davis v. Townsend, 10 Barb. 333; Laverty v. Moore, 32 Barb. 347; Vosburgh v. Teator, 32 N. Y. 561; Williams v. Montgomery (1878) 16 Hun, 50 (not appealed).

[116] Chapman v. Crooks, 41 Mich. 595, 2 N. W. 924. Comp. Joyce v. Williams, 26 Mich. 332.

[117] Nys v. Biemeret, 44 Wis. 104; relying on Boardman v. Reed, see note 99.

[118] Hunter v. Heath, 67 Me. 507.

[119] Saunders v. Hart, 57 Tex. 8, where too short a line was run for the north boundary of the "University League."

[120] The words "with all the buildings thereon" have been expressly decided to have no effect. Crosby v. Parker, 4 Mass. 110. It may be otherwise where the buildings were at one time owned separately from the ground. Bacon v. Bowdoin, 2 Metc. (Mass.) 591.

such as rights of way, water courses, rights to light and air, etc. But it seems that whatever easements or hereditaments will pass under the general description of "privileges and appurtenances" will pass without them, as mere incidents to the land, unless the intention to reserve such right, and to detach it from the land, is apparent.[121] But it is a general principle, that "land cannot pass as an appurtenance to land," and it has been said that even the necessity of enjoyment cannot make one parcel of land pass as an appurtenance to another.[122] But this rule applies only where the principle tract is defined by its boundaries, or by courses and distances; not where it is designated by the name of the building standing upon it. The lot on which a house or mill stands may be conveyed as "my house" or "my mill."[123] But where a man conveys "the buildings on such land, built and now occupied by me," it is clear that the land is intended to be excluded, and such intention might be indicated in many other ways.[124] The sale of a house, mill, factory, barn, etc., will carry with it not only the soil actually covered by the building, but the "curtilage"; that is, the yard and garden that is habitually occupied with a dwelling house, and certain small parcels, with or without outbuildngs, without which the

[121] "Some things will pass by the conveyance of land as incidents appendant or appurtenant thereto. A conduit conveying water to the lands sold from another part of the lands of the grantor will pass as being necessary or quasi appendant thereto." 4 Kent, Comm. p. 467, quoting Nicholas v. Chamberlain, Cro. Jac. 121. As easements belonging to land have no value, and often no existence without it, the failure to pass them over to the grantee would be equivalent to their destruction.

[122] Ogden v. Jennings, 62 N. Y. 526; Armstrong v. Du Bois, 90 N. Y. 95; Woodhull v. Rosenthal, 61 N. Y. 382; going back to Bettisworth's Case, 2 Coke, 516. Recognized as the rule in Massachusetts, in Ammidown v. Ball, infra. So in other states. Humphreys v. McKissock, 140 U. S. 304, 11 Sup. Ct. 779 (interest of railroad company in an elevator not adjoining it does not pass as "appurtenances"); Wilson v. Beckwith, 117 Mo. 61, 22 S. W. 639 (the railroad and appurtenances do not include the land grant). The exception as to ground under streams, and as to flats and highways, will be fully discussed.

[123] Johnson v. Rayner, 6 Gray, 110; Jamaica Pond Aqueduct Corp. v. Chandler, 9 Allen, 159, 164; Grover v. Howard, 31 Me. 546 (distinguished from Sanborn v. Hoyt, 24 Me. 118). See cases in note 125.

[124] Derby v. Jones, 27 Me. 357; Sanborn v. Hoyt, 24 Me. 118.

mill, factory, barn, etc., cannot be enjoyed, or which are left open between it and the highway.[125] And, where the word "appurtenances" is added to the designation of a dwelling house or other building, it is not a mere empty phrase, but means what is habitually occupied with it, even though it be an unfenced lot.[126] These rather informal descriptions seem to be more common in the New England States than elsewhere, and by their custom the words "mill privilege" are said to include the land on which a mill stands and the water rights enjoyed with the mill, and necessary for running it, and, moreover, so much of a mill yard as necessity or convenience may demand, to be determined as a fact by the jury.[127] While land

[125] Bac. Abr. "Grants," 1, 4; Carden v. Tuck, Cro. Eliz. 89; Allen v. Scott, 21 Pick. 25, where an exclusion of a "brick factory" was held to exclude the lot under and in front of it, and the water privileges going with it. So "paper mills" was construed in Whitney v. Olney, 3 Mason, 280, Fed. Cas. No. 17,595, "and under them, necessary for the use and commonly used with them." Very broad is Thayer v. Payne, 2 Cush. 327. And, while the soil of a mill race cannot pass as incident to the mill, the privilege of using the race does. Johnson v. Jordan, 2 Metc. (Mass.) 234; also, New Ipswich Factory v. Batchelder, 3 N. H. 190. "By the grant of mills the waters, floodgates and the like that are of necessary use to the mills do pass." Shep. Touch. p. 89. See Archer v. Bennett, 1 Lev. 131. In Blackborn v. Edgley, 1 P. Wms. 600, "a house with the appurtenances," only the garden and orchard will pass with the house; but the devise of the "house with the lands appertaining will pass the land employed for raising hay and corn." So. in Bodenham v. Pritchard, 2 Dowl. & R. N. P. 508, "my mansion house, in which I now live, called 'D,' etc., with all the buildings and lands thereto belonging as now enjoyed by me," carried lands adjoining the estate known as D., bought by the testator, and connected with it by throwing down the fences.

[126] "Lot with all the dwelling houses, with the appurtenances." Ammidown v. Ball, 8 Allen, 293. In State v. Burke, 66 Me. 127, a search warrant named a "dwelling house and appurtenances," and it was held that it covered a woodshed back of it; quoting Smith v. Martin, 2 Saund. 400, and the note thereto by Mr. Williams. "Mill" includes the land under it and its overhanging projections, and may include the water privileges enjoyed with it, quoting Co. Litt. 4b; Blake v. Clarke, 6 Greenl. 436. These cases are quoted in Cunningham v. Webb, 69 Me. 92, where the barnyard with sheepshed passed with the barn. In Doe v. Collins, 2 Term R. 499 (case of a will), "my house and gardens" were construed to include a stable and coal pen adjoining, though both were used in part for business purposes.

[127] Moore v. Fletcher, 16 Me. 63.

thus often passes under the name of a building, machinery and other fixtures will often pass under the name of land. It may be said that whatever goes with the land to the heir as against the administrator, will also pass with the freehold in a deed or will.[128]

Just as land may thus pass as the incident to a building, it may be excepted from a grant in like manner by excepting the "dwelling house" or the "factory," etc.; and it is a "rule where anything is excepted, all things that are depending upon it are also excepted." [129] It has, however, been said that an exception or reservation in a deed must be construed narrowly against the grantor.[130] Generally speaking, whosesoever is the soil, to him it belongs, up as high as the sky ("Cujus est solum, ejus est usque ad coelum"), and downward to the center of the earth. But aside of the statutory law of the United States, stated hereafter in a section on "Boundaries of Mines," there are other exceptions, even at common law. A man may have an inheritance in an upper chamber, though the lower buildings and the soil be in another. Ejectment would lie for a house without any land, if it have been erected with the landowner's consent. In London, different persons not seldom have several freeholds in the same spot, the cellar belonging to one man, the upper rooms to another, and the chambers in the "Temple" used to

[128] Shelton v. Ficklin, 32 Grat. (Va.) 727. The test for treating the machinery as part of the land is here its permanency, the building being set up or at least fitted up to receive it.

[129] See Hammond v. Woodman, 41 Me. 192, quoting from Shep. Touch. p. 100. But in Sanborn v. Hoyt, 24 Me. 118, a deed described land by metes and bounds, "excepting and reserving all the buildings on said premises." This was construed as excepting the buildings only, without the underlying soil, and to turn them into personalty. See Allen v. Scott, supra, note 125; quoting Ive v. Sams, 2 Cro. Eliz. 521, where it was held that if a man lets his manor, except the woods and underwoods, the soil under them is also excepted. It will be noted that nearly all the cases on these informal descriptions are quoted from Maine and Massachusetts, where the primitive mode of selling land by the name of "house" or "mill" seems to have been quite prevalent.

[130] Howard v. Wadsworth, 3 Greenl. 471, where "the mills now on said falls," in an exception, was confined to the building, so as to cease when that fell into disuse, and the same words would not have been taken more broadly in a grant. Wyman v. Farrar, 35 Me. 64.

be held by separate freeholds.[131] In like manner as upper chambers may be owned in fee separately from the soil, so also may the "depths" be owned apart from the surface. This principle went back to the prerogative ownership which the English crown always exercised over mines for the more precious metals, no matter to whom the soil belonged. An action of ejectment or a real action may, at the common law, be brought for a mine.[132]

A very wide subject, at which here we can only glance, is that of fixtures,—that is, of those articles affixed to, or permanently placed on, the ground, as to which there is reason for doubt whether they are a part of the freehold or not. With the question between landlord and tenant as to the ownership of fixtures set up at the cost of the latter, we are not here concerned, nor even with that between the heir and executor,—only what articles belonging to the owner of the ground have so far become part of the freehold that they would pass by the grant, mortgage, or devise of the land.[133] There are two tests, neither of them sufficient, neither of them always adhered to. Whatever is fastened to the floor or to the walls of a building, or to a post let into the ground, by either nails, screws, or cleats, bears one mark of being part of the freehold. Whatever is put in position, where it is to be permanently used with the buildings, for the purpose for which they are erected, has another claim to be so considered. Steam engines in mills and factories, when the furnace is built of brick, or stands on a brick or stone foundation, and the boiler is set in the wall, are readily admitted to be parts of the freehold. The water wheel which drives machinery, and which can do its work only in the place which it occupies, stands on the same ground. The difficulty arises when we come to the machinery which the steam engine or the water wheel drives.[134]

[131] 3 Kent, Comm. 401, note c; quoting Co. Litt. 48b; Doe v. Burt, 1 Term R. 701; Doty v. Gorham, 5 Pick. 487. A grant of water does not pass the soil beneath, but gives only right of fishery. Co. Litt. 4b.

[132] U. S. v. Castellero, 2 Black, 17 (a case covering over 200 pages); quoting Co. Litt. 6a.

[133] Cases on fixtures are best collected and arranged in the notes to Elwes v. Mawe in the second volume of Smith's Leading Cases, 177. We are here concerned only with the cases as between vendor and purchaser.

[134] Carpenter v. Walker, 140 Mass. 416, 5 N. E. 160; McConnell v. Blood,

§ 10. Littoral and Riparian Owners.

When land is described in a deed or survey as bounded by a body of water, the boundary has different meanings at common law, according as such water is or is not within the ebb and flow of the tide. The former is, the latter is not, deemed "navigable." When the sea, or any inlet of the sea, or any stream only so far upland as to be still within the daily tides, is named as the boundary, the common law brings the tract so described down to "ordinary high-water mark" (that is, the daily high tide), it being understood that the sovereign owns all tide water and its "shore" (i. e. the land between low and high water mark) for the free use of the public in fishery and navigation. But one who owns land along streams not navigable in this sense holds ad medium filum aquae (to the middle thread of the river), including the islands or sand bars within the stream at the time of his acquiring, or while he holds, the land along the stream, unless the contrary intention plainly appears. How far the property of the owner abutting on lakes or ponds extends, is more difficult to say, but there are no great lakes in England. These propositions of the common law are laid down in all elementary works, and in many of the cases quoted in the notes.[135]

123 Mass. 47; Hubbell v. East Cambridge Five Cents Sav. Bank, 132 Mass. 447; Maguire v. Park, 140 Mass. 21, 1 N. E. 750; Delaware, L. & W. R. Co. v. Oxford Iron Co., 36 N. J. Eq. 452; Hoskin v. Woodward, 45 Pa. St. 42. Among very recent cases on machinery we may name Tibbetts v. Horne, 65 N. H. 242, 23 Atl. 145; Oakland Cemetery Co. v. Bancroft, 161 Pa. St. 197, 28 Atl. 1021; Tolles v. Winton, 63 Conn. 440, 28 Atl. 542; Lansing Iron & Engine Works v. Walker, 91 Mich. 409, 51 N. W. 1061. Scales do not become part of the lot. O'Donnell v. Burroughs, 55 Minn. 91, 56 N. W. 579. As to pumping engines, New Chester Water Co. v. Holly Manuf'g Co., 3 C. C. A. 399, 53 Fed. 19; mirror, Spinney v. Barbe, 43 Ill. App. 585.

[135] Says Mr. J. Field in Packer v. Bird, 137 U. S. 661, 666, 11 Sup. Ct. 210: "It is the rule of the common law that the title of owners of land bordering on rivers above the ebb and the flow of the tide extends to the middle of the stream, but that, where the waters of the river are affected by the tides, the title of such owners is limited to ordinary high-water mark. The title to land below that mark in such cases is vested in England in the crown, and in this country in the state within whose boundaries the waters lie; private ownership of the soils under them being deemed inconsistent with

In America, with its great rivers and lakes, that have been likened to inland seas, the English doctrine of treating every stream or lake above tide water as nonnavigable, and therefore private property, is hardly applicable, and has been rejected in many of the states. The federal courts have, in construing the deeds issued by the United States, generally followed the law of the state in which the land lies. While reserving to itself the public lands in the states formed out of the common territory, the national government, however, everywhere disclaims the ownership over the beds of great navigable rivers up to the "bank,"—that is, up to high-water mark,—whether it be within or above the tides;[136] and it seems to do so even where the state adheres to the English doctrine. Wherever a grant or deed, in America, calls for the "shore" of the sea, or simply for the sea, or for any inlet, creek, or river, at a point where the tide ebbs and flows, the call means, as in England, ordinary high-water mark, while the strip between it and the higher line reached by the "spring tides" only is included within the grant, and the legislative grants made by the United States of the shore lands in territories are to be construed as reaching down to high-water mark only (as in the case of the Oregon donation lands), leaving the flats below that line to be granted by the

the interest of the public at large in their use for purposes of commerce. In England this limitation of the right of the riparian owner is confined to such navigable rivers as are affected by the tides, because there the ebb and flow of the tide constitute the usual test of the navigability of the stream." He afterwards refers to People v. Canal Appraisers, 33 N. Y. 461, 499, as setting forth the whole American doctrine. Whatever littoral rights the United States acquires by cessions from other nations it holds in trust for the future state. Knight v. United States Land Ass'n, 142 U. S. 161, 12 Sup. Ct. 258.

[136] Pollard's Lessee v. Hagan, 3 How. 212; Goodtitle v. Kibbe, 9 How. 471; Webber v. Harbor Com'rs, 18 Wall. 57. The rights of the state over the waters of the Great Lakes are, under the decision of the supreme court of the United States, the same as over the waters of the sea; and these powers are inalienable, as they are held for the good of the people of the whole country. Illinois Cent. R. Co. v. Illinois, 146 U. S. 387, 13 Sup. Ct. 110, decided by four judges against three, two not sitting. The United States, in acquiring tide-water lands from other nations, acquires them in trust for the future states, subject, however, to the rights of municipal bodies, which may have owned the flats or tidal lands, under the old government. Knight v. United States Land Ass'n, 142 U. S. 161, 12 Sup. Ct. 258.

future state in its discretion.[137] In Massachusetts and Maine a colonial ordinance of 1641, re-enacted in 1647, gives to the grantee of littoral lands the "flats" to a width of not more than 100 rods below high-water mark, and these flats pass incidentally with the uplands, though they may also be conveyed separately. In New Jersey, also, by statute, grants along the sea and on tide-water rivers extend to low-water mark, with a right in the owner to build out docks or piers beyond it into the water. And in Oregon the sales of flats by littoral owners have been ratified, and the state has since fully authorized the sale of its "tide flats."[138] A fresh-

[137] The civil law and the Spanish law in force in Mexico is said to be the same as to land bounding on the sea as the common law. U. S. v. Pacheco, 2 Wall. 587. The distinction between the daily tides and those at full moon and new moon, or spring tides, is made in this case. The shore is defined as the "land over which the tide daily ebbs and flows." The old rule to consider only tide waters navigable was sensible enough before the use of steam power enabled ships and large boats to ascend fresh-water rivers. As to the reservation of the flats to the state, see Shively v. Bowlby, 152 U. S. 1, 14 Sup. Ct. 548.

[138] Cortelyou v. Van Brundt, 2 Johns. 357, referring to Hale's Treatise de Jure Maris. In the recent case of Tappan v. Boston Water-Power Co., in the supreme court of Massachusetts, 1892 (157 Mass. 24, 31 N. E. 703, 704), the doctrine and authorities are given thus: "At common law the title of the owner of land bounding on tide water only extends to ordinary high-water mark. Com. v. Charlestown, 1 Pick. 182; Porter v. Sullivan, 7 Gray, 441; Com. v. City of Roxbury, 9 Gray, 477, 483, 491; Com. v. Alger, 7 Cush. 53, 65. This applies to a stream discharging fresh water, but in which the tide ebbs and flows. The test whether or not it is to be regarded as tide water is whether there is a regular rise and fall under the influence of the tide. Attorney General v. Woods, 108 Mass. 436; Peyroux v. Howard, 7 Pet. 343; Lapish v. Bank, 8 Greenl. (Me.) 85; the latter being the case of an owner expressly limited by high-water mark. The colony ordinance of 1641–47, however, extended the title of all proprietors of land adjoining creeks, coves, and other places, where the tide ebbs and flows, to low-water mark, if not more than one hundred rods." In Peyroux v. Howard it was deemed sufficient that the tide swells the water, though it does not overcome the current. This was, however, only to determine a place for admiralty jurisdiction under the old English rule, now abandoned, and had no bearing on land boundaries. The hundred rods law of Massachusetts applies to the open sea. Sale v. Pratt, 19 Pick. 191. The ordinary rules of description apply to the flats. Montgomery v. Reed, 69 Me. 510. This ordinance is in force in the Plymouth colony, inuring to the benefit of previous grantees under it. Inhab-

water lake which has been rendered salty, and subject to the tides, only by means of a canal from the sea, does, however, retain its inland and fresh-water character.[139]

The presumption that a call for the "shore" of the sea, or tide-water generally, means the line of high tide, can be overcome by words in the instrument clearly pointing the other way, such as distances laid down from fixed points, and leading to low water, the claimant of the flats having to settle his dispute with the state as well as he can.[140]

The "bank" of a body of salt water has been defined as the margin where vegetation ceases; the "shore," as the sandy or rocky ground between the bank and the water. Thus "bank" is a line, the same as "high-water mark"; "shore," a surface.[141]

On streams and rivers in which the tide does not ebb and flow,

itants of Litchfield v. Scituate, 136 Mass. 39. Beginning at high-water mark, and giving three miles inland, does not negative a purpose to give the flats. Id. The right of the riparian (or littoral) owner over the flats is recognized in Connecticut in Simons v. French, 25 Conn. 346, and New Haven Steamboat Co. v. Sargent, 50 Conn. 199, in which case it is held that the right to the flats (or mud flats) can be sold separately. From the latter case it seems that the sale of a mere strip of the flats would carry everything below that strip. The fee in the flats may pass under the name of "privileges" in the flats. Dillingham v. Roberts, 75 Me. 469. In Oregon, see Acts of 1872 and 1874, as to previous sales of tide lands by littoral owners, and authorizing the purchase of the full title from the state. De Force v. Welch, 10 Or. 507. And see Acts of 1891, on pages 2010 and 2011 of Revision of 1892. For Virginia, see Code, § 1388; for New Jersey, Revision, "Wharves," §§ 2, 8.

139 Wheeler v. Spinola, 54 N. Y. 377, though the Harlem river is within the rule of high-water mark (Mayor of New York v. Hart, 95 N. Y. 443), a small creek flowing into it, though swollen by the backing tide, was held not to be within the rule. Breen v. Locke, 46 Hun, 291. In Mayhew v. Norton, 17 Pick. 357, the grantee was allowed the flats as accessories, though the quantity conveyed was satisfied without them. The salt marshes below the 150 rods, if capable of possession, may pass as property, and be held as such by title from or prescription against the state. Clancy v. Houdlette, 39 Me. 451.

140 Storer v. Freeman, 6 Mass. 435; Oakes v. De Lancey, 133 N. Y. 227, 30 N. E. 974.

141 McCullough v. Wainwright, 14 Pa. St. 171. "To the stream" includes, "To the bank" excludes, the flats. Thomas v. Hatch, 3 Sumn. 171, Fed. Cas. No. 13,899.

and which are not navigable in fact, the riparian owner holds "to the middle thread," by the law of all the states. But as to rivers navigable in fact, yet above the reach of the tides, each of these doctrines is maintained: one, looking upon them as the inland seas of America, reserves not only the main bed of the river, but even the shore up to the bank, or high-water mark, to the sovereign state, for the purposes of commerce; another doctrine, more prevalent, follows the common law of England, and treats the bed of the greatest rivers as private estate, the owner on each side holding to the middle thread; while the courts of a few states decide, or at least intimate, that the riparian owner on a great navigable river comes down to low-water mark. The fee of the riparian owner "to the middle thread," or to low-water mark, of a navigable river, is, of course, subject to the free use of the public for fishing and navigation.

The supreme court of Iowa laid down the first of these three doctrines (that of high-water mark) as to the Mississippi, though the state itself holds to its middle thread and the supreme court of the United States warmly approved this view in a case growing out of the same grant.[142] On the Lower Mississippi, where some of the most valuable lands are flooded almost every year, a rule limiting grants below by the high-water line is wholly impracticable. On tide water the high mark is reached twice a day; on fresh water, at most, once in a year. A salty tide kills vegetation; a fresh-water flood enriches the soil. Hence the analogy between the Mississippi and tide water is not very close; and the states which hold to the English rule are not far out of the way, and perhaps those states which carry the riparian owner down to low-water mark are most nearly right. On the Ohio and Upper Mississippi some curious results are worked out. West Virginia and Kentucky have dominion of

142 McManus v. Carmichael, 3 Iowa, 1; Barney v. City of Keokuk, 94 U. S. 324. The half-breed Sacs and Foxes had been granted a tract west of and adjoining the Mississippi, not as a tribe, but as tenants in common. Held to begin at high-water mark. The "flats" below were afterwards granted by the state to the city and other defendants, and their title was sustained against the plaintiff's title, which was derived from the half-breeds. See, also, Wood v. Chicago, R. I. & P. R. Co., 60 Iowa, 456, 15 N. W. 284, reaffirming the doctrine of the earlier Iowa cases.

the whole of the Ohio river to low-water mark on the northern side. The latter (though not the former) of these states extends the ownership of the riparian owner to the middle thread, contrary to the example of West Virginia;[143] and Ohio, Indiana, and Illinois would, to judge from their treatment of other rivers, do the same, if the northern half of the Ohio belonged to them. As it is, they can only go to low-water mark.[144] So, also, on the Mississippi, between Illinois and Iowa (though the states share the river bed), the riparian owner in Illinois holds to the middle thread (as he does also in the state of Mississippi); he in Iowa, only to high-water mark.[145] In Michigan and Wisconsin it is a settled rule that the title of the riparian owner on inland waters, whether navigable or not (except on the Great Lakes), extends to the middle thread of the stream, or center of the pond or lake.[146] In Ohio (aside of the Ohio river, on account of the limited state jurisdiction) the same rule prevails.[147] The Great Lakes are always treated as inland seas with an outline "where the water usually stands, when free from disturbing causes."[148]

On the other hand, some of the New England states,[149] New York, with some hesitation, and by the aid of local statutes enacted for

[143] Virginia decisions, like Garrison v. Hall, 75 Va. 150, are mainly based on an act of 1791, not applicable to the Kentucky district, which forbade the grant of land below the bank of navigable rivers. See, also, Hayes v. Bowman, 1 Rand. 417; Mead v. Haynes, 3 Rand. 33. In West Virginia (Town of Ravenswood v. Flemings, 22 W. Va. 52, containing a full review of American authorities) the Ohio river is treated like tide water. The grantee holds only to the bank, and cannot, as against the municipality, erect wharves. In Kentucky, see, as to the Ohio, Berry v. Snyder, 3 Bush, 266; as to smaller rivers, Williamsburg Boom Co. v. Smith, 84 Ky. 372, 1 S. W. 765; Kentucky Lumber Co. v. Green, 87 Ky. 257, 8 S. W. 439.

[144] Handly's Lessee v. Anthony, 5 Wheat. 375; Booth v. Shepherd, 8 Ohio St. 247.

[145] Middleton v. Pritchard, 3 Scam. 510; Fuller v. Dauphin, 124 Ill. 542, 16 N. E. 917; Morgan v. Reading, 3 Smedes & M. 366 (a leading case).

[146] Fletcher v. Thunder Bay Boom Co., 51 Mich. 277, 16 N. W. 645; Webber v. Pere Marquette Boom Co., 62 Mich. 626, 636, 30 N. W. 469; Lorman v. Benson, 8 Mich. 18; Arnold v. Elmore, 16 Wis. 509, 516; Jones v. Pettibone, 2 Wis. 308.

[147] Gavit v. Chambers, 3 Ohio, 496.

[148] Sloan v. Blemiller, 34 Ohio St. 492.

[149] In Adams v. Pease, 3 Conn. 481, the common-law definition is enforced;

other objects,[150] and Pennsylvania, which bounds riparian owners on navigable rivers by low-water mark,[151] have cut loose from the common-law distinction, adopting "the better doctrine of the civil law." And, in the same line, the supreme court of California says "that the Sacramento river being navigable in fact, the title of

nothing but tide waters navigable. See, contra, Rowe v. Smith, 48 Conn. 444. On "navigable" rivers, grant extends only to high-water mark. Chapman v. Kimball, 9 Conn. 38; New Haven Steamboat Co. v. Sargent, 50 Conn. 199. In New Hampshire the common-law rule seems to be declared in Claremont v. Carlton, 2 N. H. 369. The position taken by the United States supreme court in Packer v. Bird, supra,—"most, if not all, of the New England states," have departed from the common-law rule as to what is "navigable,"—is hardly borne out. See, for Massachusetts, Com. v. Chapin, 5 Pick. 199, where the Connecticut river above the tides was held not navigable. As to same river in New Hampshire, see Scott v. Wilson, 3 N. H. 321. Still, it is a public highway.

[150] People v. Canal Appraisers, 33 N. Y. 365. The opinion aims to give the substance of the English and American decisions down to its date (1865). The English precedents are mainly: The Royal Fishery of River Banne, Dav. Ir. K. B. 55; Warren v. Mathews, 6 Mod. 73, 1 Salk. 357; Carter v. Murcot, 4 Burrows, 2162; Mayor of Lynn v. Turner, Cowp. 86; Rex v. Smith, Doug. 441; Miles v. Rose, 5 Taunt. 705. There is a review of the older New York cases: Ex parte Jennings, 6 Cow. 518 (the old doctrine); Hooker v. Cummings, 20 Johns. 90 (none but salt-water rivers "navigable"). Palmer v. Mulligan, 3 Caines, 308, held otherwise, but Kent and Thompson, JJ., dissent in favor of the old doctrine. Case of Tibbits, 17 Wend. 571, treats the Mohawk as navigable. Canal Appraisers v. People, 17 Wend. 610, proceeds mainly on the acts of the legislature which deal with the Hudson, Mohawk, and Lake Champlain as public waters. Starr v. Child, 20 Wend. 149, as to the Genesee river, was reversed in Child v. Starr, 4 Hill, 369, where it was held that a boundary running eastwardly to the river, "thence northwardly along the shore of the river," conveyed no part of the bed, but the grantee took only to low-water mark. This case is rather doubted in Seneca Nation v. Knight, 23 N. Y. 498, in which "meanders" from a point in the bank are carried along the middle thread, as a zigzag line along the water's edge would be very inconvenient. In the late case of Smith v. City of Rochester, 92 N. Y. 463, the riparian owner's lines are extended to the middle line of a small lake; and so, again, in Gouverneur v. National Ice Co., 134 N. Y. 355, 31 N. E. 865, and 32 N. E. 1014. See infra as to doctrine in other states.

[151] Monongahela Bridge Co. v. Kirk, 46 Pa. St. 112, 120. Hart v. Hill, 1 Whart. 124, 137, brings the ownership down to the water's edge or low-water mark. In Wood v. Appal, 63 Pa. St. 210, on the Ohio river, it is "ordinary low-water mark," which would not include bars appearing in very low stages.

the abutters extends no further than the edge of the stream."[152] Since the supreme court of the United States, in the cases of The Genesee Chief and of Fretz v. Bull, extended the admiralty jurisdiction over the great inland lakes and rivers, it has become partial to this doctrine, and it warmly approved the California, as it did the Iowa, ruling.[153] Indeed, in some of its laws for the sale of public lands, congress has discriminated between rivers navigable and those not navigable; and the context forbids construing these words according to the common-law rule, which considers only tide waters navigable.[154]

Except Iowa, the states rejecting this view generally confine the riparian owner to the "water's edge," leaving the question between low-water mark and high-water mark open, as the case generally turns on the ownership of an island.[155] Minnesota, like Pennsylvania, lets the riparian owner on navigable waters come down to low-water mark, and allows him, with due regard to navigation, to project wharves and piers beyond that line.[156] Kansas and Alabama treat their great rivers, as Iowa does, like tide waters, limiting the riparian owner by high-water mark.[157] Some states have laid stress on such phrases as "by the side of" or "by the margin of" a stream, as exclusive; and where the description of land starts from the edge of a river, making the latter a terminus a quo, rather than ad

[152] Lux v. Haggin, 69 Cal. 255, 10 Pac. 674, and next case, which were affirmed in the United States supreme court.

[153] Packer v. Bird, supra, note 135; The supreme court avows its willingness to construe federal grants by state law. The Genesee Chief and Fretz v. Bull will be found in 12 How. 443, 466. The former applies to Lake Ontario; the latter, to the Mississippi.

[154] Act May 18, 1796 (1 Stat. 468); Railroad Co. v. Schurmeir, 7 Wall. 272.

[155] Passim in cases quoted "to the water's edge" or "to the water line"; e. g. Hart v. Hill, note 151.

[156] Schurmeier v. St. Paul & P. R. Co., 10 Minn. 82 (Gil. 59), 7 Wall. 272; Union Depot Street Railway & Transfer Co. v. Brunswick, 31 Minn. 297, 17 N. W. 626; St. Paul, S. & T. F. R. Co. v. First Division St. P. & P. R. Co., 26 Minn. 31, 49 N. W. 303.

[157] Wood v. Fowler, 26 Kan. 682. Though the Kansas and other rivers were declared in 1864 by act of the legislature "not navigable," they were impliedly navigable before that time, and still remain so as to riparian ownership, which extends only to high-water mark. So, also, in Alabama. Mayor, etc., of Mobile v. Eslava, 9 Port. 577; affirmed in U. S. Sup. Ct., 16 Pet. 234.

quem, the intent to exclude the river bed may be more easily inferred. Yet this is, and should be, but sparingly done. Even monuments on the bank do not, by themselves, indicate such exclusion, as they can hardly be placed lower down.[158] But the courts of some of the states, in the matter of streams as well as of highways, are inclined to exclude the grantee on rather slender grounds.[159]

While the body of the Great Lakes is never subjected to riparian ownership, the ponds and smaller lakes, from half a mile to three miles in width, and up to ten miles in length, which abound in the Northwest, have caused much difficulty. The supreme court of the United States has, on these lakes, taken the view most favorable to the riparian owner. It has always held that the meandering lines by which the surveyors bound the subdivisions of the public land bordering upon rivers, lakes, and ponds have no other effect than to fix the price at which the lands must be sold, but that they do not limit the rights of the purchaser over the adjoining land that is covered with water, as far as that belongs by the local law to the riparian owner.[160] In Michigan and Indiana it was held that the purchaser of a fractional lot (such as a quarter section) bounded by a nonnavigable lake takes only so much of the lake bottom as is required to fill out the lot of which he has bought the fraction; and this rule has the authority of the Roman law, as well as convenience, to recommend it.[161] New Jersey, lying along the sea coast, and hav-

158 Haight v. Hamor, 83 Me. 453, 22 Alt. 369. Contra, Hart v. Hill, supra, note 151. In Rockwell v. Baldwin, 53 Ill. 19, following Hatch v. Dwight, 17 Mass. 298, grantee under deed with call "to the west side of C. creek, thence down west line of said creek," etc., takes to the western bank only. Contra, King v. King, 7 Mass. 495; Gavit v. Chambers, 3 Ohio, 495. The meander lines are measured along the bank for the surveyor's convenience, who otherwise would have to wade through the water; hence their high location proves nothing.

159 Hosleton v. Dickinson, 51 Iowa, 244, 1 N. W. 550 ("east to Pine creek, thence N. E. up its west bank"); Whitehurst v. McDonald, 8 U. S. App. 164, 3 C. C. A. 214, and 52 Fed. 633.

160 Middleton v. Pritchard, 3 Scam. 510; also, Jefferis v. East Omaha Land Co., 134 U. S. 178, 10 Sup. Ct. 518; approved in Hardin v. Jordan, 140 U. S. 371, 11 Sup. Ct. 808, 838.

161 Clute v. Fisher, 65 Mich. 48, 31 N. W. 614; Stoner v. Rice, 121 Ind. 51, 22 N. E. 968. The Roman law on the subject is quoted in Hardin v. Jordan, supra, from Dig. lib. 41, tit. 1., ff. 7, 16; Lamprey v. State, 52 Minn. 181, 53 N. W. 1139.

ing no great rivers in which the tide does not ebb and flow, has retained the English common-law doctrine, in all its fullness, both as to streams and lakes.[162] The courts of Illinois draw a distinction between running waters, large or small, and a lake or pond, following therein an early New Hampshire precedent.[163] The round or irregular shape of the latter, and the lack of current, render it difficult to locate a middle thread, or even a center, and the riparian owner therefore takes only to the water's edge.[164] But the majority of the supreme court of the United States (Brewer, Gray, and Brown dissenting), while claiming to act on the law of Illinois, extended fractional lots on the edge of a small lake to its center, wherever that might be found; and setting aside the convenient rule of Indiana and Michigan, it carried the fractional lots much further than the lines of the full squares, over the reclaimed soil of the lake.[165]

Where a ditch is made the boundary of a grant, half of its width goes to the grantee, just as half of a wall or stone or other monument would go.[166]

The highest authority has defined, in a contest between states,

162 Cobb v. Davenport, 32 N. J. Law, 369.

163 State v. Gilmanton, 9 N. H. 461, where the current or lack of current is made the test.

164 Seaman v. Smith (1860) 24 Ill. 521, 523, as to Lake Michigan; Cortelyou v. Van Brundt, 2 Johns. 357, furnishing the analogy as to the usual stage of the water; Trustees of Schools v. Schroll, 120 Ill. 509, 12 N. E. 243, as to the Mendosia Lake, which is about five or six miles long, and near the Illinois river.

165 Hardin v. Jordan, 140 U. S. 377, 11 Sup. Ct. 808, 838; Mitchell v. Smale, 140 U. S. 406, 11 Sup. Ct. 819, 840. The little lake in question in both these cases has an outlet through Wolf river into Lake Michigan. The fractional lots granted by the United States are extended far beyond the full squares. In one case the purchaser of about 4½ acres gets with them a reclaimed tongue of land of 25 acres. S. P. in Tappendorff v. Downing, 76 Cal. 169, 18 Pac. 247. There is a very full review of authorities, among them Bristow v. Cormican, 3 App. Cas. 641, decided by the house of lords as to Lough Neagh, in Ireland. Among American cases not heretofore quoted, Ledyard v. Ten Eyck, 36 Barb. 102; Cobb v. Davenport, 32 N. J. Law, 369, 33 N. J. Law, 223; Ridgway v. Ludlow, 58 Ind. 248. Still later, Lembeck v. Nye, 47 Ohio St. 336, 24 N. E. 686 (nonnavigable lake, private property of riparian owners).

166 Warner v. Southworth, 6 Conn. 471.

where the middle thread of a great river is, as will be shown in another section. Whether the ruling will be accepted by all the states in controversies between riparian owners, when both sides of the stream are within the same state, is not quite certain, as the question between them may turn on different grounds.[167]

Among the incidents of riparian ownership are those of alluvion or accretion, on the one hand, and of attrition, on the other; that is, new soil may be lodged by the lake or river against the owner's land, enlarging it, or may be washed off, so as to diminish such land. On a river the accretion on one side may take place at the cost of the owner on the opposite shore. The courts have, with great consistency, adhered to this distinction: That when the accretion and attrition have gone on gradually, or imperceptibly, the soil added to one side and taken from the other is won and lost by the respective owners; but when the stream is suddenly turned from its channel, so that the change can be readily seen, the former line of middle thread (if that was the dividing line) remains such after the change.[168] Where a subdivision had been laid out on the shore of a great lake, which touched the corner of a block and partly covered the street in front of the block, and a large accretion of new soil was afterwards formed on the other side of the street, as laid out on the plan, this accretion was adjudged to those claiming the residuary belonging to the owner of the subdivision, as against the

[167] See infra under "State Boundaries."

[168] Mayor, etc., of New Orleans v. U. S., 10 Pet. 662, 717 (New Orleans would otherwise be cut off from the river); Jones v. Soulard, 24 How. 41 (accretion applies to Mississippi, and a city is to be treated as riparian owner); Saulet v. Shepherd, 4 Wall. 502 (accretion goes to the nearest strip, never to lands back of it); St. Clair Co. v. Livingston, 23 Wall. 46 (test, that witnesses cannot perceive the progress as it goes on, though they notice it from time to time); Jefferis v. East Omaha Land Co., 134 U. S. 178, 10 Sup. Ct. 518 (a water line, no matter how it shifts, remains the boundary). On the other hand are quoted 2 Bl. Comm. p. 267; Ang. Water Courses, § 60; The King v. Lord Yarborough, 3 Barn. & C. 91; Trustees of Hopkins Academy v. Dickinson, 9 Cush. 544; Buttenutth v. St. Louis Bridge Co., 123 Ill. 535, 17 N. E. 439; Hagan v. Campbell, 8 Port. (Ala.) 9; Murray v. Sermon, 1 Hawks, 56,—all quoted in Nebraska v. Iowa, 143 U. S. 359, 12 Sup. Ct. 396. The law of accretion does not apply to the drying or draining of a swamp. Lewis v. Roper Lumber Co., 113 N. C. 55, 18 S. E. 52.

purchaser of the block.[169] But, where the purchase of the larger tract had been made by a public officer for the benefit of the townspeople, it was held that the lot owners abutting on the water street have all the riparian rights to the accretions and "relictions" beyond it.[170]

§ 11. Fee in Highways.

It lies outside of the scope of this work to discuss the origin and nature of highways. The editor of Smith's Leading Cases, in opening his notes upon Dovaston v. Payne, defines a highway as "a passage which is open to all the king's subjects," which does not include a turnpike or other toll road, nor a street which, though laid out on a plat by which lots are sold, and the use of which is thereby secured to all the purchasers of such lots, has not been accepted by any public authority. However, much of what is said in this section about the fee in highways is almost as fully applicable to toll roads and unaccepted streets. What has made Dovaston v. Payne a leading case is the short sentence of Mr. Justice Heath: "If it be a way, he must show that he was lawfully using the way; for the property is in the owner of the soil, subject to an easement for the benefit of the public." [171]

Streets of cities are always highways, and, considering the money value of the soil covered by them, the most important of all highways. Generally speaking, when a town or city is laid out or enlarged, the fee in the roadbed of the streets remains with the former owner of the soil, subject only to the right of the public to pass and repass on foot, on horseback, or in carriages, and to carry goods or

[169] Banks v. Ogden, 2 Wall. 57. The case turns on the question, who was the owner nearest to the water's edge? And it was a very close case indeed. It was followed up in 1893 by the very important case of Illinois Cent. R. Co. v. Illinois, 146 U. S. 387, 13 Sup. Ct. 110, in which the wharf rights and the reclamation rights on the lake front were held not to pass with the mere right of way of the railroad.

[170] Waite v. May, 48 Minn. 453, 51 N. W. 471.

[171] Dovaston v. Payne was decided in 35 Geo. III. in the common pleas and was originally reported in 2 H. Bl. 527, but is much better known from its place in the second volume of Smith's Leading Cases (page 142). It turned on the proposition that, to justify the breaking of cattle from a highway into the defendant's close through defective fences, the owner of the cattle must show that they were "passing and repassing on the highway."

drive beasts over them; also to use the streets or roads for all such further purposes as have been contrived in modern times, such as horse-car tracks, steam or electric roads, gas and water pipes, posts and electric wires, etc. The indicia of private ownership in the roadbed is shown in the owner's right to cut grass or trees, to take earth, stones, and minerals from it, or water from a spring or stream, and to sue others for trespass, who, not being owners, cut grass or trees, or take earth, stones, or minerals.[172] In the case of city streets, the ownership of the abutting lot holders is indicated by the bins or cellars which they are allowed to extend under the sidewalks. In some cities and towns, under express law, the fee in the streets is vested in the municipality, and such is the case as to all, or nearly all, the streets of New York City.[173] Statutes under

[172] Makepeace v. Worden, 1 N. H. 16; Town of Oldtown v. Dooley, 81 Ill. 255. By far the greatest number of cases as to the fee in highways seem to have arisen in New York and New England, and turn about the taking of grass, trees, earth, and so forth. It was held in Fisher v. City of Rochester, 6 Lans. 225, that the value of stone taken from a street, and used by a city contractor in its improvement, could not be credited to the city on the contract price, as such stone belongs to the abutting owner. To the same effect are West Covington v. Freking, 8 Bush, 121; Tucker v. Eldred, 6 R. I. 404. That is, the owner may extract minerals from the roadbed, as long as he does not interfere with the use of the road. A town by-law allowing strangers to pasture their cows on the highway is void, and the state law authorizing it is unconstitutional, as divesting the rights of the landowners. Woodruff v. Neal, 28 Conn. 165, decided on the very ground of Dovaston v. Payne, that cattle can only pass over the highway. But see, contra, Griffin v. Martin, 7 Barb. 297. The springs or water courses on the highway belong to the private owner. Town of Oldtown v. Dooley, 81 Ill. 255. The town cannot put a public building on the highways. Winchester v. Capron, 63 N. H. 605, 4 Atl. 795. The gravel may be taken by the municipality, as far as needed for the highway itself, or as its removal is necessary in grading, but not for other purposes; and the smallness of such interests is no justification for invading the owner's rights. Robert v. Sadler, 104 N. Y. 229, 10 N. E. 428.

[173] Drake v. Hudson River R. R., 7 Barb. 508, where it is said that in colonial times the streets belonged to the crown, and the avenues and streets laid out under the act of 1813 (2 Rev. Laws, 414) are made public property by that act. Dunham v. Williams, 37 N. Y. 251, points out that under the Dutch government, according to the civil law, highways belonged to the state. So does the road from Flatbush to Brooklyn, made under Gov. Stuyvesant. According to this case, only in the upper part of New York

which, at an early time, towns were laid out in Kentucky, vested the streets, wharves, and public places in the "trustees of the town," and, while giving them power to sell the lots, conferred no power on them to sell the streets, wharves, and public places, and thus rendered them inalienable; and a similar law prevailed at one time in some towns of Illinois.[174] But such is the exception. The vast majority, both of country roads and of city streets, remain, after their dedication to public use, or after they have been acquired by the public by "condemnation" and payment of value and damages, the property of the former owners, subject only to the public easement. While this easement is exercised,—while the road or street is open for travel,—the question of ownership over the narrow strip of ground may indeed be tested, but is of comparatively trifling importance; but when, as sometimes happens, the road or street is discontinued, the ownership of this strip may become highly valuable, and the loss of it very annoying.

When roads or streets are first laid out, the land on both sides generally belongs to the same owner. But when land is sold after the establishment of a highway running through it, most frequently, only so much is granted to the same purchaser as lies on one side of the road or street. In the case of such a conveyance,

the streets seem to belong to the city. But there is a distinction between streets which are simply dedicated, whereby the public has the easements, and streets that have been accepted and "opened" by authority. The city owns the fee in the latter only. Williams v. New York Cent. R. Co., 16 N. Y. 97; Knox v. City of New York, 38 How. Prac. 70; Wendell v. Mayor, 43 N. Y. 261; In re Munson, 29 Hun, 325.

174 Trustees of Augusta v. Perkins, 3 B. Mon. 437, where not only a street, but even the public square, laid out by the trustees, was held inalienable. Nearly all the cities and towns of Kentucky have been laid out under special charters, and the fee is generally with the abutting owners. Also, Buckner v. Trustees of Augusta, 1 A. K. Marsh, 8. Under a former statute of Illinois, the title to streets vested in the corporation of the town as soon as the plat was recorded. Board of Trustees of Illinois & M. Canal v. Haven, 11 Ill. 557. In a number of cases in Kentucky the municipal body attempted to sell the "slip" next to the navigable river, or the "lots below Water street"; in other words, the wharf. These sales were held void. Trustees of Maysville v. Boon, 2 J. J. Marsh. 224; Giltner v. Trustees of Carrollton, 7 B. Mon. 680. But such a sale was sustained after an acquiescence of 40 years in City of Louisville v. Bank of U. S., 3 B. Mon. 138.

as in that of land bounding upon a "nonnavigable stream," the presumption arises that the boundaries of the grant extend "to the middle thread of the way" ("ad medium filum viae"), just as the riparian owner or his grantee hold ad medium filum aquae; an analogy which is often dwelt upon by the courts. When a grant of land bounding upon a highway does, and when it does not, include such a highway, as far as its "middle thread," is almost the only question regarding highways which properly belongs to a treatise on "land titles."

While the courts of all the states have everywhere admitted the general rule as stated above, they have greatly varied in the grounds upon which they allow exceptions to be engrafted upon the rule. Chancellor Kent says in his Commentaries: "The idea of an intention in the grantor to withhold his interest in the road to the middle of it, after parting with all his right and title to the adjoining land, is never to be presumed. It would require an express declaration to sustain such an inference."[175] Messrs. Hare and Wallace (and their successors), who in their note on Dovaston v. Payne, Smith, Lead. Cas., have written probably the best American treatise on the Law of Highways, strongly express the same view, and quote at length from the opinion of the supreme court of Pennsylvania,[176] and from that of Judge Redfield given in the supreme court of Vermont, the reasons why an "express declaration,"

[175] 3 Kent, Comm. 349 (431 in later editions), quoting Peck v. Smith, 1 Conn. 103. The only American case wholly ignoring the doctrine is Alden v. Murdock (decided in 1816) 13 Mass. 259. The position that the dedication or laying out of a road over land does not divest the fee of the owner is supported in New York by Livingston v. New York, 8 Wend. 85, and Babcock v. Lamb, 1 Cow. 238, though one parcel of land cannot pass as an appurtenance to another.

[176] Paul v. Carver, 26 Pa. St. 223, an exhaustive opinion, following in line of argument from policy that of Judge Redfield in the text. It practically overrules what has been said in Pennsylvania in Com. v. McDonald, 16 Serg. & R. 390, and in Union Burial Ground v. Robinson, 5 Whart. 18. It is followed, as settling the law, in Cox v. Freedly, 33 Pa. St. 124, and is approved in the "riparian" case of Wood v. Appal, 63 Pa. St. 210, 222; also, in Trutt v. Spotts, 87 Pa. St. 339; Spackman v. Steidel, 88 Pa. St. 453; and sustained lately, though the road binds on a navigable river, in Lotz v. Reading Iron Co., 10 Pa. Co. Ct. R. 497; Robinson v. Myers, 67 Pa. St. 9, 17; Baker v. Chester Gas Co., 73 Pa. St. 116.

within the meaning of Kent's maxim, should not be found in the accidental reference to one side of the highway, or in the measurement of the lot being carried from the rear of the lot to the highway. The words of Judge Redfield deserve to be copied into every treatise on this subject: "Could I feel any assurance that the decision made in this case will not hereafter be regarded as having virtually set aside the well-settled rule that land bounded by deed or other conveyance upon a fresh-water stream, not navigable, or by the side of a highway, is to be regarded as extending to the center of such boundary, I would surely not occupy the time of the court, or space in the Reports, by making any dissent from the judgment of the court in this case. But if I comprehend that rule, and also its application to the facts of this case, it must be regarded hereafter as virtually abrogated in this state for all useful purposes. The rule itself is mainly one of policy, and one which, to the unprofessional, might not seem of the first importance; but it is at the same time one which the American courts, especially, have regarded as attended with very serious consequences, when not rigidly adhered to; and its chief object is to prevent the existence of innumerable strips and gores of land along the margins of streams and highways, to which the title for generations shall remain in abeyance, and then, upon the happening of some unexpected event, and one, consequently, not in express terms provided for in the title deeds, a bootless, almost objectless, litigation shall spring up, to vex and harass those who, in good faith, had supposed themselves secure from such embarrassment. It is, as I understand the law, to prevent the occurrence of just such contingencies as these that in the leading, best-reasoned, and best-considered cases upon this subject it is laid down and fully established that courts will always extend the boundaries of land deeded as extending to and along the sides of highways and fresh-water streams, not navigable, to the middle of such streams and highways, if it can be done without manifest violence to the words used in the conveyance. And to have this rule of the least practical importance to cure the evil which it is adopted to remedy, it must be applied to every case where there is not expressed an evident and manifest intention to the contrary,—one from which no rational construction can escape. The rule, to be of any practical utility, must be pushed somewhat to the extreme

of ordinary rules of construction, so as to apply to all cases when there is not a clearly-expressed intention in the deed to limit the conveyance short of the middle of the stream or way. If it is only to be applied like the ordinary rules of construction as to boundary, so as to reach as far as may be the clearly-formed idea in the mind of the grantor at the time of executing the deed, it will ordinarily be of no utility as a rule of expediency or policy. For in ninety-nine cases in every hundred the parties, at the time of the conveyance, do not esteem the land covered by the highway of any importance either way; hence they use words naturally descriptive of the prominent idea in their minds at the time, and in doing so define the land which it is expected the party will occupy and improve." [177] This doctrine of Kent and Redfield (with which the writer heartily agrees) has been much doubted and attacked,[178] but seems latterly to be gaining more and more ground.

Three kinds of distinction have been drawn: First, some courts, while admitting that a tract bordering or binding "on the" named road or street will include half of its width, insist that a lot binding on a given side or line of the road (e. g. "on its northerly side") cannot include any part of the road, as the language excludes the road, and that this is an express declaration, within the meaning of Kent's rule.[179]

[177] Dissenting opinion of Redfield, J., in Buck v. Squiers, 22 Vt. 484. But in Cole v. Haynes, Id. 589, these views seem to have been acted upon, though again abandoned in later Vermont cases. He is hardly correct in denouncing the litigation for the roadbed of abandoned streets as "hootless." It is rather a dishonest purpose than no purpose for a man who has sold all of his land in lots, as bounding upon streets and alleys, at its full value, to seek after the lapse of many years, when a street or lane happens to have been discontinued, to recover its soil, squeezing himself in among unwilling neighbors. The supreme court of the United States leans to Kent's doctrine. Barclay v. Howell, 6 Pet. 498.

[178] Jackson v. Hathaway, 15 Johns. 447 (decided in 1818), and Tyler v. Hammond (1831) 11 Pick. 193. The latter is followed by O'Linda v. Lothrop, 21 Pick. 292; Keith v. Reynolds, 3 Greenl. (Me.) 393, based on older Massachusetts authorities, and on Goodtitle v. Alker, 1 Burrows, 143. On its special facts, Tyler v. Hammond is probably right; the highway in question being a wharf, to which the grantor still kept access after the conveyance. Jackson v. Hathaway is somewhat weakened by the concessions of the counsel for the grantee.

[179] Grand Rapids & I. R. Co. v. Heisel, 38 Mich. 62, quoting Sibley v. Hol-

This distinction, when applied to city streets, may be almost called childish; for city lots are nearly always described as binding on one or the other line or side of the street, and the depth of the lot is measured from the side of the street to the rear, not from the middle. Secondly, where the description of a tract begins away from the road, and reaches it by calls given in course and distance, so that the latter strikes one side of the highway, it has been a little more plausibly claimed that the way is excluded. This will often occur in the description of city lots which run back to an alley, or run through between two principal streets. Such a description is a mere accident, and indicates no intention whatever on the part of the grantor to retain his fee in the back street.[180] Third, and much more plausibly, when the description names monuments that are in the side of the highway, or carries a course in direction and distance to the highway, but does not in either case mention the highway at all, there seems to be some doubt whether any rights over the highway, either of access, or in the soil, were intended to be conferred.[181] Not so strong in favor of the reservation is a deed in which monuments such as stakes or posts in the side of the highway are mentioned, and a boundary line is carried along such monuments.[182]

den, 10 Pick. 249; Phillips v. Bowers, 7 Gray, 21; Hughes v. Providence & W. R. Co., 2 R. I. 508; Anderson v. James, 4 Rob. (N. Y.) 35; Clark v. Rochester City & B. R. Co., 50 Hun, 600, 2 N. Y. Supp. 563; Morrow v. Willard, 30 Vt. 118, 120 (case of a county road). Some of these cases refer to Howard v. Ingersoll, 13 How. 381, where the western bank of a river is made the state boundary between Georgia and Alabama. The distinction is still kept up by the court of appeals of New York in Blackman v. Riley, 138 N. Y. 318, 34 N. E. 214, when it has been abandoned almost everywhere else. In the late New York cases of Halloway v. Southmayd, 64 Hun, 632, 18 N. Y. Supp. 703, and Holloway v. Delano, 64 Hun, 27, 18 N. Y. Supp. 700, the distinction between lots binding along the highway and lots lying along the west side of the highway is kept up.

180 In Ames v. Hilton, 70 Me. 36, the words "to the road" are said to exclude it if it be a private way, but are of doubtful import if it be a highway.

181 Hoboken Land & Imp. Co. v. Kerrigan, 31 N. J. Law, 13, where the boundary struck the highway, and then proceeded along it by course and distance without mention.

182 Peabody Heights Co. v. Sadtler, 63 Md. 533; Hunt v. Brown, 75 Md. 481, 23 Atl. 1029. "Post or stone in the side of the road," thence bounding on the road, does not convey to the center. In Phillips v. Bowers, 7 Gray

Connecticut gave Kent the first precedent for the maxim laid down in his Commentaries, and has adhered to it faithfully, even in the extreme case of calls for the side of an unnamed road.[183] Kentucky has gone equally as far.[184] Maine and New Jersey have at least rejected the distinction between a tract that lies on or along the highway and one that lies on or along one side or one line of it, going in either case to the center line; holding that the reference to one side of the street does not show a contrary intent.[185] Massachusetts, which in its earlier decisions, went furthest in disregarding the general rule, has made amends by inventing a reason for carrying a distance which reaches the side of the highway by meas-

(Mass.) 21, a course "to a stake by land laid out for a street, thence southerly by said street," excluded the street, as the court could not say that the middle of the street was the monument, but a point in its side was. And, as the lot is not surveyed to the center, the quantity need not measure out to the center. Fraser v. Ott, 95 Cal. 661, 30 Pac. 793. But, in a sale by the acre, vendee was made to pay for half of the road in Firmstone v. Spaeter, 150 Pa. St. 616, 25 Atl. 41.

[183] Stiles v. Curtis, 4 Day, 328, the first American case on the subject; Peck v. Smith, supra, note 175; Warner v. Southworth, 6 Conn. 471 (case of ditch); Champlin v. Pendleton, 13 Conn. 23 (monuments in side of road, which is not referred to); Chatham v. Brainerd, 11 Conn. 60 (the words "on the highway or common," it turning out that the open place is a highway, control the distances).

[184] Campbell v. Kaye (MS. Op. Ct. App.; Oct., 1880), referred to by counsel in Schneider v. Jacob, 86 Ky. 101, 5 S. W. 350. In Schneider v. Jacob the principle is laid down in the broadest terms, and applied to a street which had never been accepted, and afterwards abandoned. This and Jacob v. Woolfolk, 90 Ky. 426, 14 S. W. 415, follow Trustees of Hawesville v. Jander, 8 Bush, 679. In the two latter cases the deed was made before the streets were accepted, but the lots were sold as on the street or alley.

[185] Bucknam v. Bucknam, 12 Me. 463 (presumption that part owners, when taking in severalty, divide the road between them); Johnson v. Anderson, 18 Me. 76 ("beginning on the westerly side," etc., "thence running north, touching westerly side," etc., extended to center). The court relies on Kent's third edition, as against Tyler v. Hammond, 11 Pick. 193, and approves the Connecticut decisions. In Low v. Tibbetts, 72 Me. 92, it was said the contrary intent must be shown clearly and distinctly, and the mere mention of a monument on the side of the road or bank of the river is not enough. In New Hampshire, Reed's Petition, 13 N. H. 381, states the rule broadly, but admits the old Massachusetts and New York cases which set it aside on slight grounds as authority. In Woodman v. Spencer, 54 N. H. 507, land

urement, but calls for the highway generally, to the center line; namely, that the whole highway is a monument, of which the center must be sought, as it would be of a tree or rock, and that the monument must be preferred to the measurement. And the decisions in Massachusetts are now in line with those of other states.[186] New York, Michigan, Rhode Island, and Maryland seem alone to keep the extreme ground of distinguishing between lots binding on the highway and along the side of the highway;[187] but in Maryland a late

binding on the easterly side of the highway is extended to the middle. In McShane v. Main, 62 N. H. 4, the general rule is stated very strongly, and the riparian case of Sleeper v. Laconia, 60 N. H. 201, is quoted as authority. And so, in New Jersey, "thence S. E. wardly, along the northerly side of ——— street," included it to center. Salter v. Jonas, 39 N. J. Law, 469. See, also, Ayres v. Railroad Co., 52 N. J. Law, 405, 20 Atl. 54.

[186] Newhall v. Ireson, 8 Cush. 595. The boundary was "running northerly 7 poles to the county road, thence upon the road 4 poles," etc. The ordinary construction, says the court, would carry the land to the middle of the highway, and quotes three Connecticut cases taking extreme ground. The circumstances that the seven poles would reach the south line of the road, which is marked by a wall, says the court, is sufficient to countervail the presumption, and sets up the theory, since re-echoed by the courts of many states, that the "thread"—i. e. the center of the road—is the monument. The suit here was brought for the diversion of a water course on plaintiff's side of the highway, and was sustained. In White v. Godfrey, 97 Mass. 472, where Boston v. Richardson, 13 Allen, 146, is quoted, the distinction between a lot on the north side of the street and one on or along the street is set aside, and the doctrine of Kent and Redfield is said to be "now established"; and this, again, is followed in Peck v. Denniston, 121 Mass. 17. The distinctions as to streets not yet opened and as to private ways have been dropped. Stark v. Coffin, 105 Mass. 328 ("by a passageway fifteen feet wide"); Fisher v. Smith, 9 Gray, 441. And parol evidence was not admitted in that case as to a wall on the line of the road, to show an intention of excluding it from the grant; the decision in O'Linda v. Lothrop, 21 Pick. 292, being quietly ignored. It is probable that the supreme court of the United States, in the light of the present state of the law of Massachusetts, would not rule as they did in Harris v. Elliot, 10 Pet. 25, viz. that a condemnation of lots bounded by streets for a navy yard would not include the soil of the streets, though undoubtedly now, as then, the addition of the word "appurtenance" would not enlarge the condemnation. The theory of Newhall v. Ireson was contrived to meet the common-law maxim that land cannot be appurtenant to land, which is also stated in Webber v. Eastern R. R., 2 Metc. (Mass.) 147, as to the soil under water.

[187] One New York case, Adams v. Saratoga & W. R. Co., 11 Barb. 414,

statute does away with the mischief, at least as to town lots, by directing that every devise or grant of lands abutting on a street shall be construed to pass the testator's or grantor's right as far as the center of the street.[188] Even in New York the presumption is always in favor of him who is in actual possession of the abutting lot.[189] As to the city, acts for closing streets generally provide that the fee in the soil which theretofore was in the municipality shall vest in the abutting lot owners.[190] In many of the states the rule of ownership usque ad medium filum has been stated in general terms in all of the reported decisions; so it is in Indiana,[191] in Georgia and some other states; in California and in the Dakotas also by statute, with the proviso, "unless a different intention appear from the grant," which leaves the question just as much open as it is without a statute.[192] While, under the modern doctrine, the depth of a lot must be measured from the side of the highway, yet the evidence of monuments set up by the parties is admitted to show that such depth is to be measured from the center line of the

sustained in the court of appeals on this point, seeks to weaken the force of Jackson v. Hathaway, and to establish the commonly received rule in New York; but it has not been followed nor recognized elsewhere as stating the New York law fully.

188 Acts April 7, 1892, p. 905, c. 684.

189 Gidney v. Earl, 12 Wend. 98; Putnam v. Bond, 100 Mass. 58.

190 Laws 1867, c. 697, § 3, as to streets and avenues above Fifty-Ninth street. Where the soil is owned privately, such an act is unconstitutional. De Peyster v. Mali, 92 N. Y. 262.

191 Warbritton v. Demorett, 129 Ind. 346, 27 N. E. 730; Terre Haute & S. E. R. Co. v. Rodel, 89 Ind. 129; City of Indianapolis v. Kingsbury, 101 Ind. 200. The rule is expressed so forcibly that the court would probably follow the Pennsylvania and Connecticut precedents.

192 Silvey v. McCool, 86 Ga. 1, 12 S. E. 175; Civ. Code Cal. § 1112; Rev. Civ. Code Dak. T. § 631; Watkins v. Lynch, 71 Cal. 21, 11 Pac. 808. Moody v. Palmer, 50 Cal. 31, where the boundary ran by measurement to the side, but the next call ran "along the street," a plain case, quotes from Buck v. Squiers, 22 Vt. 484 (the opinion of the Judge Redfield), that public policy demands this rule. Mattheisen & Hegeler Zinc Co. v. City of La Salle, 117 Ill. 411, 2 N. E. 406, and 8 N. E. 81; Florida Southern Ry. Co. v. Brown, 23 Fla. 104, 1 South. 512; Rich v. City of Minneapolis, 37 Minn. 423, 35 N. W. 2.

road.[193] That the street or other highway had never been accepted, so that its dedication might be revoked, has repeatedly been the determining reason for not including any part of the soil of such a way; but the modern tendency is against the distinction.[194] The same may be said as to private ways. The rule of the middle thread was formerly not applied to them; now it generally is.[195] A turnpike has been said not to be a highway, and therefore not within the rule; but in Pennsylvania a turnpike is expressly held to be a highway.[196] And an intent to include no part of a way may be clearly shown, as when one man on the same day makes deeds to A. and B., respectively, of lots on opposite sides of a street, but bounds the lots sold to each on the same side of the street, thus clearly giving the whole street to one of them.[197]

It is a disputed question, whether an ejectment, or writ of entry, or similar action at law for the recovery of land which is rightfully used as a road, can be brought by the owner of the fee to determine those rights which he may enjoy notwithstanding the easement of the public. A decision of Lord Mansfield and the king's bench is invoked on one side; the opinion of Mr. Justice Thompson, in the supreme court of the United States, on the other. The right is generally tried in an action of trespass. The difficulty of executing a writ of haberi facias, which ought to follow the judgment in ejectment, is the chief argument against the use of that remedy.[198]

193 Dodd v. Witt, 139 Mass. 63, 29 N. E. 475.

194 See note 186, as to change in Massachusetts. The Kentucky cases (all modern) all applied the rule to unaccepted streets.

195 In re Seventeenth St., 1 Wend. 262; Case of Private Road, 1 Ashm. 417.

196 Parker v. Framingham, 8 Metc. (Mass.) 260 (turnpike not a highway); Pittsburgh, M. & Y. R. Co. v. Com., 104 Pa. St. 583 (it is; the case does not, however, touch on the fee in the soil).

197 Warren v. Blake, 54 Me. 276, and Cottle v. Young, 59 Me. 105; the former on an unaccepted street, the latter on a country road, decided on the supposed intention, not on technical grounds. A clear intent to exclude was also found by the court in Bangor v. Brown, 33 Me. 315, and Palmer v. Dougherty, Id. 507. The decision in Sibley v. Holden, 10 Pick. 249, that joint owners, making partition, intended to retain the road between them in common, was based on a technical construction, and may be considered as obsolete. In Mott v. Mott, 68 N. Y. 246, the lanes were excluded on consideration of all the surrounding circumstances.

198 Goodtitle v. Alker, 1 Burrows, 143. Contra, City of Cincinnati v.

Where ejectment may be brought subject to the easement of the public, it would follow that any use of the road which does not altogether exclude the public cannot constitute adverse possession as against the public.[199] Where lots are sold by a plat on which streets, alleys, and public places are laid down, the purchaser of each lot has a right to see to it that these ways and places are kept open, not only to him, but to all the world, as the value of his lot greatly depends upon them.[200] This is a property right which the legislature cannot take away to the injury of the lot owners, though, of course, every part of the streets and alleys in a large "addition" or town plat is not necessary to the convenience of every lot owner, and the constitutional right would not extend beyond the needful protection of the purchasers.[201]

White's Lessee, 6 Pet. 431, and Barclay v. Howell, Id. 499. As the latter cases were decided on the merits, the plaintiff seeking to recover the locus free of the easement, and failing, the point was hardly involved. That an ejectment or action for possession may be maintained for a street subject to the easement has been held in Virginia (Warwick v. Mayo, 15 Grat. 528), in Indiana (Sharpe v. St. Louis, etc., R. Co., 49 Ind. 296), and would in Connecticut follow from the opinion in Read v. Leeds, 19 Conn. 182 (that the possession is not incompatible with the public easement). In Kentucky the right to bring such an ejectment is intimated in Trustees of Augusta v. Perkins, 3 B. Mon. 437. But Cincinnati v. White's Lessee is followed in Hunter v. Trustees of Sandy Hill, 6 Hill. 407.

[199] Watkins v. Lynch, 71 Cal. 21, 11 Pac. 808, growing wheat on the road is not adverse possession.

[200] The Kentucky cases of Rowan's Ex'rs v. Town of Portland, 8 B. Mon. 232; Wickliffe v. City of Lexington, 11 B. Mon. 163, and Alves' Ex'rs v. Town of Henderson, 16 B. Mon. 131, 170, are leading on the subject. A dedication need not be signed. McKinney v. Griggs, 5 Bush, 405. Also, Huber v. Gazley, 18 Ohio, 18; Dummer v. Board of Selectmen, 20 N. J. Law, 86, 106; Bartlett v. Bangor, 67 Me. 460; Scott v. Cheatham, 12 Heisk. 713; Fisher v. Beard, 40 Iowa, 625; De Witt v. Village of Ithaca, 15 Hun, 568. Streets thus dedicated would in most of the states pass with the lots usque ad medium filum. Cox v. Louisville, N. A. & C. R. Co., 48 Ind. 178. In Brizzalaro v. Senour, 82 Ky. 353, it was lately held that to bound a lot on a private alley, not mentioned elsewhere, nor laid out in fact, though the deed be recorded, does not bind a subsequent purchaser of the adjoining lot, which comprises the alley.

[201] Rohmeiser v. Bannon (Ky.) 22 S. W. 27, following Transylvania University v. City of Lexington, 3 B. Mon. 25.

§ 12. Oyster Beds.

The littoral rights of the owner along the seashore, discussed heretofore, attach, at most, to the flats, or to the strip between high and low water mark. But there are valuable property rights in the waters below the line of the lowest ebb as well as above low-water mark, enjoyed within well-known boundaries, and which may be litigated, like land, in an action of ejectment, viz. the rights over oyster beds. The grant to an individual, or to a town or like corporation, of waters below low-water mark, is certainly unknown to the common law; but such grants were made by royal authority at such an early date in American history,[202] and have been acted on so long that it is now too late to draw the legality of this private ownership in certain shallow meres and inlets into doubt. In some states, especially New Jersey and Maryland, these rights have been regulated by statute.[203] The theory laid down by the supreme court of the United States is this: That ever since Magna Charta the kings of England had not the power to grant a private right of piscary or other rights in navigable waters (i. e. in those in which the tide ebbs and flows) in or adjoining England; that therefore their colonial charters, foremost among which is that from Charles

[202] Lowndes v. Board of Trustees of Huntington, 153 U. S. 1, 14 Sup. Ct. 758, recites a charter to the freeholders, etc., of the town of Huntington from the Duke of York's governor, dated in 1666, followed by two confirmations and enlargements of 1688 and 1694. Of about the same date is the charter to the town of Brookhaven, passed upon in Trustees, etc., of Town of Brookhaven v. Smith, 118 N. Y. 634, 23 N. E. 1002.

[203] Act N. Y. 1870, c. 234, discriminating between owners of "private lots or beds" in Suffolk county waters and other persons, sustained in People v. Hazen, 121 N. Y. 313, 24 N. E. 484. The first New Jersey act was passed in 1718, the one now in force (digested as a chapter on clams and oysters in the Revision in 1846, amended by act of 1877 being like chapter in supplement to Revision). See, also, article 72 (made up of very modern statutes) in the last Maryland revision (Code Pub. Gen. Laws). See in Rev. St. N. Y. pt. 1, c. 11, tit. 1, §§ 18, 19, powers of town of Oyster Bay over "beaches and marshes." Code Va. §§ 1388, 1389. Gen. St. S. C. § 1712, declares the stealing from an oyster bed, the property of another person, larceny. The acts forbidding the taking of oysters by dredges or otherwise en masse are supposed not to rest on the general police powers of the state, but on its ownership of the ungranted beds. McCandlish v. Com., 76 Va. 1002.

II. to his brother, the Duke of York, in granting "rivers, harbors, lakes, waters, fishings," etc., must be construed as annexing all rights over navigable waters to the governmental powers of the grantee; that whenever or wherever such grantee or his assigns surrendered the power of government to the crown, or when such grantee or his assigns—in one word, the proprietaries—in any way lost the powers of government, they could no longer dispose of the oyster beds or of fisheries in navigable waters, or of the soil under said waters.[204]

Whatever property in waters fitted for oyster beds the British crown had at the time of the Revolution passed to the several states not to the Union, for these waters are all infra fauces terrae. In fact, they have generally been granted to, or been incorporated into, townships; and, they being the property of some state, it seems that its legislature may give the preference to those residing within it, in the business of planting or gathering oysters.[205]

In Virginia, where the ownership of littoral owners now extends to low-water mark, it is declared "that all beds of the bays," etc., "of the sea," etc., "not conveyed by special grant or compact," etc., "shall remain the property of the commonwealth," etc., "and may be used as a common by all the people of the state," etc. In short, some previous grants of "beds" are recognized, but none are to be, or could have been, made since the first passage of the acts on which

[204] Martin v. Waddell, 16 Pet. 367 (two justices dissenting); Den v. Jersey Co., 15 How. 433. Same had been decided by the supreme court of New Jersey in Arnold v. Mundy, 6 N. J. Law, 1. The supreme court of New York in Rogers v. Jones, 1 Wend. 237, went further, and held that even in England the sixteenth chapter of Magna Charta did not forbid the king's granting a fishery in navigable waters to an individual or body corporate, and rejected the case of Warren v. Matthews, 1 Salk. 357, 6 Mod. 73, to the contrary, as probably misreported.

[205] People v. Lowndes, 130 N. Y. 458, 29 N. E. 751, following Corfield v. Coryell, 4 Wash. C. C. 371, 381, Fed. Cas. No. 3,230 (Washington, J.): "A several fishery, either as the right to it respects running fish, or such as are stationary, such as oysters, clams, and the like, is as much the property of the individual to whom it belongs as dry land, or land covered by water;" applied to tide-water oyster beds in New Jersey. So article 72, § 45, Pub. Gen. Laws Md., prohibits all but citizens of Maryland or Virginia from taking oysters from the Potomac; the state thus asserting its ownership as sovereign of the waters containing the oyster beds.

these sections are founded; and these, to judge by the decisions that the bed of a navigable river cannot be granted, seem to be pretty old. In the New England states no such grants as in New York were made by the crown or its governors in colonial times, and shellfisheries have more of a public character.[206] The statutes of Maine and Massachusetts assume that the tide-water fishery, including that of shellfish of all kinds, belongs to the adjoining towns and cities, and may be exercised either by the license of the city or town authorities, or by the inhabitants individually, within prescribed rules. The former state gives to the owners of shores or flats certain privileges over the waters beyond. It seems that in neither state can there be water lots subject to alienation or to a real action. But in Massachusetts a license describes the flat or creek by metes and bounds, is recorded, and gives an exclusive privilege to the licensee, his heirs and assigns, for 20 years.[207] In Rhode Island all shellfisheries are claimed by the state, and are leased by its commissioner for a term of years, not exceeding 10, in places that are covered by water at low tide, but within limits that are particularly set forth in the statute.[208] In Connecticut, also, the towns have full power to regulate the planting of oysters and the taking of shellfish, by their by-laws, and all private rights arising under these regulations are treated as personalty, being classed with leaseholds.[209] In Alabama and Mississippi the title to oyster beds, and to water lots generally, is unaffected by grants of the British crown, and rests altogether on local statutes. In the former state the owner of lands fronting on any bay, river, etc., is granted the right to plant oysters in the waters in front of him to the distance of 600 yards; but where the distance from shore to shore is less than 1200 yards the owners on each shore may go to the

206 Home v. Richards, 4 Call, 441, 449; Mead v. Haynes, 3 Rand. 33; French v. Bankhead, 11 Grat. 169. Norfolk City v. Cooke, 27 Grat. 430, 436, recognizes the ownership of the city in water lots under three colonial acts, and its right to complain of an unlawful entry by defendant, because it had been in "actual possession" as far as this is possible of a water lot. "The port warden had marked off and designated these water lots, and they have been plotted and made a matter of record." See Code, ubi supra.

207 Pub. St. Mass. c. 91, §§ 94–99; Rev. St. Me. c. 40, § 28.

208 Pub. St. R. I. c. 146.

209 Gen. St. Conn. §§ 136, 602.

middle line, with a rather obscure rule in the statute for drawing the dividing lines.[210] In Mississippi natural oyster reefs belong to the public, and cannot be appropriated by any one; but the sole right of planting oysters belongs to a riparian owner, and extends only up to the channel, that is, not into the open sea.[211] In Oregon, also, all natural oyster beds are public, and free to residents of the state and county (of certain standing). Private "plantations belonging to the citizens of this state" are recognized as private property. No advantage is given to the littoral or riparian owner, but the "claims," not exceeding two acres each, must be staked out according to the local regulations of the Oyster Men's Association.[212]

§ 13. Boundaries of Mines.

The well-known maxim, "that he who owns the ground owns vertically down to the center of the earth, as well as upward to the sky," finds an exception in the congressional laws on mining claims, which, in their turn, are based on the customs of the gold and silver miners on the Pacific slope, and these, in turn, on convenience, and, we might say, necessity. Under the present law, enacted on the 10th of May, 1872, wherever no adverse claim existed on that day, every locator of a mining claim who complies with the laws and local regulations has the exclusive possession and enjoyment of all the surface within his location, "and of all veins, lodes or ledges throughout their entire depth the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes or ledges may so far depart from the perpendicular in their course downward, as to extend outside the vertical side lines; but such outside parts of * * * veins shall be confined to such portions thereof as lie between vertical planes drawn downward * * * through the end lines of their locations, so continued in their own directions, that such planes will intersect such exterior parts of veins * * *."[213] The principal rule or law with which the locator

210 Civ. Code Ala. § 1385.

211 Code Miss. §§ 3084, 3094.

212 Ann. Laws Or. § 3844.

213 Rev. St. U. S. §§ 2320–2324, from Act May 10, 1872, amending and revising Act 1866. "For eighteen years, from 1848 to 1866, the regulations and customs of miners as enforced and moulded by the courts, and sanctioned

must comply is to have his claim surveyed, and its boundary marked visibly on the ground within a prescribed number of days. Unless he does, he cannot pursue the veins.[214] When A. and B. have thus complied, and A.'s lode runs beneath B.'s surface lot, the latter lacks, indeed, something of the absolute ownership downward from his lot, but only as against A.'s mining right. Against anybody else but the latter, B.'s ownership is complete, and even A. has only the right to extract ore when he enters the lode beneath B.'s surface ground. Thus we have an easement to deal with, but one which is bounded and measured like land. The rights under the certificate or patent which is granted by the government are governed by the same rules as those under the "location."[215]

It becomes thus important to know—First, which are the end lines, and which are the side lines, of the location; second, what is a vein, lode, or ledge, and how far it can be traced? The natural import of side and end lines would give us a rectangle, or at least a parallelogram; its longer sides being the side lines, the shorter ones the end lines. But under the act of 1866, and the older customs, such a shape of the location was not insisted on; and even under the act of 1872, now embodied in the Revised Statutes, only the end lines must be straight and parallel to each other, so that they confine the subterranean mining rights within parallel, vertical planes.[216] It is also the object of the law that the side lines should

by the legislature of the state, constituted the law governing property in mines and waters on the public mineral lands. Until 1866 no legislation was had looking to the sale of the mineral lands. In that year the act was passed. In the first section it was declared that the mineral lands of the United States were free and open to exploration and occupation by citizens, etc., and subject to such regulations as might be prescribed by law and the local customs * * * of miners. In other sections it provided for acquiring the title of the United States to claims in veins or lodes of quartz bearing gold, silver, cinnabar, or copper, the possessory right to which had been previously acquired under the customs of miners." Jennison v. Kirk, 98 U. S. 458 (a case relating to a "water claim"). The present statute adds the words "or other valuable deposit" after "copper."

214 Doe v. Waterloo Min. Co., 54 Fed. 935.

215 See a boundary agreement construed as to its underground bearings in Richmond Min. Co. v. Eureka Min. Co., 103 U. S. 839.

216 Iron Silver Min. Co. v. Elgin Mining & Smelting Co., 118 U. S. 196, 6 Sup. Ct. 1177 (now considered the leading case on the subject).

run parallel, or nearly so, to the course which the vein is likely to take, so that if they really run along with it, and contain it, the locator would obtain no subterranean rights outside of its own survey; and these rights are intended only to meet unavoidable divergence between the anticipated course or dip of the lode and that which it actually takes "with all its dips, spurs, variations, and angles"; and a location across the vein (i. e. such that the long side lines are made purposely to run at right angles to it and the end lines extended would, if the course or dip was correctly guessed, take in the whole of vein or lode) is considered a fraud upon the law.[217] The end lines must be marked as such in the survey, and the locator or patentee cannot follow out a vein in the extension of other lines than those so marked. To avoid mistakes, the local laws or customs give the locator from 60 to 90 days from the time when he sets up the post and signboard marking the discovery, before fixing the actual lines of the survey.[218]

The act of 1872 allows a location of 1,500 feet in length along the supposed course of the vein, and not over 300 feet in width on each side from its middle, or as much less in width as the local law or custom may limit locations to, but in no case less than 25 feet on each side. The preliminary claim, as set out on the discoverer's

[217] Mining Co. v. Tarbet, 98 U. S. 463, known as the "Flagstaff Case." The locator must gather the general direction of the lode from its outcroppings in or near the surface. "The end lines are those which measure the width of a claim as it crosses the lode. When there are surface outcroppings from the same vein within the boundaries of two claims, the one first located necessarily carries the right to work the vein." The Colorado Law (Gen. St. § 2400) demands that the certificate of location give the general course of the lode. See, also, Tyler Min. Co. v. Last Chance Min. Co., 7 U. S. App. 463, 4 C. C. A. 229, and 54 Fed. 284. The claimant is not allowed to gain anything by calling the short lines crossing the vein "side lines," and those parallel to it "end lines." King v. Amy & Silversmith Consol. Min. Co., 152 U. S. 222, 14 Sup. Ct. 510; Argentine Min. Co. v. Terrible Min. Co., 122 U. S. 478, 7 Sup. Ct. 1356.

[218] Iron Silver Min. Co. v. Elgin Mining & Smelting Co., supra. The line where a location is crossed by another valid location does not thereby become an end line. Cheesman v. Hart, 42 Fed. 98. The sign is generally put on a post in the "discovery shaft." By the Colorado law, it may also be placed in an adit or cross cut dug or sunk horizontally or obliquely. Gen. St. §§ 2401–2403.

signboard, may be very brief, and the law will supply the rest. Thus, if "1,500 feet" are claimed, it means 750 feet in the direction of the vein in each direction from the post bearing the sign, and the maximum width on each side of a line drawn through the post, as the local law or custom allows.[219]

Tunnel claims, under the present law, may be 3,000 feet in length. Before the act of 1866 some local laws and customs allowed a length of 5,000 feet, and even now a claim for a greater distance from the starting point than 3,000 feet would stand good to that extent.[220]

Where a location was made before the acts of congress, it is subject only to the local law and custom, and may be confirmed by the land office, though its dimensions exceed those prescribed by these acts; but, as to the direction of the lines to the vein or lode, the same principles apply.[221]

The manner of marking the boundary of the survey differs in the different mining states. Thus in Colorado there must be six well-set, substantial stakes,—one at each corner of the parallelogram, and one at the center of each of the side lines.[222]

A "vein, lode, or ledge" is defined as a "body of mineral or of mineral-bearing rock within defined boundaries in the general mass of the mountain, unbroken and without interruption"; and it is said that if either the body of mineral, or the defined boundary, clearly appears, but slight evidence will be required of the other element. The boundaries make what geologists call a "fissure"; and the presence of hard, well-marked rock walls, beneath (foot wall), above (hanging wall), and on both sides, is a strong evidence

[219] Erhardt v. Boaro, 113 U. S. 527, 5 Sup. Ct. 560. Compare the "certainty" which the Kentucky courts worked out in entries under the Virginia land act of 1779, supra, § 6, note 67. The location on the signboard stands in about the same relation to the registry with county recorder as the entry under the old Virginia law to the survey. The Colorado statute limits the width to 150 feet on each side of the middle of the vein, except in four named counties, where it is only 15 feet. Gen. St. Colo. § 2398.

[220] Richmond Min. Co. v. Rose, 114 U. S. 576, 5 Sup. Ct. 1055; Glacier Mountain Silver Min. Co. v. Willis, 127 U. S. 471, 8 Sup. Ct. 1214.

[221] Jennison v. Kirk, supra; Broder v. Water Co., 101 U. S. 274; Chambers v. Harrington, 111 U. S. 350, 4 Sup. Ct. 428.

[222] Cheesman v. Shreeve, 40 Fed. 787; Gen. St. Colo. § 2402.

of a vein, and, when they have been laid open, of a known vein.[223] It follows naturally from the law which gives the side divergence of a vein to the locator that as between two locations, which have the apex or out-croppings of a vein in or under its surface, side by side, the first in order of time must prevail.[224]

"Placer" mining claims are governed by other rules. Under the present law the location is to coincide, wherever the land is surveyed, with the division into sections, quarter sections, and quarters of quarter sections, and both the location and the ultimate patent exclude all "known veins or lodes." The patent is to exclude veins which are known at its date, but not such as are then "claimed or known"; and an exception of more than what the law excepts is, as to the excess, disregarded.[225]

By the laws of California and the Dakotas, a mine carries with itself, as fixtures, the "sluice boxes, flumes, hose, pipes, railway trucks, cars, blacksmith shops, mills, and all other machinery or tools used in working or developing a mine," and these will pass with it in any instrument disposing of the mine.[226]

As to the description of vein or lode claims on the surface, it may be remarked that, when located on surveyed lands, it must refer to the lines of the public surveys, but need not conform to them; but when the patent is for claims on lands still unsurveyed

[223] Iron Silver Min. Co. v. Mike & Starr Gold & Silver Min. Co., 143 U. S. 394, 404, 12 Sup. Ct. 543. The court cannot define how much ore or metal the rock must contain to be called a "mineral bearing rock"; and it must be left to the jury in each case whether it holds enough to pay for working it.

[224] Watervale Min. Co. v. Leach (Ariz.) 33 Pac. 418. The first locator has also the right to the ore in the intersection with a cross lode.

[225] Rev. St. U. S. §§ 2329–2331. The 40-acre lots of the survey are to be divided into 10-acre tracts. It was held in Idaho, in Rosenthal v. Ives, 2 Idaho, 244, 12 Pac. 904, that a local law or rule restricting a "placer" location to less than 10 acres is not in conflict with the laws of the United States. It was 80 rods—i. e. 1,320 feet—in length. This matter will be treated more fully in a chapter on Public Grants.

[226] Rev. St. U. S. § 2333. Compare the "exceptions" in the patents as given in Sullivan v. Iron Silver Min. Co., 143 U. S. 431, 12 Sup. Ct. 555; Iron Silver Min. Co. v. Reynolds, 124 U. S. 374, 8 Sup. Ct. 598; U. S. v. Iron Silver Min. Co., 128 U. S. 673, 680, 9 Sup. Ct. 195; Deffeback v. Hawke, 115 U. S. 392, 6 Sup. Ct. 95 (the patent ought to exclude buildings or improvements; and such exclusion, if made, would be unavailing); also Civ. Code Cal. § 661.

the surveyor general will, in extending the survey, adjust it to the boundaries of the patented claims, without in any case changing them.[227] The description of mines (whether lode or placer) on unsurveyed lands is also to refer to natural objects or permanent monuments; but, where neither of these can be found, stakes run into the ground for the purpose are deemed sufficient.[228]

What we say here applies only to mines of minerals, properly so called, on the national domain; not to coal mines anywhere, nor to mines of any kind opened on lands which have never belonged to the United States, or which were acquired from the United States, as agricultural lands, before 1841.

§ 14. State Boundaries.

The boundaries of the 13 original states were first defined by the royal charters which established them, and by the grants made by the Duke of York of parts of his vast domain, out of which Maine, New York, New Jersey, Pennsylvania, and Delaware were carved. But the lines of the several colonies were so vague, and often so contrary, that new arrangements between them became necessary; and some lines, like the south line of Virginia, were changed simply to conform the right to the possession, the latter being based on mistaken surveys.[229] Next come the treaties with Great Britain, France, Spain, and Mexico, by which the outlines of the United States, as an independent power, were fixed, new territory was granted, or disputed boundaries were marked and admeasured.[230] There are, thirdly, the acts of cession made by some of the original states to the United States during and after the Revolutionary war, among which Virginia's cession of the Northwestern Territory in 1784 is the most important. These acts of cession put

[227] Act May 10, 1872 (now Rev. St. U. S. § 2327).

[228] Hammer v. Garfield Mining & Milling Co., 130 U. S. 291, 9 Sup. Ct. 548.

[229] In Poore, Const., the descriptions of the old states can be found: Massachusetts, Maine, New Hampshire, Rhode Island, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, Carolina (but not the division into North and South Carolina), Georgia. The history of the boundaries of South Carolina is found in Howard v. Ingersoll, 13 How. 381. The descriptions there given have lost almost all practical value.

[230] Rev. St. U. S. pp. 232, 266, 492, 713.

at rest the vague and conflicting claims of western expansion derived from the royal charters. Next the voluntary divisions of states, with the assent of congress; the boundary line being generally found in the state statute, not in the congressional act. There are, lastly, the acts of congress carving territories and states out of the common domain. Wherever a state has "revised" its statute law, there is always a chapter on "Boundaries," or, as the Delaware Revision calls it, on "Sovereignty, Jurisdiction and Limits," while some of the Revisions give even the boundary lines of all the counties. The lines of those states which were admitted,[231] or of the territories which were organized[232] by congress, are readily found at the places indicated in the Statutes at Large.

The calls for boundary in charter, treaty, or statute law are, in the main, of two kinds: Either great natural objects, such as the sea, a lake, or a river; or an imaginary line, generally a meridian, or a parallel, or a line defined by an oblique course, like a part of the boundary between Virginia and Kentucky, which runs from southwest to northeast, at an angle of 45 degrees to the meridian. About these geographical lines only this need be said: that they were for

[231] The boundaries of the states admitted out of the common territory will be found as follows: Tennessee, joint resolution of April 2, 1790 (1 Stat. 106); Ohio, Act April 30, 1802 (2 Stat. 173); Louisiana, Act April 8, 1812 (2 Stat. 701); Indiana, Act April 19, 1816 (3 Stat. 289); Mississippi, Act March 1, 1817 (3 Stat. 348); Illinois, Act April 18, 1818 (3 Stat. 428); Alabama, Act March 2, 1819 (3 Stat. 489); Missouri, Act March 6, 1820 (3 Stat. 545); Michigan, Act June 15, 1836 (5 Stat. 49); Arkansas, Act of like date (5 Stat. 50); Iowa, Act March 3, 1845 (5 Stat. 742). Florida is admitted in same act, but it refers for its boundary to treaty of February 22, 1819, found perhaps most readily in Poore, Const. p. 309. See for boundary between United States and Florida, fixed in 1795, Id. 307. See 8 Stat. 138 et seq. The boundaries of Wisconsin are given in the acts of August 6, 1846 (9 Stat. 56), and March 3, 1847 (9 Stat. 178); California, Act Sept. 9, 1850 (9 Stat. 452); Minnesota, Act May 11, 1858 (11 Stat. 285); Oregon, Act Feb. 14, 1859 (11 Stat. 383); Kansas, Act Jan. 29, 1861 (12 Stat. 126); Nevada, Act March 21, 1864 (13 Stat. 30); Nebraska, Act April 19, 1864 (13 Stat. 47); Colorado, Act March 3, 1875 (18 Stat. 474); North Dakota, South Dakota, Montana, and Washington, Act Feb. 22, 1889 (25 Stat. 676); Idaho, Act July 3, 1890 (26 Stat. 215); Wyoming, Act July 10, 1890 (26 Stat. 222).

[232] Utah, Rev. St. § 1897; New Mexico, Rev. St. § 1896; Arizona, Rev. St. § 1901; Oklahoma (including "No Man's Land"), 26 Stat. 81 (Supp. Rev. St. p. 720).

merly surveyed with the compass, corrections being afterwards made for the variation of the needle; but in so far as these corrections were themselves incorrect, by reason of insufficient data, mistakes in the lines may have arisen. The laws of congress and of Virginia require that all boundary lines be run by the true meridian.[233] There are often references to the national boundary, as where a Northwestern territory is to reach northward to the British possessions, or to political lines already established. Thus the act admitting West Virginia, and that which enlarges its area, deal with counties only, and must be construed by reference to the county lines as laid down in older documents.

The dispute between Virginia and West Virginia as to the inclusion of Berkeley and Jefferson in the latter state turned on the question whether the consent of congress to the cession of these counties had been given before such cession had been withdrawn. The decision of the supreme court (three justices dissenting) sustained the transfer to West Virginia.[234]

An anomaly in state boundaries is the strip on the boundary of Kentucky and Tennessee, from four to ten miles in width, east of the Tennessee river, which is under the jurisdiction of the latter by a compact between the two states, under which the former retained its rights to the soil, all of which has now been sold.[235]

The disputes arising from mistaken measurements of latitude

[233] Rev. St. U. S. § 2395; Code Va. §§ 920–922.

[234] Virginia v. West Virginia, 11 Wall. 39.

[235] The author reproduces from his work on Kentucky jurisprudence (page 154) the following explanation about the land in Tennessee known as the strip "South of Walker's Line": "The southern boundary of the state is that which, before the erection of Kentucky and Tennessee into states, separated Virginia and North Carolina, and was supposed to be the line of 36° 30′. It was run in the years 1779 and 1780, and is known as 'Walker's Line.' In 1819, after the extinguishment of the Indian title to the land west of the Tennessee river, a line between it and the Mississippi river was run by Alexander and Munsell along the parallel of 36° 30′; and it was then found that Walker's line was about 10 miles too far north. An agreement was then made between the states of Kentucky and Tennessee recognizing Walker's line from the Cumberland Mountains to the Tennessee river as the true line of sovereignty and jurisdiction, but reserving to the state of Kentucky all the lands now [i. e. February 2, 1820] vacant and unappropriated, lying within the strip included by Walker's line on the north, and the parallel of 36° 30′ on the south, and the power

having been settled at an early date (the last-named settlement in 1820 being about the last), recent disputes have turned mainly on riparian rights.

In the treaty of 1783 between the United States, Great Britain, and France, the Mississippi river was made the western boundary of the American Union. By the cession of Louisiana this river became the dividing line between the states and territories on one side and the other. The state on each side has an equal right to the river. Each holds ad medium filum.[236] And so it is also with the Missouri river, where, under the acts of congress, it becomes the boundary between Nebraska and Iowa.[237] But where one state held at one time the land on both sides of a river, as Virginia held, or claimed to hold, both shores of the Ohio, the rights of the communities formed thereafter must rest and depend on the words of the cession. The deed of cession by Virginia in favor of the United States, executed in 1784, granted everything "to the northwest of the river Ohio," and was made in pursuance of two acts, dated in 1781 and in 1784, which yielded to the United States all right, title, and claim which Virginia had to the territory "northwest of the river Ohio." This state thus retained the river itself, with its islands, in her own jurisdiction; and the low-water mark on the northwestern side of the Ohio river became the boundary line between Virginia (now West Virginia) and its western offshoot, Kentucky, on the one hand, and the states formed out of the Northwestern Territory on the other. But West Virginia or Kentucky cannot claim a tract on the northwestern shore which becomes an island only in a high stage of water, by the formation of a bayou beyond it.[238]

Whether the middle thread or low-water mark on one side be the lawful boundary, difficulties may arise in either case by changes in the river bed or channel. There may be an accretion of soil on

of passing all laws for disposing thereof; all entries of Virginia warrants made within the strip to remain good."

236 The treaty is republished in second volume of Rev. St. U. S., as well as in 8 Stat. at Large.

237 5 Stat. 742; 13 Stat. 47.

238 Handley's Lessee v. Anthony, 5 Wheat. 374, approved in Indiana and Kentucky. The Kentucky counties bordering on the Ohio extend to the state line. Gen. St. Ky. c. 8, "Boundaries."

one side, while the soil on the opposite side is washed off, and such a change may be either gradual or sudden. Or the river may dig for itself a new channel, and leave on one side thereof a strip not of "made land," but of the hard, old soil, which had been before on the other side of the stream. The questions arising upon such facts have been decided by the supreme court very much as if they had arisen between private riparian owners. Where the accretion and degradation of the soil are gradual (and such it is deemed along the Missouri river, where four weeks may suffice for many acres), the state on either side gains or loses what the current has brought or taken away, while it is admitted, that if a large slice of land were suddenly and visibly (as sometimes happens) carried over from one side to the other the ownership, as between man and man, or the jurisdiction between state and state, would travel across the stream with the body of earth carried across it.[239] Where the river changes its channel, but leaves the old soil in its place, as happened with Wolf Island, in the Mississippi, between Kentucky and Missouri, the jurisdiction over the soil remains as it stood before.[240] And, for a like reason, Green Island, in the Ohio, was adjudged to Kentucky, because there was, when the line was first established, a permanent channel to the north or northwest of the island, though at present, in very low water, it may be reached almost, or quite, dry-shod, from the Indiana shore.[241] In both of these cases the judgment of the court was founded mainly on long acquiescence, as the strongest and most reliable evidence, the old maps made before the year 1800 being deemed unreliable.

The cession made by Georgia of its vacant lands in 1802 is worded differently from the Virginia grant. Georgia "cedes to the United States [the land] west of a line beginning on the western bank of the Chattahoochee river, where," etc., "running thence up the river, etc., 'along the western bank." Alabama, which constitutes the most easterly portion of the ceded territory, claimed to hold the land

[239] Nebraska v. Iowa, 143 U. S. 359, 12 Sup. Ct. 396. The court quotes Attorney General Cushing's opinion (8 Op. Attys. Gen. 177) as to the effect of changes in a river which is an international boundary. The final decree is found 145 U. S. 519, 12 Sup. Ct. 976.

[240] Missouri v. Kentucky, 11 Wall. 395.

[241] Indiana v. Kentucky, 136 U. S. 47, 10 Sup. Ct. 1051.

as far east as low-water mark on the west side of the Chattahoochee; but the supreme court, in two cases brought before it,—the second being a direct boundary suit between Alabama and Georgia,—held that the latter state retained in its cession the whole river bed, as held within its banks, up to ordinary high-water mark, but not so far as to include lands which could only be flooded when the river should overflow its banks.[242]

The supreme court has lately determined what is meant by the middle thread of a great navigable river which forms the boundary between two states. The Mississippi, now a boundary between states of the Union, ran formerly between independent nations,—the English colonies, lying on the east; those of France or of Spain, on the west. In such cases, as both nations must have free access to the river for the purpose of navigation, it would be useless to find the middle thread of the river, at its usual stage, between bank and bank, because to do so might exclude one of the two nations from the deep or navigable channel. "It is," says the court, speaking through Mr. Justice Field, "laid down in all the recognized treatises of international law of modern times that the middle of the channel of the stream marks the true boundary between the adjoining states"; meaning by channel the deepest part in the river, in which boats usually ride. This line is spoken of also as "mid channel," or as "middle of the main channel." [243]

NOTE. The dispute between Georgia and Florida over an ill-surveyed line was settled amicably between the states, without previous suit. It is referred to in Coffee v. Groover, 123 U. S. 1, 8 Sup. Ct. 1.

[242] Howard v. Ingersoll, 13 How. 381, and Alabama v. Georgia, 23 How. 505. In his opinion in the former case, Mr. Justice Wayne gives a long historic account of boundary dispute between South Carolina and Georgia, which was closed before the adoption of the United States constitution, though it had no bearing on the dispute with Alabama.

[243] Iowa v. Illinois, 147 U. S. 1, S. 13 Sup. Ct. 239. See, also, Dunlieth & Dubuque Br. Co. v. County of Dubuque, 55 Iowa, 558, 560, S N. W. 443.

CHAPTER III.

ESTATES.

§ 15. Estate in Fee.

We shall not examine the feudal origin of the land laws of England and America, nor discuss the distinction between a tenure of land, in the lightest form which it can take, that of "free and common socage," and an allodium, or pure ownership. For all practical purposes, at this day, land is owned in the United States as absolutely as horses or cattle; and the great bulk of land which is now owned privately has come out of the ownership of the sovereign—United States or state—by grants or patents, in which no feudal rents or services are reserved, even in name, though otherwise these instruments are framed very much like the land grants of the English crown, which treated the grantee as a vassal, and the land given as a fief. That the state reserves the powers of taxation, of eminent domain, and of escheat over the land within its borders, is no more a trace of feudality than the like powers which it reserves over goods and chattels, and which all governments have, in all ages and countries, reserved to themselves over all kinds of property.

But while American ownership of land is allodial, the legal terms applied to it are feudal. The owner and possessor of land is, in many of his relations, called a "tenant"; his possession, a "seisin";

the terms of his ownership, his "tenure"; its measure in time, an "estate"; the greatest estate he can have, a "fee," [1]—more precisely, a "fee simple," or "fee simple absolute." The first includes a fee tail, to be discussed hereafter. The fee simple includes, besides that which is absolute, also that which is conditional or defeasible, also to be treated hereafter.

The common-law form of words by which an estate in fee simple in lands or other hereditaments can be conferred by deed or will is, "to A. B. and to his heirs." [2] The old form in deeds of feoffment, which has survived to our days, ran thus: "Praedicto Johanni et haeredibus suis et assignatis in perpetuum" ("to said John and to his heirs and assigns forever"). But it was never necessary to name the assigns,—that is, to confer the power of alienation,—for the law itself, at a very early day, annexed this power to the estate in fee simple. The word "forever" is needless, for "heirs," in the plural, means the indefinite line of heirs,—one in each generation.[3] The omission of the word "heirs" would create an estate for life only in the beneficiary of the deed or will, and in a deed there was no substitute for it which would create an "estate of inheritance"; that is, an ownership which would not come to an end with the death of the first

[1] A "fee" is in law Latin called a "feodum." This word is compounded of two Germanic words; the first syllable meaning originally live stock, the German "Vieh," Gothic "faihu," afterwards property generally, and especially the "fief" or "beneficium" conferred by the lord upon his vassal; the syllable "od" designates ownership. An allodium is "all ownership"; that is, one not clogged by services to a superior. In pleading an estate in fee simple, a man is said to be seized "in dominio suo ut de feodo," "in his demesne [i. e. dominion, ownership] as of fee." The common words in a deed "I have given and granted" (dedi et concessi) are those of an infeudation, no less than "enfeoffed" is. The clause "habendum et tenendum" (to have and to hold) was originally inserted after these words to state by what services or rents the person taking the fief was to hold it. The statutes of New York, Michigan, Wisconsin, Minnesota, etc., declare that the ownership in fee is allodial; of Kentucky, that all titles to land are allodial.

[2] The necessity of inserting the word "heirs" came from the oldest form of infeudation, which was only for the life of the vassal.

[3] Chancellor Kent (4 Comm. 5) shows that the word "heir" in the singular, though informal, is enough to create an estate of inheritance, against the assertions of Coke in Co. Litt. 8b, which he contradicts in Co. Litt. 22a. Kent relies mainly on the authority of Dubber v. Trollope, Amb. 453.

taker, but go, after his death, to his heir or heirs.[4] After the freedom of devising lands was introduced in England, the rule requiring "words of inheritance" in a will was much relaxed, and any clear expression of the intent to give the whole estate of the testator in the land named was gradually taken to be sufficient;[5] and a fee is always presumed to be given by a will, if the land is charged with the payment of legacies, or burdened with a trust in such a manner and to such an extent that a life estate may possibly be insufficient to bear the burden; also when other words are used, clearly showing an intent to give a perpetual ownership, or all the ownership which the testator has to give.[6] In the United States very little remains

[4] For this position, Kent, ubi supra, quotes Litt. § 1. The word "heirs" may be placed in any part of the instrument: Lord Coke in Gough v. Howarde, 3 Bulst. 128. The rule applies to conveyances under the statute of uses, as to a deed of feoffment. See, also, 2 Bl. Comm. 107, 108. But the rule does not apply to a fine when in the nature of an action or to a common recovery, for here the land is adjudged to the purchaser, as if it was his own; nor to the release of an easement, extinguishing it; nor to partition among joint owners, or mutual releases between them. See quotations, 4 Kent, Comm. 6, 7.

[5] The greater liberality is shown in giving effect to the supposed intent in wills, because the testator is often inops consilii (unable to get advice). Chancellor Kent, l. c., quotes Co. Litt. 9b; Holdfast v. Marten, 1 Term R. 411; Fletcher v. Smiton, 2 Term R. 656; Newkerk v. Newkerk, 2 Caines, 345; 4 Dane, Abr. c. 128. See, also, Lambert's Lessee v. Paine, 3 Cranch, 97. For the general position, we need not quote later cases. An executory contract to convey land, upon stated terms, has always meant a contract to convey a fee simple. Kent quotes 2 Com. Dig. tit. "Chancery," T, 1; but the same principle is laid down in Glenorchy v. Bosville, 1 White & T. Lead. Cas. Eq. 1, viz. that "articles" or any executory contract, which calls for the drawing up of a formal conveyance thereafter, is to be construed in its popular sense. What words in a devise, not in words restricted to a life estate, create such, and what words a fee, will be shown in the sections on "Estates for Life." The words "or heirs," instead of "and heirs," have been held sufficient. O'Rourke v. Beard, 151 Mass. 9, 23 N. E. 576.

[6] For the state of law now existing at most as to wills of rather ancient date, we abridge from Jarman on Wills (volume 2, pp. 170–181) a short statement of what was necessary in England before the will act of 1837 to vest a devisee with a fee, with a few of the authorities quoted by him: Words of inheritance necessary, Roe v. Blackett, Cowp. 235; though testator in opening will declares intention to dispose of his whole estate, Denn v. Gaskin, Id. 657; Doe d. Child v. Wright, 8 Term R. 64; or has cut off the heir "with a shilling," Roe v. Daw, 3 Maule & S. 518; or declared his intent to disinherit the heir,

of the old principle. It is true that the six states of New England, and those of Pennsylvania, New Jersey, Delaware, South Carolina, Florida, Ohio, and Wyoming, have not dispensed with words of inheritance in deeds; but in deeds these words are seldom omitted, when required. Connecticut, Florida, and the District of Columbia alone have failed to dispense with words of inheritance in a will,—Connecticut, because at an early date its highest court declared such words to be unnecessary; that the absolute ownership in lands would pass under the same words as the ownership of chattels. Florida would

or has given him a life estate in the same land, Right v. Compton, 9 East, 267; though other devises are given expressly for life, Goodtitle d. Richardson v. Edmonds, 7 Term R. 635; Silvey v. Howard, 6 Adol. & E. 253. On the other hand, a fee was implied where an undefined devise is charged with debts and legacies or a sum in gross, as otherwise the devisee might lose though loss be highly improbable, Doe v. Holmes, 8 Term R. 1; Goodtitle v. Madderu, 4 East, 496; even when the charge is payable in the future, Doe v. Allen, 8 Term R. 497; and when it is contingent, Abrams v. Winshup, 3 Russ. 350; Doe v. Phillips, 3 Barn. & Adol. 753; and whether the devisee is directed to pay simply, or to pay out of the land, Doe v. Snelling, 5 East, 87; and though the devisee be named as executor, Doe v. Phillips, supra; but only when the devisee is charged, not when the lands only are, Denn v. Mellor, 5 Term R. 558, 1 Bos. & P. 559; contra, Doe v. Richards, 3 Term R. 356; Gully v. Bishop of Exeter & Dowling, 12 Moore, 591. An annual sum charged on the devise, though smaller than the income, has been held to raise a fee. Spicer v. Spicer, Cro. Jac. 527; Baddeley v. Leppingwell, 3 Burrows, 1533 (this case is put rather on the ground that another parcel is left expressly for a devisee's life, and that a gross sum is to be paid beside the annuity). But, where an annuity is clearly to be paid out of the income only, the estate is not enlarged. Andrew v. Southouse, 5 Term R. 292. It is enlarged also by a gift over, if the devisee should die under 21, Marshall v. Hill, 2 Maule & S. 608; Frogmorton v. Holyday, 3 Burrows, 1617 (intent shown by testatrix to dispose of whole estate was taken into consideration); or if he die under age and without issue, Toovey v. Bassett, 10 East, 460; or the latter alone, Hutchinson v. Stephens, 1 Keen, 240; but not where the gift over has no reference to the devisee's death, Roe v. Blackett, Cowp. 235. The gift over itself is not enlarged to a fee. Roe v. Holmes, 2 Wils. 80. Land given to trustees in fee, the last beneficial devisee takes a fee. Challenger v. Sheppard, 8 Term R. 597 (judgment without reasons given); Bateman v. Roach, 9 Mod. 104 (an unreliable report) So where a trust was to cease at the devisee's full age. Peat v. Powell, Amb. 387, 1 Eden, 479. Words other than "heirs," but clearly denoting perpetuity, are enough: In fee simple, 8 Vin. Abr. 206, pl. 8; to A. forever, or to A. and assigns, forever, Co. Litt. 9b; to A. and his successors, 8 Vin. Abr. 209, pl. 1;

robably follow the early precedents of South Carolina, which contrue a fee in a devise on very slight grounds. It will be seen hereafter hat the states above named do not, even in deeds, enforce very rigdly the rule requiring words of inheritance, while the District, havng been separated from Maryland before the act of 1825, dispensing vith such words in a devise of land, has retained the old commonaw rule simply because congress found no time to legislate on maters of this kind.[7] Thus, it will be seen, words of inheritance are ery seldom required in America.[8]

) A. and his blood, Co. Litt. 9b; 8 Vin. Abr. 206, pl. 10; or in any way with ıe power to give away at death. But no fee is given by a devise to a person by her freely to be possessed and enjoyed," Goodright v. Barron, 11 East, 20; contra, Loveacres v. Blight, Cowp. 352. According to 4 Kent Comm. 35, a fee is also carried by a devise of "all my estate," "all my property," my whole remainder," "all I am worth and own," "all my right," "all my tles," when there is nothing in the will to the contrary. A very late Maryınd case on the effect of a charge of money on a devise is Snyder v. Nesbitt, 7 Md. 576, 26 Atl. 1006, running back to Gibson v. Horton, 5 Har. & J. 180, nd through it to Wellock v. Hammond, Cro. Eliz. 204. In Pennsylvania it ras held under a will made before the present statute of wills, in opposition) the weight of authority, that the introductory words "as to my worldly state," etc., sufficiently show an intent to devise a fee. Schriver v. Meyer, 19 'a. St. 87.

7 The clauses as to wills in states not legislating as to deeds are Rev. St. Ie. c. 74, § 16; Pub. St. N. H. c. 186, § 6; Pub. St. Mass. c. 127, § 24; It. . Vt. § 2041; Pub. St. R. I. c. 182, § 5, Revision N. J. "Descent," § 13; rightly's Purd. Dig. Pa. "Wills," § 10 (it is section 9 of the will act of April 8, 833, and reads thus: "All devises of real estate shall pass the whole estate f the testator in the premises devised, although there be no words of inheritance or of perpetuity, unless it appear, by devise over or by words of mitation or otherwise in the will, that the testator intended to devise a less state"); Rev. Code Del. c. 84, § 24; Rev. St. Ohio, § 5970; Gen. St. S. C. § 861. References to short forms of deeds, or to the dispensation with words f inheritance therein, will be given in the sections on "The Deed." In Conecticut the matter is disposed of by Hungerford v. Anderson (1810) 4 Day, 38; for Florida probably by the early South Carolina cases, such as Whaley . Jenkins, 3 Desaus. Eq. 80; Dunlap v. Crawford, 2 McCord, Eq. 171.

8 In speaking of the abolition of the rule which requires words of inheritance, hancellor Kent, in a note to his second edition, greatly doubts the benefit of ıe change. It will "engender litigation. There was none under the operation : the rule. The intention of the grantor was never defeated by the applicaon of it. He always used it when he intended a fee." Deeds of gift or fam-

In a grant or devise to a corporation, words of inheritance are not necessary, because they are inapplicable. The corporation does not die, though its members do. The words "and its successors" were never necessary, though quite common. And this applies as well to corporations sole as to corporations aggregate. But at common law the grant or devise made to a corporation was, in one sense, for its life only; that is, if the corporation should expire by the limitation of its charter, or should be dissolved by any of the causes known to the law (e. g. by judgment of forfeiture, or vacation of charter on a quo warranto), any lands owned by it at the time of dissolution would return to the grantor, or to his or the devisor's heirs, like land given for life, on the death of the life tenant. This doctrine is, however, wholly obsolete. In modern practice, whenever the powers of a corporation cease a court of equity takes hold of the assets, real and personal, applies them first to the payment of creditors, and turns over the rest, when it is a commercial company, to the stockholders, otherwise to the persons or for the purposes to whom the property belongs, or to which it should be rightfully applied.[9] Only where land is settled upon, or devised to a charity, it

ily settlement are meant, the ordinary deed of sale being nearly always written on an invariable printed blank, which always included "heirs and assigns, forever." The writer fully agrees with the greatest of American jurists in the sentiment that the security of titles, the peace of families, and the prevention of litigation are much more important ends than a greater probability of having correctly guessed and carried into effect the intention of some fond old man, in settling or devising his estate.

[9] Bacon v. Robertson, 18 How. 480, reviews the authorities: Mayor, etc., of Colchester v. Seaber, 3 Burrows, 1866; Richards v. Richards, 2 Barn. & Adol. 447; Wallworth v. Holt, 4 Mylne & C. 635; Foss v. Harbottle, 2 Hare, 491; Curran v. Arkansas, 15 How. 304. "The instances which support the dictum in reference to the (reversion to those who had granted them of the) lands consist of the statutes and judgments which followed the suppression of the religious military order of knights, whose lands returned to those who had granted them, and did not fall to the king as an escheat; or of cases of dissolution of monasteries, etc., upon the death of all their members, or of donation to public bodies, such as a mayor and commonalty. But * * * the acquisitions of real property by a trading corporation are commonly made by a bargain and sale, for a full consideration, and without conditions in the deed; * * * and the vendor has no interest in the appropriation of the property to any specific object, nor any reversion where the succession falls." See, also,

may happen that when the corporation managing the charity comes to an end, and the charity itself becomes impracticable, the land may return to the donor's heirs.[10]

While the feudal system was in full vigor, subinfeudations were common; i. e. a man holding a fief from the crown or from an intermediate lord could, in his turn, give a part, or the whole, of the land to another, as to his own tenant in fee, to hold (tenendum) by one of the known tenures (reddendo), rendering therefor rents or services to him. A rent so reserved was feudal in its nature,—a so-called "rent service,"—and enforceable by distraint. But in the eighteenth year of Edward I. the practice of subinfeudation was checked by the statute of quia emptores. Thereafter all but the king's tenants in capite were forbidden to confer new fiefs. Any other landowner, when giving or settling land in fee, could only substitute the purchaser for himself as tenant to his own lord; and the habendum clause took the shape "to have and to hold, etc., reddendo to the superior lords of the fee their accustomed rents and services," which, being common to all deeds alike, was gradually dropped. The effects of this statute have long outlived the feudal system from which it sprang. Under it, land cannot be conveyed in fee simple upon a rent service reserved to the feoffor or grantor, such rent being an incident of feudal tenure. It is true that the intent and spirit of the statute were eluded by reserving a "fee farm rent," which, in its nature, was a mere annuity, and turning it into a rent charge by annexing the right of distress to it by express contract. Yet, upon the whole, the practice of subjecting estates in fee (on other than copyhold lands) to permanent burdens fell very much into desuetude. In many states the question whether the statute of quia emptores is in force has been doubted, and generally left undecided.[11] But it is very different in Pennsylvania, where the proprietary at an early day set the example of selling on quit rents, not by claiming

Mobile v. Watson, 116 U. S. 289, 6 Sup. Ct. 398 (where a new corporation takes place of the old).

[10] 1 Bl. Comm. p. 484; Stanley v. Colt, 5 Wall. (U. S.) 119.

[11] And it is clear that, under the statute of quia emptores, a feoffment in fee might be made upon condition that, whenever the feoffee and his heirs fail to pay a yearly rent, the feoffor and his heirs may enter, and hold the lands free of the feoffment. Such a rent would not be a rent service. See Co. Litt. § 325, quoted 4 Kent, Comm. 123.

an exemption from the statute, but on the broad ground of its not being in force; and the example set was followed by landowners, great and small. Here the "ground rent reserved" has become an important species of property, treated in all respects as real estate, and passing by deed, will, or descent, through its own chain of title, while the ownership of the ground subject to the ground rent passes through another.[12]

The statute of quia emptores does also recognize the free power of alienation by act among the living, and this power is inseparable from the ownership of the fee, at least when the owner is not under the disability of infancy or coverture; and any clause in a deed or will seeking to forbid the sale or incumbrance of an estate in fee by a person sui juris is deemed repugnant to such an estate, and therefore void.[13] We shall see hereafter how little this result can be attained, even indirectly by conditions; but we may state, that wherever married women are under disabilities, and can only convey in a manner prescribed by law, a temporary restriction upon their power of alienation has generally been sustained.[14]

No one can make his own law of descent, and impress it on a tract of land according to his pleasure. Hence a gift "to S. and her heirs

[12] Ingersoll v. Sergeant, 1 Whart. 337, determines that a rent reserved to the grantor and his heirs is in Pennsylvania a rent service. Hence a release of part of the land from the rent leaves the remainder subject to its due proportion. The statute of quia emptores was by the charter of Pennsylvania to apply neither between Penn and his grantees nor between others; and this was recognized by an act of assembly of 1700. Hence there is here a privity of estate between grantor and grantee in fee, unknown in other states. Royer v. Ake, 3 Pen. & W. 461; Herbaugh v. Zentmyer, 2 Rawle, 159; Hannen v. Ewalt, 18 Pa. St. 9. Hare and Wallace discuss this matter in their notes to Spencer's Case in 1 Smith, Lead. Cas. 137. As to the nature of the estate in ground rents, see Kenege v. Elliott, 9 Watts, 258; Hiester v. Shaeffer, 45 Pa. St. 537; Korn v. Browne, 64 Pa. St. 55.

[13] 4 Kent, Comm. 139. In fact, who could ask for the enforcement of the restriction? The owner of the fee sought to be made inalienable could not, for he would be bound by his deed; and so would his heirs or devisees. Ernst v. Shinkle, 95 Ky. 608, 26 S. W. 813.

[14] Stewart v. Brady, 3 Bush, 623 (Judge Robertson). No authorities are quoted by the court, and the report does not show any quoted by the counsel, for the feme. She was allowed to avoid a deed which she had made before the age named in the clause against alienation. See, contra, Mandlebaum v. McDonell, 29 Mich. 78, and authorities there quoted.

on the father's side" will be read as if written "to S. and her heirs," and confer a fee simple upon her.[15]

So much of the "fee simple absolute."

But the act which creates the estate in fee may name an uncertain future event on the happening of which it shall cease. If this event be the indefinite failure of issue, or of issue in the male line, of the first taken, the fee simple becomes a fee tail, of which we must speak separately. But the books give instances of other limitations, among which we may mention as the more likely to occur, a limitation to a widow and her heirs until she shall marry, or to one person and his heirs until another person marries. "If the event marked out as the boundary to the time of the continuance of the estate," remarks Chancellor Kent, "becomes impossible, the estate ceases to be determinable, and changes to a simple and absolute fee; e. g. if the widow whose fee is to determine upon marriage should die unmarried." Before that time it was a qualified, a base, a defeasible fee.[16] But the most frequent event, by which a fee is made to come to an end is if the first taker should die without having issue living at the time of his death, or if his issue should become extinct at such time named in the instrument creating the fee as the law allows to be named, the former limit (at the time of death) being by far the commonest.[17] The owner of a defeasible fee cannot transfer to another any greater estate than he has himself. The estate will, in the hands of his alienee, be just as liable to be defeated as in his own hands, if the event should happen which determines or defeats the fee.[18] But

[15] Johnson v. Whiton, 159 Mass. 426, 34 N. E. 542.

[16] When Kent wrote, more than 60 years ago, the distinctions between the absolute fee simple and the lesser estates of inheritance had already become unimportant and obsolete. He follows Lord Coke by dividing them into fees simple, fees qualified, and fees conditional, meaning fee tail by the last named. The fee which may come to an end by a subsequent event is, however, usually known as a defeasible fee, and only became important when conveyances were contrived, under the statute of wills and statute of uses, "to limit a fee upon a fee"; that is, to create executory devises and springing uses, to begin when the first fee is defeated. Of these hereafter.

[17] See section hereafter on "Dying without Issue."

[18] A common instance is a widow holding lands of her late husband by a devise in fee, to determine if she should marry again. No one will buy from her, as he would lose the land in case of her re-marriage.

the defeasible fee, as long as it lasts, is an estate of inheritance, for all purposes. It descends accordingly, and the widow of the owner has dower, though the fee should come to an end at the very moment of his death.[19]

§ 16. Estate for Life.

An estate in fee or for life is a freehold. Its owner has all the privileges which the law may give to freeholders. An estate for years is only a chattel interest.[20] And, as a freehold, a life estate must be created or transferred by such a conveyance as the law requires for real estate, and the conveyance must be recorded as one of "land" or real property. The life estate can only be recovered by suit before a court having jurisdiction over land. It can be levied upon execution or attachment only when the process is such as to justify a levy on real estate.[21] A grant or devise of the "rents and profits" of land during life is as much a life estate as if the land had been given during life.[22] A person may have an estate for his own life, or for the life of another. Thus, if A., owning a life estate in a house and lot, should convey all his estate to B., the latter would then have an estate per autre vie, which, as long as both are alive, is a freehold, though, as we shall see in the "Law of Descent," it may be different after the death of the tenant per autre vie.[23] The life estates occurring most frequently in this country are those of dower and curtesy; that is, the life estate of the widow in one-third of the lands of her husband, and the life

19 See hereafter in sections on "Dower."

20 4 Kent, Comm. 24; 1 Prest. Est. pp. 206–210. New Jersey still has its "chosen freeholders." In many states the appraisers of lands must be freeholders. Jurors must be householders or freeholders, etc.

21 However, in some states leaseholds, or at least those having yet a certain time to run, as those having an unexpired term of five years in New York (Code Civ. Proc. § 1430), are treated like freehold estates in all proceedings for the collection of debts.

22 Mandlebaum v. McDonell, 29 Mich. 79, 84; Herbert's Guardian v. Herbert's Ex'r, 85 Ky. 134, 2 S. W. 682. The position is elementary and undisputed, going back to Coke upon Littleton.

23 Both English and American statutes, as to the treatment of such estates when the owner dies before cestui que vie, will be noticed. The common law of "special occupancy" will be found in 2 Bl. Comm. 259.

estate of the husband, if there has been issue born alive, in the lands of his wife, both of which rights have been greatly modified by legislation. But such estates are frequently created by wills and by family settlements; a devise to the widow for life, of some or all of the dying husband's lands, being very common. Leases at a rent, for life or lives, formerly so common in the farming system of England, are now, at least, wholly unknown in the United States.[24]

An estate for the taker's life is still a freehold, though it is made to determine upon an event which may happen much sooner than the owner's death. Such is the common devise of land to a widow "as long as she remains my widow," i. e. only until she marries again.[25]

We have seen that, in most of our states in a deed, and everywhere in a will, words giving land generally imply a fee simple, and that express words are needed to cut an estate down to a life tenancy. The words most appropriate and oftenest chosen for that purpose are "for and during his (her) natural life;" but "for life" is just as good, and many other expressions have been held sufficient.[26]

[24] Instances of such leases on the "patroon estates" of the Rensselaers and Livingstons are met with in the older New York Reports.

[25] Co. Litt. 42a; 4 Kent, Comm. 26 (even where the life estate is to be defeated, when a certain sum has been satisfied out of the rents and profits, which is in consonance with modern views).

[26] See clauses deemed sufficient to cut down to a life estate an estate given in general words, in Jones v. Deming, 91 Mich. 481, 51 N. W. 1119; Brant v. Iron Co., 93 U. S. 326; Larsen v. Johnson, 78 Wis. 300, 47 N. W. 615. A very late case in the United States supreme court—Roberts v. Lewis (May 14, 1894) 153 U. S. 367, 14 Sup. Ct. 945—passes on a devise to a widow durante viduitate, which was, subject to the conditions of not re-marrying, held to confer a fee, on the strength of Little v. Giles, 25 Neb. 327, 41 N. W. 186, arising on the same will, contrary to the previous opinion of the United States supreme court on the same will in Giles v. Little, 104 U. S. 291. (The case ought to have gone off on the construction of a "power," as it finally did.) The Nebraska statute, governing the land, not only dispenses with words of inheritance, but a clause copied from Michigan, as the Michigan law is in substance copied from that of Massachusetts, says: "Every devise of land in any will," etc., "shall be construed to convey all the estate of the devisor therein," etc., "unless it should clearly appear," etc., "that the devisor intended to convey a less estate." In the case in 104 U. S. the supreme court says very truly that, where the devise goes on to limit a subsequent interest to others, the law is

It will be seen in the section on "Estates Tail," how the statutes of no less than eight states give a life estate only to the person who would formerly have been the first tenant in tail, and in another section, how in Kentucky a life estate is worked out from a clause which elsewhere would give a joint estate in fee to a mother and her children. Lastly, in three states (Maine, Massachusetts, and Rhode Island), which still recognize the special estate tail, in its old meaning, there may be "an estate tail with possibility of issue extinct," which is only a species of life estate; that is, if an estate be given "to A. B., and to the heirs of his body begotten upon his wife (naming her)," and that wife die childless, the impossibility of having heirs to inherit under the gift becomes certain, and the estate is no longer an estate of inheritance.[27]

At common law a life estate might be forfeited for two causes to those in remainder: First, for an attempt by the life tenant to convey the whole fee, or any estate greater than that which he held; second, for waste. The first of these causes of forfeiture has been

complied with at all events, whether you give a fee to the first taker and nullify the later limitation, or give to the former only a life estate and carry out the later limitation; for in the latter view also the whole estate is disposed of. In Weir v. Michigan Stove Co., 44 Mich. 506, 7 N. W. 78, effect is given to the statute; and in Dew v. Kuehn, 64 Wis. 300, 25 N. W. 212, it is said of a similar clause that it "changes the presumptions as to the estate devised." The Kentucky act says: "Unless a different purpose appear by express words or necessary inference, every estate in land created by deed or will, etc., shall be deemed a fee simple," etc.; enforced in Robbins' Ex'r v. Robbins (Ky.) 9 S. W. 254. And Howard v. Howard's Ex'r, 4 Bush, 494, reconciles a devise of the whole and of one-third by giving each devisee a fee, but cutting the former down to two-thirds. But see Anderson v. Hall's Adm'r, 80 Ky. 91, for words sufficient to create an estate for life. The supreme court of Massachusetts in Brimmer v. Sohier, 1 Cush. 118, 132, says that "clearly and manifestly," in the act of that state, means no more than according to the ordinary rules of construction. In Dew v. Kuehn, supra, a devise to K. simpliciter was held to be for life only, because a subsequent estate in the same subject was given to others. In Kaufman v. Breckinridge, 117 Ill. 315, 7 N. E. 666, a devise to the wife "as long as she shall remain his widow, to be disposed," etc., was held a fee because the necessities of the family as shown in the will would require a sale.

[27] Classed by Co. Litt. §§ 32, 27b, foremost among the estates not of inheritance. It differs from other such estates by being free from impeachment of waste. To same purpose are Blackstone and other standards.

formally abolished in many of the states;[28] but of this there was no need, for the forfeiture, even at common law, arose only when the life tenant made a "common-law conveyance," such as livery of seisin,—a manual, visible turning over of the land, by which the purchaser would take the place of the former owner as a freehold tenant in the feudal polity,—or a fine, or common recovery; both of these being fictitious proceedings in a law court, which operated a transfer of the land. As livery of seisin, fine, and common recovery are no longer in use, but land in the United States is transferred either by deed of "bargain and sale," which takes its origin, if not its effect, from the statute of uses, or by a statutory "grant" or "quitclaim," and as such conveyances were always deemed "harmless," conveying no greater estate than the bargainor, grantor, or releasor had, no forfeiture could arise, though it had never been abolished.[29] The other cause of forfeiture not only remains unrepealed, but most of the states have re-enacted the English statute, which allows the remainder-man, in case of waste, to sue the life tenant, and to demand in his action not only damages for the waste committed, but a forfeiture of the place wasted. However, the right of the remainder-man to the forfeiture seems to have become a dead letter.[30]

[28] (e. g.) Rev. St. N. Y. pt. 2, c. 1, tit. 2, § 166 ("shall not work a forfeiture, but shall pass to the grantee all the title, estate, or interest which such tenants could lawfully convey").

[29] The effect of a "feoffment" in creating a disseisin, and thus a wrongful fee, is fully discussed in 4 Kent, Comm. 480-490, under the head of "Feoffment." Nothing there said ever applied to conveyances under the statute of uses, or conveyances under the American statutes.

[30] The statute of Gloucester (6 Edw. I. c. 5) gives treble damages and forfeiture of the place wasted—re-enacted in New York (Rev. St. pt. 3, c. 5, tit. 5, § 10; Code Civ. Proc. § 1655); Indiana (Rev. St. § 286); Minnesota (Gen. St. 1878, c. 76, §§ 45, 46; Gen. St. 1894, §§ 5882, 5883); Delaware (Rev. Code, c. 88, § 9); North Carolina (Code, § 629); Kentucky (Gen. St. c. 66, art. 3, § 1); Dakota (Terr. Code Civ. Proc. § 652); Missouri (Rev. St. 1879, § 3107); Washington, but only for voluntary waste (Code Proc. § 660); Massachusetts (Pub. St. c. 179, § 1); Maine (Rev. St. c. 95, § 1); Rhode Island (Pub. St. c. 231, § 1); New Jersey (Revision, "Waste," 2, 3); Iowa (Code, §§ 3333, 3334); Nebraska (Comp. St. § 633); Oregon (Hill's Ann. Laws, § 337); and Georgia (Code, § 2255)—for all waste, which would seem to include permissive waste. There are few, if any, instances of the enforcement of the penalty, or even of an attempt to enforce it. The waste in the mind of English law-

It is the duty of the life tenant towards those who take the land after him by way of reversion or remainder to pay the taxes which accrue during his tenancy, and which are a lien upon the land, and to keep down the interest on the incumbrances created before his tenancy, the principal of which must be borne by those ultimately taking the estate in fee.[31] The rights of the parties are plain as to yearly interest, and as to the yearly burdens imposed by city, county, or state, in taxing the land ad valorem, which is usual throughout this country;[32] but they are not so plain, when "assessments for benefits" are imposed on the land,—under the taxing power, it is true,—but for the grading and paving of streets and alleys, and like improvements, the cost of which is supposed to add itself permanently to the value of the lots on which they are assessed.[33]

makers and judges is mainly the cutting of valuable timber, in a less degree the opening of new mines. The conditions of America as to forest trees were such for a long time that the cutting of timber was not deemed much of an injury; and the wild mountain lands, in which the best timber is now found, and good mineral lands, are bought up by corporations or firms of traders, among whom life estates for widows' dowers or under family settlements are not likely to occur. As to the American mitigation of the English law of waste, see Findlay v. Smith, 6 Munf. 134; Crouch v. Puryear, 1 Rand. (Va.) 263; Jackson v. Brownson, 7 Johns. 227; Parkins v. Coxe, 2 Hayw. 339; Ballentine v. Poyner, Id. 110; Loomis v. Wilbur, 5 Mason, 13, Fed. Cas. No. 8,498; Fritz v. Tudor, 1 Bush, 28; Hastings v. Cruncleton, 3 Yeates, 261. Jackson v. Brownson, supra, was an action for forfeiture upon a condition in a lease for life if the tenant should commit waste. Nearly all the suits about waste (except in states which had no equity system) have been by way of injunction in chancery, or in the nature of equity proceedings, and thus forfeiture was excluded.

[31] Casborne v. Scarfe, 1 Atk. 606; Lord Penrhyn v. Hughes, 5 Ves. 99, and other cases, cited 4 Kent, Comm. 74. It is therefore inequitable for the life tenant to buy at a foreclosure sale caused by his failure to pay the interest. The incumbrancer does not, however, lose his recourse against the owner of the remainder or reversion by neglecting to collect the interest from the life tenant. Kent, l. c.

[32] Sillcocks v. Sillcocks, 50 N. J. Eq. 25, 25 Atl. 155; Ladd v. Alcorn, 71 Miss. 395, 14 South. 266 (cannot buy at tax sale).

[33] Stilwell v. Doughty, 2 Bradf. 311, where a number of authorities are cited, none exactly defining the life tenant's relation to assessments. The surrogate held that there was a distinction between the ordinary and extraordinary assessments.

When an estate of lesser duration than the fee simple, such as a life estate (including an estate for the life of another), or the estate for years,—to be discussed hereafter,—meet in the same person, the smaller interest is said to be "merged" (literally drowned) in the greater and all-comprising one. Thus, when the life tenant becomes the heir of him who has the reversion or remainder in fee, or if he conveys his life interest to the owner of such reversion, a merger takes place, and the smaller estate has lost its separate existence, though in the latter case it is more correct to say that the life estate has been surrendered.[34]

NOTE. Just as a grant or devise of the profits of land for life is a grant or devise of the land itself for life, so to give the profits in fee is to give the land in fee, only the latter application does not happen so often. The rule has been brought into great prominence by the first decision of the supreme court of the United States in Pollock v. Farmers' Loan & Trust Co. (the Income Tax Cases), reported in 157 U. S. and 15 Sup. Ct., which was published after the MS. of this work went into the hands of the printer. The chief justice, on page 580, 157 U. S., and page 429, 15 Sup. Ct., to show that a tax on the rent of land is a tax on the land, quotes from Co. Litt. 45: "If a man seised of land in fee by his deed granted to another the profits of the lands, to have and to hold to him and his heirs, and maketh livery secundum formam chartae, the whole land itself doth pass. For what is the land but the profits thereof?" Mr. Justice Field, in his separate opinion, quotes in support of the position, also, Doe v. Lakeman, 2 Barn. & Adol. 30, 42; Johnson v. Arnold, 1 Ves. Sr. 171; Patterson v. Ellis, 11 Wend. 259, 298, etc.

[34] 4 Kent, Comm. 99; 2 Bl. Comm. 177. Chancellor Kent discusses merger under the head of "Estates for Years," with a view to certain niceties in English conveyances which are wholly unknown in this country. He speaks again (4 Comm. 254) of the merger of contingent remainder in the fee in possession, referring also to such states of the title as could seldom, if ever, arise in this country. He says, at page 99: "As a general rule, equal estates will not drown in each other. The merger is produced either from the meeting of an estate of higher degree with an estate of inferior degree, or from the meeting of the particular estate and the immediate reversion in the same person." The doctrine of merger of the lesser in a greater estate is fully discussed in the very late case of Bradford v. Griffin, 40 S. C. 468, 19 S. E. 76. In Herbert's Guardian v. Herbert's Ex'r, 85 Ky. 134, 2 S. W. 682, a testator left a tract of land to another person and to his only child for their lives only, but failed to say what should be done with the land after both should die. There was consequently a reversion, not disposed of, which remained in the testator, or (as he is necessarily dead before his will takes effect) in his only heir. The child, being such heir, became the owner of this reversion. Hence, at the death of

§ 17. Estate for Years.

An estate which lasts for a stated time, though less than a year, is known as a "term," or an "estate for years." He who owns it is a "tenant for years." He has a "leasehold" in the land. The term or leasehold, whether short or long, is deemed personal property, except that the statutes of a few states, as we shall show in the "Law of Descent," give to certain long leases some of the qualities of real estate.[35]

Where common-law principles still prevail, a leasehold differs from a freehold in the following particulars: On the death of the owner it passes to the executors or administrators; a freehold, at once to the heir. The widow is not dowable of a leasehold; hence a man can dispose of it fully without the wife's consent. It is distributed as personalty, in which the widow generally has a larger share. It passes under a will executed so as to pass personal estate. A term or leasehold to begin in the future is known as an "interesse termini." There are estates lower than the term for years, viz. an estate at will and estate at sufferance. The former, which might at first have been terminated at any moment by either landlord or tenant, was at an early day molded by the courts, in furtherance of good tillage and of fair dealing, into an estate from year to year, or, as to city tenements subject to monthly rent, into a holding from month to month. There is a tenancy at sufferance, when one who has entered lawfully as tenant holds over after his term has expired, without the right to hold for a specified time. The laws of the states vary greatly in the length of notice which must be given so as to determine a tenancy from year to year, though generally the old English rule is followed,—six months for agricultural lands, three months for

the testator, one-half of the land went in fee to the child, as his life estate coalesced with the reversion into an estate in fee "in possession." See an instance of a life estate merging in a fee coming to the life tenant afterwards upon the happening of a contingency in Hovey v. Nellis, 98 Mich. 374, 57 N. W. 255.

[35] See Gen. St. Ky. c. 66, art. 4; Rev. St. N. Y. pt. 2, c. 1, tit. 4, § 1. Every state revision has its chapter on "Landlord and Tenant," and every practice act or code of procedure furnishes some short remedy for ousting tenants holding over unlawfully.

houses or other town property. In Kentucky, since 1873, no previous notice is required; but at the end of the year, and thereafter at any time within 90 days, either party can sever the relation. If neither party does so, the tenancy goes on for the rest of the year on the old terms. In New York City a tenancy at will is presumed to run to the first day of the succeeding May. An outstanding tenancy at will, requiring a lengthy notice to quit, or a statutory tenancy from year to year, or even from month to month, is, indeed, an incumbrance on the title, yet it lies beyond the scope of this work, and we must refer our readers to some of the treatises on "Landlord and Tenant" for the manifold statutory and other incidents of such tenancies.

Long leases, in city and country, are much less frequent in America than in England, and fictitious leases, formerly known among English conveyancers as "attendant terms," which were contrived only to enable the owner of the freehold to deal with it as with personalty, when it became necessary to do so for the security of his estate, were never in use in the United States, nor was it ever the custom to raise money by mortgaging land for a term of years.[36] At common law the holder for a term of years did not enjoy full security for his term, as his landlord might allow judgment to go against him, which he could not falsify; but the statute 21 Hen. VIII. c. 15, removed in the tenant's favor all doubts on this score; and under it, or under the re-enactments of that statute in this country, a tenant for years would, no more than a tenant for life at common law, be bound by a judgment rendered against his landlord, unless he had been made a party to the action.[37]

[36] 4 Kent, Comm. 85 et seq. Chancellor Kent congratulates the American bar and bench for being saved all the intricate learning of attendant terms. The Alabama statute (Civ. Code, § 1836) forbids the creation of terms for over 20 years; that of California (Civ. Code, §§ 717, 718), over 20 years in town lots, over 10 years in farming or other lands. Dakota (Terr. Civ. Code, § 203) and Nevada statutes are to same effect. Maryland, in all cases, forbids leases for over 15 years, with the alternative that, when longer, the tenant has an option of purchase (Pub. Gen. Laws, art. 21, § 85, taken from Acts 1884, c. 485). The object seems to be akin to the statute of quia emptores, to prevent a quasi feudal relation.

[37] St. 21 Hen. VIII. c. 15, removed all doubt as to the tenant's right to falsify a recovery suffered to his prejudice, and, being suited to American institu-

Leases for years, except only those for very short terms varying in the several states, are embraced in the laws for the conveyance of land, and for the registry of conveyances. It is as important for a party taking a lease for a term of any length, or expecting to make valuable improvements, to examine the title to the property which he expects to rent, as for a purchaser or a mortgagee; and, on the other hand, a lease for a long term, or even a short lease, at a low rent, or upon a rent paid in advance, may be as serious an objection to a good title as a mortgage or other incumbrance.[38] At common law any tenant for years may assign his term, and the assignee would take his estate, along with all its rights and obligations; at least, as far as these rights and obligations are declared in "covenants running with the land."[39] He might also "sublet his term," and to prevent the subletting from becoming an assignment, by which the undertenant would be turned into an assignee of the term, and bound personally by the lessee's covenants, the term had to be shortened so as to leave to the lessee a reversion (if only of one day) after the end of the sublessee's term; for in the common-law theory, as fortified by the statute of quia emptores, rent, eo nomine, was inseparable from a reversion.[40]

It became the common practice of English landlords, at an early day, to counteract the liberty of assigning and subletting, by covenants and conditions in their indentures of lease which gave a right

tions, was received in the colonies as part of the English law. Where titles are allodial, the broad distinction in dignity between freehold and leasehold fails, and the leaseholder can no more than any one else interested in the land be barred by a judgment to which he is not a party.

[38] It will be shown in the chapter on "Title by Private Grant" what leases under the laws of the several states must be in writing and signed by the lessor; and in the chapter on the "Recording Laws," leases of what length must be recorded in order to have force against creditors and purchasers.

[39] The subject of covenants running with the land (or against the land; that is, against an assignee of the lessee) and covenants running with or against the reversion is fully treated in the English and in Hare & Wallace's American notes to Spencer's Case, 1 Smith, Lead. Cas. 137. The "running with the reversion" of not only covenants, but of all the rights of the landlord reserved in the lease, has in many states been confirmed, and perhaps enlarged, by statute.

[40] Cornell v. Lamb, 2 Cow. 652.

of re-entry to the landlord, or which forfeited the lease, if an assignment was made, or the land, or any part of it, sublet without the landlord's written license.[41] In modern times some statutes have been passed abridging the right of assigning or subletting, though the lease be silent; at least, where the lease is for a short term, not justifying the tenant to make outlays for valuable improvements, though in most of the states the landlord has still to rely on covenants and conditions in the lease.[42] The nonpayment of the rent reserved at the time stipulated is not, at common law, a cause of forfeiture of the lease, nor a ground of re-entry for the landlord. Nor has this defect, if such it be, except in two states, been removed by American statutes.[43] But written leases nearly always contain a clause of re-entry.

It is not our purpose to speak at large of "covenants running with the land," and "covenants running with the reversion." Suffice it to say that a covenant running with the land is one made in the instrument of lease by the lessor to the lessee, which is such that it will pass to any subsequent tenant who derives title from such lessee; whether as executor or administrator, or by assignment, or by purchase under process of law, and whether the transfer be mediate or immediate. Of these covenants, the most valuable and important is the one that the landlord will permit the tenant to remove buildings at the end of the lease, or will then pay the tenant for them, if he prefers to retain them; a covenant which is shaped and worded in many different ways, more or less favorable to the tenant. It is this covenant (sometimes a simple privilege of removal) which mainly gives to a leasehold its pecuniary value, as it is unusual for the tenant, in this country, to make an advance payment, known as a "fine," upon

41 Bryan v. French, 20 La. Ann. 366.

42 In Texas (Rev. St. art. 3122) and Georgia (Code, § 2279) no tenant can underlet or assign without the consent of his landlord. In Missouri, Kansas, and Kentucky no tenant at will or for a term less than two years can so underlet or assign. If he does, a forfeiture accrues to the landlord. For the details of this subject, readers are referred to works on "Landlord and Tenant."

43 New Hampshire (Pub. St. c. 246, § 3) and Michigan, by Act 1885, c. 162 (see 3 How. Ann. St. § 5774), confer on the landlord a right to give a seven days' notice to quit upon nonpayment of rent; but it is doubtful from the language of the statutes whether they refer to leases other than "at will."

receiving a lease of land. This covenant or privilege represents the value of the buildings, and by it the tenant becomes, in some measure, the owner thereof. However, the buildings, or rather the right of removal or of receiving payment (often with a further option in the landlord to renew the lease for a stated number of years), are considered in law as a mere incident of the lease, and pass along with it, by deed, will, or the judicial process.

§ 18. Estate Tail.

Under the law of England as it stood when it was brought to this country, an estate tail was an estate of inheritance in the purchaser, or in such of his heirs as it might have fallen on by descent, which could descend only on an heir of the body of the first taker; that is, on an heir by lineal descent from him or her. Upon the extinction of the line, there being no "heir of the body," it would go by way of remainder to any one named as remainder-man in the deed or devise creating the estate tail; and, if no remainder was limited, or no remainder-man capable of taking, it goes by way of reversion to the donor (i. e. the feoffor, grantor, or testator) or his "right heirs" (i. e. general heirs). The descent on the heir of the body, or transmission to the remainder-man or reversioner, was said to be cast or to go per formam doni. The estate might be general (i. e. to all heirs of the body), or special (i. e. only to heirs male of the body, or, in theory, only to heirs female); and it might be restricted to the heirs of the body of the first taker by a particular husband or wife. In a will the word "issue" might be substituted for "heirs of the body." But even then only the eldest males among the issue, if such there were, would take. An estate tail could not be diverted from passing to the "issue in tail" (the expectant heir of the body was known by that term), nor to those in reversion or remainder, by any of the ordinary conveyances (feoffment, bargain and sale, lease and release), nor by the last will of the tenant in tail; nor was the issue in tail liable for the specialty debts of the tenant in tail by reason of lands descending on such issue per formam doni; nor could the land so descended be made liable in any way to such debts. But ever since Taltarum's Case (in the 12th year of Edward IV.) the entail could be "docked" or barred by a "common recovery," not only so as to cut

off the issue in tail, but also remainder-men and reversioners; and the former might also be barred by a "fine," with or without proclamations. In other words, by going through the form of proceedings in court, which was, in effect, only a somewhat expensive conveyance, the estate tail could be turned into an estate in fee simple. But, to enable the tenant in tail to "levy a fine" or to "suffer a recovery," he had to be "in possession," not in remainder. Hence, if an estate for life was granted or devised to A., with remainder in tail to his eldest son, the former could not levy a fine, because he had only a life estate, and the latter, because he was not in possession; but, if the latter was of full age, the two might join in "making a tenant to the praecipe," and then the proper steps could be taken by fine or recovery to "dock the entail." [44]

The mischief arising from tenancy in tail, was not near as great as it appeared to the imagination of the people, who knew nothing about fines and recoveries, and who did not know that successive life estates in the first takers and defeasible fees followed by "executory devises" would fetter a landed estate more effectually than the ordinary estate tail.[45] Feeling, however, that a feudal institu-

[44] 4 Kent, Comm. 11, as to "conditional fees" before the statute de donis conditionalibus of 13 Edw. I. c. 1, pp. 12–22, as to estates tail under the statute. The English bankruptcy laws from an early date gave to the assignment in bankruptcy the force of docking an entail, and thus estates tail of traders were subjected to their debts. Taltarum's Case is approved in Mildmay's Case, 6 Coke, 40, and in Portington's Case, 10 Coke, 35, and the effect of fines and recoveries is recognized in several acts of parliament. Under the present English statute (3 & 4 Wm. IV. c. 74) a deed enrolled in the court of chancery within six months bars the entail and all remainders and reversions. If there is a trustee now styled "protector," he must consent. In New York, fines and recoveries were only abolished in 1830, having been regulated in the Revised Laws of 1813. The issue in tail could always be barred by "lineal warranty and assets"; i. e. if the ancestor left them in fee other lands of equal value, and the deed of the entailed lands contained a warranty. In Hockley v. Mawbey, 1 Ves. Jr. 149, Lord Thurlow said that a devise to "A. and his issue" is the fittest way of describing an estate tail under the statute de donis. Zabriskie v. Wood, 23 N. J. Eq. 541. The word "tail" is probably the French "taille," cut off or shortened; on account of the reversion to the donor on the extinction of the donee's line.

[45] This subject is clearly and learnedly discussed in Jordan v. Roach, 32 Miss. 481, where it is said that the statute de donis was never in force in Mississippi.

tion must be broken up, the legislatures of the different states, led by Virginia on the 1st of October, 1776, began in different ways to change and transform the estate which a limitation to heirs of the body, or words of like import, would create;[46] but they did so in ways showing very different degrees of wisdom. The simplest course was that taken in Virginia at Jefferson's instance, and since followed in many states. Every estate which, under the law as it then stood, would have been an estate tail was turned into a fee simple; doing away with the expense of fines and common recoveries, and rendering entailed land liable to the owner's specialty debts (in later times to all his debts). The Virginia act was carried into West Virginia and Kentucky, and the same rule was also adopted by the legislatures of New York, Indiana, Michigan, Wisconsin, and Minnesota, North Carolina and Tennessee, Georgia, Alabama, Mississippi and Florida, California and the Dakotas, and in 1855 also in Pennsylvania.[47] But in New York, Indiana, Michigan, California, and the Dakotas, remainders taking effect on the death of the first taker without issue, and thus at the extinction of the estate tail, are preserved; and in Mississippi the statute, curiously worded otherwise, preserves a rever-

[46] "Lineal descendants," "lineal heirs," "issue," sometimes even "children," are words taken as the equivalent of "heirs of the body" (see University of Oxford v. Clifton, 1 Eden, 473; Powell v. Brandon, 24 Miss. 343); especially in wills where the technical word "heirs" was never required to make an estate of inheritance. In Cuffee v. Milk, 10 Metc. (Mass.) 366, a devise "to W. C. and his oldest male heir" was held an estate tail.

[47] New York, Rev. St. pt. 2, c. 1, tit. 2, § 2 (dating back to 1782 and 1786, acts abolishing future entails only, while the Revised Statutes operate on those in existence); Indiana, Rev. St. § 2958; Michigan, 2 How. Ann. St. § 5519; Wisconsin, Rev. St. § 2027; Minnesota, Gen. St. 1878, c. 45, § 3, Gen. St. 1894, § 4364 (as old as the states); Virginia, Code, § 2421; West Virginia, Code, c. 71, § 9; Kentucky, St. 1894, § 2343 (the three states last named expressly state that only such remainders on an estate tail are good as might be limited on a fee simple; all date back to 1776); North Carolina, Code, § 1325; Tennessee, Mill. & V Code, § 2813; Georgia, Code, § 2250; Alabama, Code, § 1825 (goes back to 1812); Mississippi, Code, § 2436 (1811); Florida, Rev. St. § 1818 (1829); California, Civ. Code, § 763; Dakota, Civ. Code, § 220; Pennsylvania, Brightly's Purd. Dig. "Estates Tail," § 8. The Pennsylvania act of 1855 is not retrospective, but leaves existing estates tail to be dealt with under the prior law. The Florida act ("no estate shall be entailed") simply makes the words "heirs of the body" equivalent to the single word "heirs."

sion to the right heirs of the donor.[48] This course is the simplest, and would have been the best, but it defeats the intention of the grantor or testator so plainly that some of the courts, in their desire to save this intent, have taken hold of the slightest deviation from the technical words "to J. S. and the heirs of his body," to turn the entail into a strict settlement. Thus, in Kentucky, an estate limited in a will to a woman and her bodily heirs has been construed into an estate for life in the first taker, with a vested remainder in her children; and decisions going nearly as far have been made in some of the other states which have legislated in this manner. Thus the result has been to substitute for an estate which at a moderate cost could have been made absolute and salable, in some cases at least, an estate inexorably tied up for one generation.[49]

These evil results here are rare and incidental. A worse course has been taken in Connecticut and in New Jersey, Ohio, and New Mexico, in Vermont, Illinois, Missouri, and Arkansas. In all these states a fee simple is declared, not in favor of the first tenant in tail, but of those coming after him. In the first four named states it is in favor of "the issue of the first donee," in the other four states in favor of those who would next after him take the estate "by the course of the common law," which would include remainder-men and reversioners as well as issue in tail. In all these states, except in Connec-

[48] See, as to old law in North Carolina, Doe v. Jacocks, 4 Hawks, 310; Indiana, same sections as above; New York, Rev. St. pt. 2, c. 1, tit. 2, § 4; Michigan, 2 How. Ann. St. § 5520; California, Civ. Code, § 764; Dakota, Civ. Code, § 221.

[49] Righter v. Forrester, 1 Bush, 278 (another farm had been devised to the same child "and her heirs and assigns"); a deed to Mary B. D. (then unmarried) and her children, the court admitting that the English authorities made it an estate tail, Carr v. Estill, 16 B. Mon. 309; though in Moore v. Moore, 12 B. Mon. 659, this desire to work out a strict settlement is disclaimed; only stopping short at "heirs of the body," Pruitt v. Holland, 92 Ky. 641, 18 S. W. 852; and "her and her heirs," in Short v. Terry (Ky.) 22 S. W. 841. So, also, Bone v. Tyrrell, 113 Mo. 175, 20 S. W. 796, and Sullivan v. McLaughlin, 99 Ala. 60, 11 South. 447, show this mischievous tendency. But in Mississippi the court enforced the statute loyally, turning even a restricted fee tail, "to my daughter and the heirs of her body begotten by S.," into a fee simple. Sudduth v. Sudduth, 60 Miss. 366. In fact, in a late Kentucky case, construing a devise from the whole context, the word "children" was taken as a mere word of limitation. Williams v Duncan, 92 Ky. 125, 17 S. W. 330.

ticut and in Ohio, a life estate is expressly given by the statute to the donee in tail. In Connecticut and Ohio nothing is said about the nature of his estate. All this is done by lawmakers professing to break up, or at least to shorten, entails, and to facilitate the transfer of land. In Ohio the matter is made much worse by a permission in the law to give an estate tail to "the immediate issue or descendants of any person then in being." Thus a life estate may be granted to A., with remainder in tail to A.'s still unborn children, or with like remainder to the still unborn children of B., which now means that these unborn children shall themselves have life estates, with remainder in fee to their respective issue; and the limit of perpetuity is pushed out by one unborn life.[50] In Massachusetts, Maine, until 1855 in Pennsylvania, in Rhode Island, Maryland (hence, also, in the District of Columbia), and Delaware what is probably the wisest course has been pursued. The statute substitutes for the fine or recovery a simple deed. In Rhode Island even a will is sufficient to break the entail; yet some of the incidents of the estate tail are left, especially that from which it derives its name. The reversion or remainder after extinction of issue, if the entail has not been barred, is good. This slight remnant of the old estate tail has fortified the courts of these states in declaring those limitations, which by technical rules are estates tail, to be such, though the testator evidently intended to tie

[50] Vermont, R. L. § 1916; Illinois, Rev. St. c. 30, § 6 (of 1872, enforced in Blair v. Vanblarcum, 71 Ill. 290); Missouri, Rev. St. § 8836 (dating back to 1825); Arkansas, Mansf. Dig. § 643 (dating back to 1837, acted on in Myar v. Snow, 49 Ark. 125, 4 S. W. 381); Colorado, Gen. St. § 203; Connecticut, Gen. St. § 2952 (dating back to the common law of the colony); New Jersey, Revision, "Descent," 11 (1799); Ohio, Rev. St. § 4200 (dating back to 1811); New Mexico, Comp. Laws 1884, § 1423. The Ohio act of 1811 was construed to be retrospective. Thus, very oddly, a deed made in 1807, giving an estate tail to the donors, defeated a like deed made by the donee while tenant in tail in 1838. Pollock v. Speidel, 17 Ohio St. 439, 27 Ohio St. 86. The Georgia statute (Code, § 2250) gives such an effect to an implied estate tail, which will be explained in the section on "Dying without Issue." Two cases in Ohio (Gibson v. McNeeley, 11 Ohio St. 131, and Turley v. Turley, Id. 173) are reported where an estate tail given to an unborn child was sustained as a life estate. In the latter it was the unborn grandchild of the person named as life tenant.

the estate up more effectually.[51] In the states of New Hampshire, South Carolina, Iowa, Kansas and Nebraska, Texas, Wyoming, Nevada, Idaho and Montana, Oregon and Washington, there seems to be no statute whatever on the subject of estates tail; and as, under the codes of procedure of those states, there can be no such proceeding as a "fine per conuzance de droit," or a common recovery, there is no law that provides for the breaking of an entail. It will be shown how these states severally ridded themselves of entailments.[52]

Returning to the group of states in which the statute turns the entail into a strict settlement, it should be remarked that the incidents of curtesy and dower are nevertheless preserved in New Jersey by statute. This should perhaps be implied in those states where the remainder is limited to those who would take "by the course of the common law," but we are without reported cases on the subject.[53] Where the remainder in fee is conferred by the law

[51] Pub. St. Mass. c. 120, §§ 15, 16, provides for joining the holder of the particular estate where the tenant in tail is in remainder. Rev. St. Me. c. 73, § 4, embraces both provisions. Pub. St. R. I. c. 172, §§ 3, 4, requires the deed to be acknowledged before a judge (if a resident), a special commissioner outside of the state. But the tenant must be "seized"; hence a remainder-man in tail would have to buy in the life estate preceding, while, under the act preceding the revision of 1882, life tenant and remainder-man in tail were to join. The Rhode Island statute allows the entail to be barred by will. Pub. St. c. 173, § 3; Id. c. 182, § 1. The old Massachusetts act (1791) required a deed attested by two witnesses and acknowledged, and a valuable consideration in good faith. Pennsylvania (Brightly's Purd. Dig. "Estates Tail," §§ 3, 4; Act 1799): Tenants in tail in possession, reversion, or remainder may convey as if owners in fee, deed to be acknowledged and to be recorded within six months; enlarged and amended as to entails created before 1855 by acts of 1874 and 1883 (Id. §§ 9–11). Delaware allows tenant in tail, in possession, or remainder to bar the entail by deed; Maryland, to descend as if in fee (Pub. Gen. Laws, art. 46, § 1); cannot be devised (Id. art. 93, § 307); whether in possession, reversion, or remainder, can be sold and conveyed, barring all that could be barred by common recovery, by an ordinary conveyance (Id. art. 21, § 24). A quitclaim deed to the party in possession bars the entail. Coombs v. Anderson, 138 Mass. 376. See other authorities below passim.

[52] See infra for various states.

[53] New Jersey (Revision, "Descent," 11). See Ross v. Adams (1859) 28 N. J. Law, 160; Harkness v. Corning, 24 Ohio St. 418. In Vermont the fee in a

on the issue in tail, and there is no issue, it would seem that remainders limited to take effect after the estate tail are not too remote, and that in default of such remainders there is a reversion; but they would stand on the same footing as remainders in fee and reversions after an estate tail under the English law. Yet the authorities are not everywhere clear on the subject. Where the statute, as in Vermont, Illinois, Missouri, and New Mexico, limits the remainder in fee implied by it from the words of entailment to those who would "by the course of the common law take the estate" after the death of the person named as tenant in tail, a literal construction would point to the eldest son to take to the exclusion of younger sons and of daughters; but such seems not to be the understanding from any of the reported cases.[54] In Connecticut, the words "life estate" are not applied to the first taker. Yet the result seems to be the same; for first taker in tail cannot convey the fee, while the estate of the issue in tail is a mere expectancy which cannot be conveyed before the first taker's death, and which the legislature may bar in its discretion.[55] Where the statute turns the estate into

special tail goes to the children by the designated husband or wife. Thompson v. Carl, 51 Vt. 408.

[54] Horsley v. Hilburn, 44 Ark. 458. The point did not arise, but it was said that, on failure of issue, the estate would go to the brothers and sisters of the first taker. It was decided, however, that "common law" here includes the statute de donis, and that, therefore, the survival of issue does not render an alienation valid. In Farrar v. Christy's Adm'rs, 24 Mo. 463, the tenant in tail took a release from his brothers and sisters, giving in return a bond for the value should they become entitled to any estate on his death; and an action on the bond by a niece not of the oldest male stem was sustained. So, in the Illinois case (Blair v. Vanblarcum, 71 Ill. 290) above quoted, the brothers and sisters of the grantor, as presumptive reversioners, were made parties; but the point was neither raised nor decided.

[55] The Connecticut statute dates back to 1784, but a number of decisions under deeds or wills of earlier date declare the same law. Welles v. Olcott, Kirby, 118; Chappel v. Brewster, Id. 175; Manwaring v. Tabor, 1 Root, 79; Comstock v. Comstock, 23 Conn. 349. Nor could the tenant in tail by his deed bar an implied estate tail. See section on "Dying without Issue"; Williams v. McCall, 12 Conn. 328, as to warranty and assets. Comstock v. Gay, 51 Conn. 45 (arguendo), where the power of the legislature over entails is affirmed. See De Mill v. Lockwood, 3 Blatchf. 56, Fed. Cas. No. 3,782. First tenant and issue joining in release do not bar the latter, though a warranty would operate as estoppel on the expectant estate. Dart v. Dart, 7 Conn. 250.

a fee simple, all the incidents of such an estate follow. The owner can grant, devise, or incumber it at pleasure, and it may be sold for his debts. And a remainder limited in the same instrument after the estate tail thus converted is void, unless it necessarily takes effect at the end of a named life or lives in being, in which case it may be sustained as an executory devise or springing use.[56] Among the states which turn the estate tail into a fee, Mississippi has by a proviso allowed a "conveyance or devise of lands to a succession of donees then living (not more than two), and to the heirs of the body of the remainder-man, and, in default thereof, to the right heirs of the donor in fee simple,"—that is, to A. for life, B. in tail, reversion to the donor. The supreme court of the state has declared that this statute must not be construed so as to extend the donor's power to tie up the estate, and construes it thus: If B. leaves heirs of his body, they have a fee simple; if not, the reversion takes place at B.'s death. The result is to assimilate the law very much to that of Ohio, but, in the absence of a declared reversion to the donor's heirs, it seems that the tenant in tail himself should have the fee.[57] It was held in Massachusetts, where estates tail are made liable to the tenant's debt, that the sheriff's deed upon an execution sale need not (while the law required such forms in the tenant's own deed) be attested by two witnesses; and further, that a deed of release operates as a bar, as well as a warranty deed, and that the wife's estate tail could, before any married woman's act, be barred by the joint deed of husband and wife.[58] But a premature conveyance, made before

[58] A tenant in tail, even after possibility of issue extinct, is not liable for waste. Co. Litt. 224; Id. 27; 2 Bl. Comm. 125. For the incidents of dower, courtesy, and the right to bar by fine, as well as freedom from waste, see 2 Bl. Comm. 115, 116.

[57] Jordan v. Roach, 32 Miss. 481. There is an ill-concealed sarcasm as to the unwisdom of the legislature in passing the law running through the opinion. "If estates in tail ever existed here, they existed with the common law incident [of being barred by a common recovery]." Contra, Dibrell v. Carlisle, 48 Miss. 691.

[58] In Maine, under Rev. St. c. 73, § 4, tenant for life and remainder-man in tail can join in a deed to bar the entail. Willey v. Haley, 60 Me. 117; Cuffee v. Milk, 10 Metc. (Mass.) 366; Nightingale v. Burrell, 15 Pick. 104. The tenant can bar the entail, even after he has sold his own interest. Hall v. Thayer, 5 Gray, 523.

the grantor has come into possession by the falling in of a preceding estate, though it contain a covenant of warranty, will not by estoppel bar the issue or remainder-men; for, though it might preclude the grantor during his own life, those whom he can only bind by the express authority of the statute cannot be bound by his unauthorized act.[59] The Rhode Island statute on the barring of entails has been carried out without much difficulty.[60]

In Maryland the act of 1786 on descents, which did away with primogeniture, directed land held in tail to go and descend to the same heirs as land held in fee simple. The full effect of such a law, which renders reversions and remainders after estates tail impossible (for there is always an heir, collateral if not lineal), was not noticed by the courts, until June term, 1827, when the former cases were overruled, and an estate tail—at least, tail general—held practically the same as a fee, liable to the debts of the tenant. And this was, in 1863, carried so far that the devise of an estate tail to an only son was held a nullity, as the quality of the estate was the same as he would take by inheritance. This case arose before the revision of 1860, which, by a clause copied into the present revision, forbids the devising of estates tail.[61] In the District of Columbia, the Maryland law took root before the line of decisions against the binding force of estates tail began.[62]

The estates tail still subsisting in Pennsylvania, cannot, it seems,

[59] Whittaker v. Whittaker, 99 Mass. 364; Allen v. Ashley School Trustees, 102 Mass. 262. But see, as to heirs claiming in reversion being barred by estoppel, Perry v. Kline, 12 Cush. 118. An equitable estate in possession is enough to justify barring the entail. Doe v. Ewart, 7 Adol. & E. 636.

[60] Sutton v. Miles, 10 R. I. 348, under the old revision, c. 145, § 3 (joint deed with life tenant); Lippitt v. Huston, 8 R. I. 415 (the acknowledgment of a married female tenant in tail, under the statute on entails which dispensed with the forms prescribed for married women in ordinary cases).

[61] Newton v. Griffith (1827) 1 Har. & G. 111, overrules Smith v. Smith, 2 Har. & J. 318; is followed in Tongue v. Nutwell, 13 Md. 424; last case Posey's Lessee v. Doe, 21 Md. 477. No decisions since 1827 as to effect of tail male or one restricted to issue by a named wife or husband.

[62] The law can now be easily found in the compilation, made under public authority, of the statutes (British, Maryland, Congressional, and Territorial) in force in the District in 1894.

e sold under execution, so as to bar the issue in tail.[63] The deed arring an entail ought to be recorded, but this requirement has been eated quite indulgently. In Massachusetts it was held sufficient o put the deed to record after the tenant in tail's death.[64] Among ne states which have no statute on entails, New Hampshire has been eclared free of them by implications from the act of 1789 on de-cent.[65] In Iowa and Oregon it was decided in 1882 and 1883 that he statute de donis had never been in force in either state, and hat, if the words "heirs of the body" had any force, they made at ost a "fee conditional" at common law, which the donee might alien, he purchaser taking the risk of issue being born to fulfill the condi-ion. The decision in Oregon is probably also law for Washington.[66] n South Carolina, also, it has been held that the statute de donis s not in force, and a limitation to "the heirs of the body" makes a ee conditional, with the incidents of curtesy and dower; and the enant's deed, if he has issue, bars the reversion as well as the issue.[67] n Texas, Kansas, and Nebraska estates tail, as they existed in England under the statute de donis, are not recognized by the com-non opinion of the bar, and no cases of such estates are reported. n Texas, while a republic, "primogeniture and entailment" were

[63] Waters v. Margerum, 60 Pa. St. 39. Covenant does not bar entail. Doyle . Mullady, 33 Pa. St. 264.

[64] Terry v. Briggs, 12 Metc. (Mass.) 17. But in Maryland a deed to bar an ntail must be recorded "in time"; i. e. within six months after execution. ones v. Jones, 2 Har. & J. 281. See, for Rhode Island, Cooper v. Cooper, 6 t. I. 261.

[65] Jewell v. Warner, 35 N. H. 176. The statute de donis in the original Latin s copied into the opinion. It is said not to be in force in New Hampshire, hough the court admits that some actions of formedon had been brought in New Hampshire, and sustained without question; and an act had been passed n 1837 to authorize the barring of entails by simple deed.

[66] Pierson v. Lane, 60 Iowa, 60, 14 N. W. 90, goes back to Michigan act of 821, declaring all titles to land allodial. Rowland v. Warren, 10 Or. 129. That the owner may sell before performance of conditions, Blanchard v. Blanchard, 1 Allen, 223, is quoted. A special tail (issue by named husband) hus becomes a fee absolute.

[67] Izard v. Middleton, Bailey Eq. 227; Barksdale v. Gamage, 3 Rich. Eq. 79; Burnett v. Burnett, 17 S. C. 545; Withers v. Jenkins, 14 S. C. 598; Carigan v. Drake, 36 S. C. 354, 15 S. E. 339.

prohibited by the last clause of the constitution.[68] In the states of Idaho, Montana, and Wyoming there has hardly been time for questions growing out of attempts to establish estates tail to come before the courts. The decision probably in each of them would be to the effect that the statute de donis is not in force.

The descent of estates tail will be discussed in the chapter on "Title by Descent," in the section on "Descendants."

§ 19. Remainders and Reversions.

At common law, a future estate was either a reversion or a remainder. A reversion is the estate which the grantor or his heirs will have, when an estate less than a fee has been given, after such lesser estate (for years, for life, or in tail) expires. A remainder is the estate which is granted or devised in the same deed or will to take effect after the "particular" estate comes to an end. But there may be successive remainders for life or in tail; and after all of these comes a reversion in all cases in which the grantor or donor, owning the fee simple, does not part with it, or, more generally, in all cases in which a man parts with an estate of lesser duration than he owns. Remainders are of two sorts,—vested and contingent. It is vested, according to Kent, "when there is a present fixed right of future enjoyment, and it gives a legal or equitable seisin." The statutes of New York, Michigan, Wisconsin, Minnesota, California, and the Dakotas define the remainder as vested "when there is a person in being who would have an immediate right to the possession of the lands upon the ceasing of the intermediate or particular estate." A reversion, at least after an estate for life or for years, and for some purposes, also after an estate tail, is always vested.[69] "A contingent

[68] There is no reported case in Nebraska. The writer is, however, assured by Messrs. Harwood, Ames & Kelly, of the Lincoln bar, that, in the opinion of the lawyers of that state, the same law prevails as in Iowa.

[69] 4 Kent, Comm. 202; Rev. St. N. Y. pt. 2, c. 1, § 2; Gen. St. Minn. c. 45, §§ 10–12 (Gen. St. 1894, §§ 4371–4373); Rev. St. Wis. §§ 35–37; How. Ann. St. Mich. §§ 5527–5529; Civ. Code Cal. §§ 693–695; Civ. Code Dak. Ter. §§ 185, 187. Coke upon Littleton defines a remainder (from the Latin "remanere") as the remnant of an estate in land, expectant upon a particular estate, created together with the same at one time (143a). Blackstone (2 Bl. Comm. 169) defines vested remainders or "remainders executed" as "those by which a present in-

remainder is limited so as to depend on an event or condition which is dubious or uncertain, and may never happen or be performed, or not until after the determination of the particular estate," or, in the words of the statutes, "while the person to whom, or the event upon which, they are limited to take effect, remains uncertain." [70]

The two sorts of remainder are best illustrated thus: A father devises his land to his wife for life, remainder to his sons John and James and their heirs forever. John and James have a vested remainder. As soon as, by their father's death, the will takes effect, they have a present fixed right of enjoyment in the future,—that is, after the widow's death; and so, if, instead of their names, they were designated as "my two sons," or even if only named as "my sons," and only John and James are alive at the testator's death. But, if the devise were to run thus: "to my wife for life, and at

terest passes to the party, though to be enjoyed in futuro; and by which the estate is invariably fixed to remain to a determinate person after the particular estate is spent." We shall see that this is not always true. The language for defining the vested remainder sometimes varies slightly from that in the text; e. g. in Kennard v. Kennard, 63 N. H. 308. Postponement does not prevent vesting. Dimmick v. Patterson, 142 N. Y. 322, 37 N. E. 109, and cases there quoted.

[70] 4 Kent, Comm. 206. See statutes as above; also, definition in the Georgia Code, § 2265. According to Fearne's Essay on Contingent Remainders (page 3), a remainder is contingent "when it is limited to take effect on an event or condition which may not happen or be performed (i. e. at all), or which may not happen or be performed till after the determination of the particular estate, in which case such remainder never can take effect." The latter part of the definition rests on reasons now generally removed by statute. Thomas, in his edition of Coke upon Littleton, says, further, on the authority of Fearne on Contingent Remainders and Preston on Estates: "It is not, however, the uncertainty of ever taking effect in possession that makes a remainder contingent, for to that every remainder for life or in tail expectant on an estate for life is and must be liable, as the remainder-man may die, or die without issue, before the death of the tenant for life. The present capacity of taking effect in possession, if the possession were to become vacant, and not the certainty that the possession will become vacant before the estate limited in remainder determines, universally distinguishes a vested remainder from one that is contingent." The distinction is fully set forth in the late case of Hennessy v. Patterson, 85 N. Y. 91. However, in New York and the states which adopted its statutes, the estates known as "executory devises" are classed among contingent remainders. A remainder limited in fee after a contingent remainder can be a vested remainder. Chudleigh's Case, 1 Coke, 137.

her death to those of my grandchildren who may then be living,"—he having no grandchildren at the time, the remainder is clearly contingent. The event that there will be any grandchildren in existence when the widow dies, or who those grandchildren will be, is dubious and uncertain, or, in the words of the statute, "the persons remain uncertain"; for in fact they have not even been born. A remainder limited to unborn children or grandchildren,—in short, to unborn persons,—of a given description, is the strongest and clearest example of a contingent remainder. In the former case, John and James can at once sell their fee in remainder, and the purchaser will be sure of coming into possession when the widow dies; and, if he buys her life estate, too, he will own the whole fee in the land. In the latter case, while the grandchildren are still unborn, an intending purchaser can find no one with whom to deal for the estate in expectancy.

But there are many intermediate positions: There is the remainder of which the character is in dispute; the vested remainder which may be divested; and there is the vested remainder which will open. The devise is: "to my wife for life and thereafter to my son John in fee; but if he should die before my widow, then his share shall go to his children." Here, according to the older authorities, John takes a contingent remainder.[71] There are, however, later cases in which his estate would be called a vested remainder liable to be divested.[72] The most important class of vested remainders that are

[71] Doe v. Scudamore, 2 Bos. & P. 289, where the devise was worded that the remainder-man in fee should take only if he should survive the life tenant, and not otherwise. The difference between this case and that of a life estate to A., and after his death to B., for life, which is wholly lost to B. if he dies before A., is that in the former case the estate, being a fee, is endless in its nature, and is defeated only by the limitation, while in the latter the remainder comes to an end by its own nature of a life estate. That the limitation over in the case from Bos. & P. was not to the issue of the first-named remainder-man can make no difference in the nature of the estate. So, also, Van Tilburgh v. Hollinshead, 14 N. J. Eq. 32; Teets v. Weise, 47 N. J. Law, 154. And, where children as a class are to take life estates after the death of their mother, their remainders are contingent, as it is uncertain which of them will take. Smith v. Block, 29 Ohio St. 488, 496.

[72] Heilman v. Heilman, 129 Ind. 59, 28 N. E. 310. "Vesting is favored." L'Etourneau v. Henquenet, 89 Mich. 428, 50 N. W. 1077. And see cases below in note 75.

liable to be divested will be fully discussed in the chapter on "Powers," but may be here shortly indicated. A man devises his land "to my wife Mary for life, and after her death to all of my children in fee [or words importing a fee], unless she should by her last will limit them to some one else." This is the effect of a "power to devise," though it is not usually expressed in that way.[73] The practical difference seems to be slight. It is as risky to buy the title of the man who would come into immediate enjoyment if the particular estate were now at an end, but who may lose the land for himself and his purchaser if the particular estate ends too late, or on some other eventuality, as to buy the title of another man who has no vested estate now, but who may obtain it by subsequent and still uncertain events. In the case first put, any one buying from John during the widow's life would take the risk of his dying before her, in which case his children would take directly under their grandfather's will, and not as heirs of John, and would not be bound by his conveyance.[74] But the old English law and the law of many states draws a distinction between the two kinds of remainder; and it is often important to classify them correctly. Or, again: "I devise my lands to my sister Mary, and at her death to her three children and to such other children as she may then have." Say she has three children when the will takes effect. These are said to have a vested remainder, each in an undivided one-third; but these vested remainders "open to let in" any children that may be born thereafter, and to that extent they are divested.[75]

[73] 4 Kent, Comm. 204, quoting Cunningham v. Moody, 1 Ves. Sr. 174; Doe v. Martin, 4 Term R. 39.

[74] Examples are very frequent, but in Gibbens v. Gibbens, 140 Mass. 102, 3 N. E. 1, an estate thus given "among my children, the issue of a deceased child standing in the place of the parent," was said to give to each child a vested remainder; there being no words of survivorship. The result made the distinction immaterial. Very similar is Lenz v. Prescott, 144 Mass. 505, 11 N. E. 923.

[75] 4 Kent, Comm. 205; Fearne, Rem. 394-396; Doe v. Perryn, 3 Term R. 484; Lawrence v. Maggs, 1 Eden, 453; Doe v. Provoost, 4 Johns. 61; Right v. Creber, 5 Barn. & C. 866; Annable v. Patch, 3 Pick. (Mass.) 360. The supreme court, in McArthur v. Scott, 113 U. S. 340, 377, 5 Sup. Ct. 652, speaks of a vested remainder to grandchildren opening to let in those after born, vesting in them successively at birth, and that it would be divested as to the

As a general principle, the courts favor vested, as against contingent, remainders, as the outstanding of an uncertain future estate hampers the full enjoyment and prevents the free disposition of the land. This doctrine has been enunciated on all occasions, by the English tribunals, the supreme court of the United States, and the state courts.[76] The tendency towards vesting estates is strongest when a remainder is limited to a child or to one of the heirs of the testator; and, in such a case, words are often supplied, in accordance with the supposed primary object of the father.[77] Thus, where

shares of those who should die. Nichols v. Denny, 37 Miss. 59; Waterman v. Higgins, 28 Fla. 660, 10 South. 97 (deed by husband to R. W., his wife, for life, then to L. P. W., his son, "in default of other heirs of my body"); Campbell v. Stokes, 142 N. Y. 23, 36 N. E. 811 (opening liable to defeasance, yet "vested"). But a devise "for the benefit of my wife during her natural life, and after her death for the benefit of my children or the survivors of them," was deemed to be contingent only in Armstrong v. Armstrong, 54 Minn. 248, 55 N. W. 971. Weehawken Ferry Co. v. Sisson, 17 N. J. Eq. 475, where a very peculiar result was worked out from the words "my son M. G. and such other issue," etc.; allowing his two daughters to come in with him as the grandfather's issue, and giving his grantee one-third, and each of the daughters one-third.

[76] "All estates, legal and equitable, given by will, should always be regarded as vesting immediately, unless the testator has by very clear words manifested an intention that they should be contingent on a future event." McArthur v. Scott, 113 U. S. 340, 5 Sup. Ct. 652, quoted and approved in Scott v. West, 63 Wis. 562, 24 N. W. 161, and 25 N. W. 18; Ives v. Legge, 3 Term R. 488, note; Hennessy v. Patterson, 85 N. Y. 91. A remainder after two life estates was given without words of inheritance, but could, under the New York law, not well take effect otherwise than a fee, and was held unaffected by failure to survive life estates. Kelso v. Lorillard, 85 N. Y. 177. Life estates to A. and B. successively, and then remainder to C. and D., unless either should die without issue, means if she so die before A. and B.'s death. Doe v. Considine, 6 Wall. 458, 476 (remainder to vest as soon as possible); Millard's Appeal, 87 Pa. St. 457; Smith's Appeal, 23 Pa. St. 9; Harris v. Carpenter, 109 Ind. 540, 10 N. E. 422; Knowlton v. Sanderson, 141 Mass. 323, 6 N. E. 228 (vested remainders are strongly favored, but the decision is against vesting); McDaniel v. Allen, 64 Miss. 417, 1 South. 356 (quoting 4 Kent, Comm. 203); where the devise after the death of the widow was "to the heirs of my body." And see In re Man's Estate, 160 Pa. St. 609, 28 Atl. 939 (only enjoyment postponed).

[77] In Burnham v. Burnham, 79 Wis. 557, 48 N. W. 661, a condition that the testator's son R. should have his share only if he should reform within five

family settlement or deed provides that after the death of a named erson, or after the lapse of so many years, trustees shall sell, and ivide the proceeds among the partakers of the donor's bounty, or hall make partition and convey to them their shares, these beneciaries are always to be ascertained (e. g. if the then living children r grandchildren are to take) as of the time of the death or expiraion of years, and not as of the time of actual distribution; so that he vesting of their estates takes place at the earliest possible moient.[78] There are, indeed, circumstances, under which the vesting f a remainder must await an actual partition, as where a testator irects that the child to whom Whiteacre is allotted shall also take Blackacre. But here, also, the principle of the earliest vesting aplies. The latter estate will vest as soon as the partition is made, nd not wait till the child to whom Whiteacre is allotted has paid he owelty of partition on Blackacre.[79]

It has been held, on technical grounds, that the remainder in fee fter an estate tail (where it still subsists in its original form) is ested, somewhat illogically, first, as the posterity of the first tenant may never be extinguished; secondly, as the entail with all remainders may be easily barred. The effect of the decision was nly to make the remainder assignable.[80] And such was the ground or discussion in most cases when the question arose: Is this remainder contingent? But as in modern law all future interests in

ears was held a condition subsequent, becoming impossible by his death within that time. His share was made to vest and descend to his heirs. And. where the doubt is between an estate in possession and a contingent remainer, the former is favored. Allen v. McFarland, 150 Ill. 455, 37 N. E. 1006. The policy of the statutes, which do not allow the lapse of a devise to a child f the testator who dies leaving issue in the latter's lifetime, is relied on in the ase just cited, and is influential in some of the other cases.

[78] 2 Jarm. Wills, 752; Moore v. Lyons, 25 Wend. 119; Kelly v. Kelly, 61 N. Y. 47; Briggs v. Shaw, 9 Allen, 516; Whitney v. Whitney, 45 N. H. 311. See. lso, on the general principle, Vanderzee v. Slingerland, 103 N. Y. 47, 54, 8 N. E. 247; In re Smith (Lord v. Hayward) 35 Ch. Div. 558; Parker v. Glover, 2 N. J. Eq. 559, 9 Atl. 217; Harris v. Carpenter, 109 Ind. 540, 10 N. E. 422.

[79] Dean v. Winton, 150 Pa. St. 227, 24 Atl. 664. A devise on condition that he devisee have the land appraised, and pay proportions to others, does not lelay the vesting. Hart v. Homiller, 20 Pa. St. 248.

[80] Moore v. Rake, 26 N. J. Law, 574.

land are assignable, the distinction between the vested and the contingent remainder is of much less weight.[81] The predilection of the law for the earliest vesting of estates will be treated further in the "Construction of Wills." While the old distinctions between vested and contingent remainders are almost effaced, the latter being no longer in danger of destruction by a common-law conveyance, yet a trace of this distinction has been kept up by many courts in this: that while a vested remainder-man is not bound by a judgment of partition, rendered at the instance of, or against, his life tenant, unless made a party to the action, a contingent remainder-man is bound. This distinction has in a very late case led to the reaffirmal of the doctrine that a remainder limited after A.'s death to such of his children as may survive him, and to the issue of those who die before him, is vested as to those in being, though liable to be defeated by death before the life tenant, and though more liable to "open" by the birth of other children.[82]

Cross remainders will be explained hereafter.

§ 20. Uses and Trusts.

Every reader of Blackstone and Kent is acquainted with the history of "Uses," an interest in land, recognized by conscience, and resting upon equitable grounds, not recognized by the courts of law, and not governed by the principles of feudal law. The "use" might not only be held in fee or in tail or for life by persons or bodies corporate, like the legal estate, but also upon conditions or limitations, which the simplicity of the common law forbade; and "future uses" might be raised, while a future estate could not be created by conveyances at the common law. Inconveniences arose from

[81] Thus, the Michigan statutes (2 How. Ann. St. § 5652) say: "Conveyances of lands or of any estate or interest therein may be made," etc.; or under Civ. Code Cal. §§ 1044, 1045: "Property of any kind may be transferred, except, etc. A mere possibility not coupled with an interest cannot be transferred." The possibility here spoken of means the chance, no matter how great, to take by descent from a person who might by devise break the line of descent, or to take by will from a person who might still change or revoke his will.

[82] Campbell v. Stokes, 142 N. Y. 23, 36 N. E. 811.

this two-fold property in land, which were felt most by the crown in its struggle with the clergy. "There was a continual struggle, maintained upward of a century, between the patrons of uses, and the English parliament; the one constantly masking property, and separating the open, legal title from the secret ownership, and the other by a succession of statutes endeavoring to fix the duties and obligations of ownership upon the cestui que use. At last the statute of 27 Hen. VIII., commonly called the 'Statute of Uses,' transferred the uses into possession by turning the interest of the cestui que use into a legal estate, and annihilating the intermediate estate of the feoffee" to uses. But the only lasting effect of the statute was to introduce the same freedom in the creation of future estates at law as there had been in raising future uses, as will be shown under the heads of Executory Devises and of Perpetuities.

The first consequence of the statute was to dispense with livery of seisin or attornment of tenants after a grant as a mode of conveyance; for if A., the owner of land, acknowledges by deed under his seal that he has bargained with B. to sell him the land for a named price, and has received that price, or if he covenants to stand thereafter seised to the use of B., in consideration of close kinship, the former custom raised a "use" in B., and this was now turned into possession, and thus a deed of bargain and sale or a "covenant to stand seised" became a common means for transferring land.[83]

But the principal end and purpose of the statute, to make the beneficial owner of land its only owner recognized by the law, was, in the words of Chancellor Kent, subverted by the courts of law and equity. It was held that the statute executed only the first use, and that a use upon a use was void. In a feoffment "to A., to the use of B., to the use of C.," or in a bargain and sale by A. to B., to the use of C., only the first use, that to B., is executed; the other is void at law. But courts of equity enforced it as a "trust"; and thus the twofold ownership of the days before A. D. 1535 came back under another name.

In this shape the law of uses and trusts, which had now become

[83] Co. Litt. 271a, 271b, gives a short account of uses before and under the statute, and of conveyances under it. In I. H. Thomas' edition (volume 2, p. 570), there is a long note on conveyances under the statute.

simply the law of trusts, was brought by the English settlers to the American colonies. "Trusts are now what uses were before the statute, so far as they are mere fiduciary interests, distinct from the legal title, and to be enforced only in equity," says Kent; but he adds that the principles of the old law of uses are more liberally construed "and with a more guarded care against abuses." First and foremost, the interest of the cestui que trust may by some process be subjected to his debts. "An assignment of an interest in trust will carry a fee without words of inheritance, when the intent is manifest. There is no particular set of words necessary to raise a trust." [84]

There are two classes of trusts, between which a broad distinction has grown up. There are the "naked trusts," also called "dry" or "passive" or "executed" trusts, in which the legal estate only, without any powers or duties, is vested in one person, and the beneficial interest, with no restriction upon the management of the estate, in another. These trusts would, under an honest and liberal construction of the statute or uses, be turned into the legal estate, and the trustee of the naked title would and should be cut out, as a useless figure, like the old feoffee to uses. There is, however, another and much more important class of trusts,—those which are "active or executory," where the holder of the legal title has duties to fulfill and powers to exercise, and the cestui que trust, either in the

[84] Kent treats of "Uses and Trusts" in section 61 (4 Kent, Comm. 289–313), from which we quote freely in this section. We say nothing here of "resulting uses," as these cannot arise under our American system of conveyances. The shifting (or secondary), springing, and future (or contingent) uses defined by Kent are estates in the future other than remainders which could in the older English and American law be only created as uses, to be out of these transformed by the statute of uses into legal estates, but which under modern statutes may be raised directly, and which we have discussed under the head of "Executory Devises and Perpetuities." The leading modern English book on "Trusts and Trustees" is Lewin's. The leading American text-book is Perry's. We are here concerned with trust estates only in so far as the title is effected by the dual ownership. The matter is closely interwoven with the subject of "Powers," which will be treated in a separate chapter; and with the separate estate, in equity, of married women. An equitable estate or trust is assignable whenever the corresponding legal interest would be; e. g. an equitable interest in a contingent remainder. Cummings v. Stearns, 161 Mass. 506, 37 N. E. 758.

nature of things (as in a trust for the benefit of a charity or of minors or of creditors) or under the words of the deed or will or other instrument creating the trust, has not the free management and disposition of the land or fund. The trustee must lease, collect rents, pay taxes and repairs, sell and convey. The beneficiaries can only receive and enjoy net rents or net proceeds. Such trusts are very common in the complex business arrangements of our days, and to throw the legal title and full ownership on those for whose benefit such a trust is raised, and to blot out the trustee's powers and duties would defeat the object in hand altogether. Such trusts must be permitted. This distinction was first recognized by the Revised Statutes of New York, which abolish all uses and trusts, by vesting the full estate in the beneficiary, except as therein excepted, that is: (1) Trusts known or implied by law, for the prevention of fraud; (2) active trusts, where the trustee is clothed with some actual power of disposition or management, which cannot be properly exercised without giving him the legal estate and actual possession.

The chapter on "Uses and Trusts" of the Revised Statutes of New York has been transferred almost bodily into the laws of Michigan, Wisconsin, Minnesota, the Dakotas, and in part to Alabama and other states;[85] and its main principle, the suppression of dry or

[85] Rev. St. N. Y. pt. 2, c. 1, art. 2, of which, counting the sections as in the corresponding chapter of the Minnesota Statute from 1 forward, section 1 abolishes all uses and trusts not provided for in that chapter; section 2 reenacts the statute of uses as to "executed" uses; section 3 says: "Every person who by any grant, assignment or devise is entitled to the actual possession of lands, and the receipt of the rents," etc., "in law or in equity, shall be deemed to have a legal estate therein," etc. See Gen. St. Minn. 1878, c. 43 (Gen. St. 1894, §§ 4274–4276); Rev. St. Wis. § 2071, etc.; Civ. Code Cal. §§ 847–871; Civ. Code Dak. §§ 273–295; and the same in Montana, Idaho and Michigan. A clause in these statutes says that the trustee, where the trust is allowed, shall take the whole estate in law and equity, and that the cestui que trust shall take no interest in the lands, but may enforce the trust in equity; but this makes no real change in the law, as the trustee can no more in these states than elsewhere dispose of his estate in the lands, to the prejudice of the cestui que trust, whose rights, if we be allowed to use the phrase, may be said still "to run with the land." Only four purposes are recognized by these statutes for which land can be put into the hands of a trustee: (1) To

naked trusts, has been also adopted in Georgia, with the broad exception that a trustee may always hold the title for any female or minor or persons otherwise under disability, without other powers or duties than such as are implied therein, such as the right to enforce or defend it in the courts.[86] Wherever a trust is expressed in the same deed, or other transfer, or devise which confers the legal title, he who purchases from the holder of the legal title always takes subject to the trust. He is bound to know the title which he buys, and has notice, in consideration of law, of all its limits and defects; and this though the deed or transfer under which trustee and cestui que trust derive their rights be not recorded, and have never come to the purchaser's actual knowledge.[87] Such a rule would be unjust as to chattels of which the ownership is shown by possession, but it is eminently just as to land the title to which rests ordinarily upon some writing; and the only case in which one buying from a trustee might take the land free from the trust imposed is either when the trustee has and exercises a "power" of conveyance, of which we shall treat in a chapter on "Powers," or when the trustee has, aside of the trust deed of which the buyer has neither knowledge nor constructive notice, another apparent

sell it for the benefit of creditors. In California (Civ. Code, § 857), the Dakotas (Civ. Code, § 282), etc., to sell, and apply the proceeds according to directions. (2) To sell, mortgage, or lease, for the benefit of legatees (annuitants), or to meet charges upon it. (3) To receive the rents and profits, and to apply them to any one's use for his life or for a shorter term. (4) To receive and to accumulate them within named time limits. Trusts for charitable purposes are governed by other chapters. A full discussion of the New York system may be found in Weeks v. Cromwell, 104 N. Y. 625, 10 N. E. 431. The provisions of the California Civil Code, with those of Idaho, Montana, etc., diverge widely from those of New York, especially as to resulting trusts, as seen infra.

[86] Code Ga. §§ 2305–2318. No trust for man sui juris, Gray v. Obear, 59 Ga. 675; may be created for unborn children, Pierce v. Brooks, 52 Ga. 425.

[87] We refer to Basset v. Nosworthy, 2 White & T. Lead. Cas. Eq. 1, with its English and American notes as the readiest handbook and collection of authorities on the conflict between the secret equity and a purchaser for value, while Le Neve v. Le Neve, Id. 109, is the best on the conflict between the unrecorded deed and the like purchaser. It will be seen that a mortgagee making a present advance stands on the same footing with a buyer.

title to the land, such as adverse possession for the number of years named in the statute of limitations.[88]

A trust, not declared in the instrument, through which the legal estate comes, whether it arises by the act of parties or by operation of law, is known as a "secret trust." One who purchases the legal estate "for value," and in "good faith," or "without notice" of trust, holds the land free from it. A "volunteer"—one to whom the land is devised, or is given; e. g. through the natural love of the donor for wife, child, or husband—takes subject to the trust, though it be secret; and it is not secret where the law authorizes the recording of the paper which raises it, and it is put upon the public registry, or where the purchaser, before parting with the price or receiving his deed, has actual or constructive notice. For the learning on this subject, we must refer the reader to books on Equity, except as we recur to it under the head of "Lis Pendens," and in the chapter on the "Registry Laws." [89] In fact, this liability of an equitable right to be lost through a purchase in good faith and for value is the one great feature which distinguishes equitable rights from those good both in law and equity, and the main weakness of the former.

The measure of the rights which are conferred by the trust declared in a will or deed, and the ways for enforcing these rights, lie beyond the scope of this work.[90] But the principle that "no trust

[88] Messrs. Hare and Wallace, in their note on Le Neve v. Le Neve, in 2 White & T. Lead. Cas. Eq. 109, say: "Where a deed is an essential link in the chain to the purchaser, a presumption of notice of its contents is raised by legal construction, which cannot be overthrown by the strongest evidence," etc.

[89] Free use will under those heads be made of the notes in White & Tudor's Leading Cases in Equity upon Le Neve v. Le Neve, just mentioned, and upon Basset v. Nosworthy,—the two first cases in the second volume.

[90] Perhaps we ought to state here the one proposition of the law of trusts,—that equity will aid a trust defectively raised for valuable consideration (money or marriage), but not a voluntary trust, though it be in favor of a wife or child, whom the donor, declaring the trust, is under moral obligation to support or provide for. Story, at least, in his Equity Jurisprudence (sections 433, 987), says that exceptions in favor of wife and child are no longer allowed; and so says Pomeroy in his Equity, in a note to his section 997; but, as will be seen in the chapter on "Powers, Defective Execution," some courts have yet quite lately aided defects in favor of wife or children.

shall fail for want of a trustee" is of the highest moment in the law of land titles, and with but few exceptions is applied to all cases of public (or charitable) and of private trusts.[91] Where a beneficial interest is created, but the legal title is not conveyed or devised, the grantor or the heirs of the testator become trustees for the purposes declared. Where, before the abolition of marital power, a "separate estate in equity," which is a trust, was declared for a married woman, and no trustee named, the husband would hold the title, as far as the law threw it on him, as trustee for the wife. Where a debtor conveys his lands to be sold for the benefit of his creditors, and the assignee named fails to accept, the equity court will appoint a trustee, or will act as trustee through its officer, known as its receiver. Where land is left for some charitable purpose, otherwise lawful and ascertainable, but no trustee is named, the court will appoint one, with such succession as is needed.[92] In short, those parties whom the owner of land intended to exclude from its beneficial enjoyment, by declaring a trust, cannot profit by the accident that there is no one clothed with the naked title, or intrusted with the management.[93]

[91] Neither the New York nor the California chapter on uses and trusts reenacts this maxim. But see Story, Eq. Jur. §§ 1058–1061, 1090; Lewin, Trusts, c. 28 (beginning); Adams v. Adams, 21 Wall. 186 (whoever holds the legal title becomes trustee); Bundy v. Bundy, 38 N. Y. 410. A husband conveying to his wife, where the deed is not valid at law, becomes trustee for her. Garner v. Garner, Busb. Eq. 1.

[92] See hereafter, in chapter on "Title by Marriage, Separate Estate in Equity." The statutes of New York, Michigan, Wisconsin, and Minnesota regulate appointments of new trustees by courts having equity jurisdiction, as do many other states, while such appointments are made in other states on general principles. See Coleman-Bush Inv. Co. v. Figg, 95 Ky. 403, 25 S. W. 888.

[93] The appointment of trustees by the court having equity jurisdiction rests in many states on the usages of equity. In New York, and in the states copying its law of uses and trusts, it is to a great extent governed by statute. The jurisdiction is exercised much oftener to supply the place of a trustee who has died or resigned or become unfit to perform his task than to supply the want of an original appointment. On general principles, the decree appointing a trustee ought not to be made without bringing all persons before the court whose interest or whose naked legal estate might be affected; but ex

Under the English system of trusts, as it was brought to this country, there are (or were) "resulting trusts implied by law," aside from those arising by grant, written declaration or devise; that is, in the words of Kent, "where an estate is purchased in the name of A., and the consideration money is actually paid at the time by B., there is a resulting trust in favor of B." [94] The law of uses and trusts in the Revised Statutes of New York, with its copies in Michigan, Wisconsin, and Minnesota, and also that of the Virginias, of Kentucky, and several other states, does away with this doctrine, very properly, as it seems to the writer; for, unless a fraud has been perpetrated on him who paid the price, the purchase in the name of another only shows a gift from the former to the latter, which should be valid, unless it be in fraud of the former's creditor.[95] The statutes of California, the Dakotas, etc., have re-enacted the old law of resulting trusts; and the courts in these states, as will be shown in the chapter on the statute of limitations, show much favor to these trusts.[96] There are, however, trusts resulting from wrong (ex maleficio), which even New York and the states following in its lead respect and enforce. These arise, when the money or effects of one or more persons are, without his or their consent, used in the purchase of land in the name of another, or when the funds of a charity or of the public are so used. In such case, equity looks upon the party to whom the land is conveyed as a trustee for the same persons or purposes to whom the money or effects

parte orders have been made repeatedly on full deliberation, and have been held good against attack. Ex parte Knust, Bailey Eq. 489; Sullivan v. Latimer, 35 S. C. 422, 14 S. E. 933.

[94] 4 Kent, Comm. 305, 306. The resulting trust is a copy of the use which resulted to the feoffor, when the feoffee had paid no consideration, and had no claims of blood.

[95] Rev. St. N. Y. pt. 2, c. 1, tit. 2, § 51: "Where a grant for a valuable consideration shall be made for one person, and the consideration therefor shall be paid by another, no use or trust shall result in favor of the person by whom such payment shall be made; but the title shall vest in the person named as the alienee," etc. This is copied in the other states named in the text, either literally or substantially.

[96] Civ. Code Cal. § 2217. In states which have not abolished resulting trusts, or have even re-enacted them, no trust results for the grantor who has conveyed without consideration. Donlin v. Bradley, 119 Ill. 416, 10 N. E. 11.

belonged, with which the land was bought.[97] The most frequent case of such resulting trusts takes place where a trustee of an express trust, such as an executor, guardian, assignee for creditors, officer handling public moneys, etc., buys land in his name, or in the name of his wife or child, with some of the funds intrusted to him in the line of his duties.[98]

In those states in which the statute abolishes the resulting trust which arises when the consideration is voluntarily paid by one, while the conveyance is made to another, the law always provides that such an arrangement shall be deemed fraudulent as against the existing creditors of the person paying the consideration; in other words, that the property thus bought shall be liable to the then existing debts of the person with whose means it is bought.[99]

[97] Davoue v. Fanning, 2 Johns. Ch. 252 (where an executor bought in his wife's name land coming to him in trust) is the leading American case on trusts ex maleficio of this class. Fox v. Maekreth, 1 White & T. Lead. Cas. Eq. 188, and notes are quite exhaustive. This matter belongs properly to a work on equity. See Pom. Eq. Jur. §§ 1053, 1054. Story, Eq. Jur. § 1255, and sections following, speaks of these trusts as arising in invitum. Several instances will be given in the course of this work.

[98] Lewin, in his work on Trusts and Trustees (chapter 30, § 2, pl. 7), says: In tracing money (of a trust fund) into land, the principal difficulty in the old cases arose from the statute of frauds, the seventh section enacting that all declarations of trust in land should be manifested and proved by some writing; but Lord Hardwicke, on the ground that constructive frauds were excepted out of the statute of frauds, ruled that parol testimony might be given (quoting Ryal v. Ryal, Amb. 413), which is reluctantly followed by Sir T. Clarke in Lane v. Dighton, Id. 409; now settled, Lench v. Lench, 10 Ves. 517; Hopper v. Conyers, L. R. 2 Eq. 549). He goes on in placita 10 to show that, where the trust fund was only part of the price, the cestui que trust has only a lien; if the whole, he has the option to keep the land; quoting Trench v. Harrison, 17 Sim. 111. The American leading case as to following a trust fund into land is Murray v. Lylburn, 2 Johns. Ch. 441. See, also, Kaufman v. Crawford, 9 Watts & S. 134; Barr v. Cubbage, 52 Mo. 404; Bazemore v. Davis, 55 Ga. 504. See, also, Fay v. Fay, 50 N. J. Eq. 260, 24 Atl. 1036. Metzner v. Bauer, 98 Ind. 425, probably goes further than any other case.

[99] Rev. St. N. Y. pt. 2, c. 1, tit. 2, § 52: "Every such conveyance shall be presumed fraudulent against the creditors at that time of the person paying the consideration," etc. The Kentucky statute says more plainly: "Such deed shall be deemed fraudulent as against the existing debts and liabilities of the person paying," etc. Before the statute the law was so held in Kentucky in Doyle v. Sleeper, 1 Dana, 531.

In a wider sense, every incomplete title becomes a trust. Thus, ıere the owner of land seeks for a good or valuable consideration convey land to another, but overlooks or omits some one of the malities which the law requires for a transfer of the title, equity ises a "trust" for the grantee, and thenceforward the grantor ll hold the title in trust for such grantee. Or where a person ls in land at an execution sale, or at a judicial or chancery sale, t has not received the commissioner's deed, the legal title still mains in the former owner, in trust for such purchaser, and so in e manifold circumstances, in which some right of ownership is ined, without a full and formal title.[100] In such cases, however, e trust is only nominal. The duties which the law imposes on the ıstee of an express trust, of disinterested fairness towards the neficiary, and which play such an important part in the law of ısts, find no place here.[101]

Even before the Revised Statutes of New York undertook to abol- ı naked trusts, and now in states which have not done so, an in- rument creating a trust was, and is, if possible, so construed that e trust estate ceases, and the legal title is cast on the beneficiaries soon as the ends of the trust are fulfilled. In wills or family ttlements trustees are appointed to manage a landed estate for me one or more persons (say minors, married women, or persons ought to be unthrifty) during their lives, with a direction giving e land, after such life or lives, to remainder-men. In the absence clear words, such remainder-men take from the trustee the whole tate, both legal and equitable.[102]

100 Examples will be given in the chapter of "Title out of the Sovereign" ıere the party who improperly or wrongfully gets the patent from the state United States is treated as a trustee for him who should have gotten the tent.

101 Examples will be given in states in which the mortgagee is still sup- sed to hold the legal title, and the mortgagor only an equity; yet the former, his dealings with the property, need not look to the interest of the latter; d it is so in the relations referred to in the preceding note.

102 Reeves v. Brayton, 36 S. C. 484, 15 S. E. 658; referring for test, as to ıeu purpose is ended, to Reeves v. Tappan, 21 S. C. 1. It may be important cast the legal title on the remainder-men, as they might otherwise be bound the running of the statute of limitations against the trustee. Meek v. ·iggs, 87 Iowa, 610, 54 N. W. 456.

We have stated above that the equitable estate raised by a deed or devise in trust is alienable by the beneficial owner like a legal estate, and, like the latter, liable to be taken for his debts; but this proposition is subject to some exceptions. Not merely that the proceeding by which an equitable estate under an active trust can be sold, or its issues and profits sequestered, is often different from those which would be taken against a legal estate in fee or for life. This is matter of procedure, with which we are not here concerned. But it has been held in many states that the owner of land may vest it in trustees for the purpose of management, with directions that they shall pay the net rents, issues, and profits to a named beneficiary for life, or for some other stated term, without power of "anticipation" or of alienation on the part of such beneficiaries; and that such restraint is valid. As to femes covert while they were under disability, such restraining clauses were always and everywhere enforced.[103] A late New York statute, proceeding upon the ground that trusts should only be created for those incapable of taking care of themselves, disables the life beneficiary of rents and profits from assigning them, unless he has gotten in the reversionary or remainder interest.[104] As to the capacity of the donor to shield the income (which is practically the life estate) of property which he gives to another (generally a child or grandchild) from the creditors of the person he desires to benefit, the question is not without difficulty; and the courts of the different states are by no means agreed upon it. Kentucky is among the states most favorable to the creditor.[105]

103 Simonds v. Simonds, 3 Metc. (Mass.) 562, In re Macleay, L. R. 20 Eq. 186.

104 Sess. Acts N. Y. April 21, 1893, c. 452.

105 We assume that there is a statute declaring that all interests, legal or equitable, in land, shall be liable for the owner's debts. In Eastland v. Jordan, 3 Bibb, 186, a slave was given to A., "in trust that the proceeds be applied to the maintenance of B. for life." A life estate in the slave was held liable to B.'s debts. In Knefler v. Shreve, 78 Ky. 297, an estate was devised to a trustee, thus: "He shall collect rents, and after paying taxes, etc., pay the rest to the son in person, quarterly for life,"—giving the state of the son's family as a reason for his larger share. The life income was held liable to attachment, and to an assignment for creditors. In Illinois the section on creditors' bill (Rev. St. c. 22, § 49) exempts broadly all trusts created by another for the cestui que trust from liability for his debts; certainly in all cases

There can be no doubt that a father, knowing the heavy indebtedness of a son, or his weakness, which will involve him in new debts, as long as he can obtain credit, may convey or devise property to a trustee, with directions to maintain such son, or the son and his family, out of the income, in such manner as the trustee may deem fit; and a man may in like manner provide for the maintenance of any other person, whether of his own blood or not. He might just as well have set aside an income for feeding a favorite horse. The support dealt out by the trustee to the unthrifty son is no more the latter's property, and no more subject to be taken in execution, than the allowance of feed is the property of the horse.[106] We may go a step further. When the trustee is not to support the family, but to pay a lump sum at short intervals, and such sum is no greater than a modest support, the right to this allowance cannot be attached.[107] The courts of Missouri have gone much further, and lay the rule down broadly: A testator (and, on the same grounds, a living donor) may, by placing an estate in the hands of trustees, protect the income from the creditors of the equitable life tenant;[108] and Illinois has declared the same rule by statute.[109] The income for life may be effectually protected by a trust for the support of the beneficiary's family, or the maintenance of himself, wife, and children. It would be impracticable to separate the part of the income needed to support the husband and father from that of the other members, while they live together; and such words would

where such seems to be the intent. The United States district court for the Northern district of Illinois, in bankruptcy, under this statute, refused to subject the life estate in Illinois lands of the same debtor, whose Kentucky lands were sequestered by the above decision. The Kentucky decision is supported by Tillinghast v. Bradford, 5 R. I. 205, on one point; by Benson v. Whittam, 5 Sim. 22. Thorp v. Owen, 2 Hare, 611, Spooner v. Lovejoy, 108 Mass. 529, and Rhett v. Mason, 18 Grat. 541, on another. In Missouri the donor can protect the equitable life estate from the holder's creditors. Jarboe v. Hay, 122 Mo. 341, 26 S. W. 968; Lampart v. Heydel, 96 Mo. 441, 9 S. W. 780.

[106] White v. Thomas, 8 Bush, 662 (use of dwelling and 20 acres), goes beyond this, and is hardly in accord with other cases in that state. See Jacob v. Jacob, 4 Bush, 110.

[107] Salter v. Samuel, 3 Metc. (Ky.) 259; Pope v. Elliott, 8 B. Mon. 56.

[108] Jarboe v. Hay, 122 Mo. 341, 26 S. W. 968, following Lampart v. Heydel, 96 Mo. 441, 9 S. W. 780, and distinguishing In re Collier's Will, 40 Mo. 287.

[109] Rev. St. Ill. c. 22, § 49.

probably shield the whole income from attachment, and at the same time prevent alienation.[110] Such a devise gives to each member of the family an interest in the land or its income, enforceable by a court of equity.[111]

A trust for a charity differs from one for "benevolence." The nature of charity, as understood in the law, is the devoting of wealth to uses which will benefit an indefinite class, though not necessarily a large class. Every disposition of a man's estate for the benefit of others is "benevolent," though the persons to receive it are few, and are named. Trusts for charitable purposes are favored in the law over those of mere private benevolence. A few cases pointing out the difference between the two kinds of trust are referred to in a note.[112]

NOTE. A full account of trustees to preserve contingent remainders, who were so often met with in English wills or family settlements, can be found in Webster v. Cooper, 14 How. 488, a writ of entry for lands in Maine brought by a remainder-man in tail, under a will made in England in 1778. A life estate is given to the testator's granddaughter, and, after forfeiture, to three trustees and their heirs during her life; then to her eldest son in tail male, he being unborn, and his remainder therefore contingent. The vested remainder (such the courts would hold it) was invented and introduced here, and in all strict settlements, to protect the contingent remainder from being defeated by feoffment or fine. It is held there that such trustees have really (as the forfeiture never happens) neither duties nor estate, but are mere men of straw, but there would be a forfeiture should the life tenant enfeoff another in fee.

§ 21. The Rule in Shelley's Case.

In Shelley's Case the rule was stated to be "that when the ancestor, by any gift or conveyance, taketh an estate of freehold, and in the same gift or conveyance an estate is limited, either mediately

110 Rudd v. Hagan, 86 Ky. 159, 5 S. W. 416. Compare Stillwell v. Leavy, 84 Ky. 379, 1 S. W. 590.

111 Forbes v. Darling, 94 Mich. 621, 54 N. W. 385.

112 Jones v. Habersham, 107 U. S. 184, 2 Sup. Ct. 336 ("it is only when a gift may be applied to benevolent purposes, not charitable, that the gift fails," etc.); Suter v. Hilliard, 132 Mass. 412; Russell v. Allen, 107 U. S. 163, 2 Sup. Ct. 327 (deeds to the "use and benefit of the Religious Institute of St. Louis, Mo.," upheld, though the institution was not established nor incorporated till after the donor's death). Compare on this subject the first section, infra, of chapter on "Devise."

r immediately, to his heirs, in fee or in tail, 'the heirs' are words of mitation of the estate, and not words of purchase." The plain ıeaning is that when a deed or will (for the latter is included by ıe old lawyers under the name of 'conveyance') gives land (either ı possession or in remainder after another particular estate) to .. for life, and after his death to A.'s heirs, A. takes a fee which he an pass by his deed; or, if the grant or devise be to A. for life, nd after his death to the heirs of A.'s body, A. has at once an state tail, which he can dock by fine or common recovery, or such ther means as the statute prescribes. Here the limitation is im-ıediate, and, if there is a devise to A. for life, remainder to B. for ife, remainder to A.'s heirs, A. would still take a fee, which he can ell or devise, subject to a life estate in B., to take effect upon A.'s eath.[113] Whatever may have been the origin of the rule,—and ıost likely it arose from considerations of feudal policy,—it had one ;ood effect: in every case it turned what the grantor might most ›robably have intended as a strict settlement into an immediate es-ate of inheritance, subject to the owner's disposition by sale, gift, r devise; and it thus kept in the "track of commerce" many landed states, which, but for the rule, would have been tied up for a whole ;eneration.[114] For the latter reason it seems the American legis-

[113] 1 Coke, 88, Easter term, 21 Eliz., in C. B. and Trinity term, 23 Eliz., ›efore all the judges, resting on cases in the Year Books. There was an ntermediate estate for years after that which was devised for life to the irst taker. A late American instance of an intermediate estate is Hoover v. Hoover, 116 Ind. 498, 19 N. E. 468. In this case, and many others of those ited in this section, the grant or devise for life, enlarged by a remainder to eirs into a fee, was itself a remainder after a preceding life estate.

[114] Perrin v. Blake, 4 Burrows, 2579, reversed in exchequer chamber (Hargr. Law Tracts). See 4 Kent, Comm. 217–222, where it was held that the rule would not yield to the most clearly expressed intent of grantor or devisor. So, also, Kingsland v. Rapelye, 3 Edw. Ch. 1. Kent states the reasons for he rule given by Lord Mansfield, Blackstone, and Hargrave. To the Eng-ish lawyer, however, who thinks of the "heir at law" in the singular, the ›lural "heirs" naturally suggests the whole line of heirs stretching into the uture; while in America several heirs who are parceners or tenants in ;ommon are the rule, and the plural indicates them. Hence the reason for he rule is much weaker in America than in England, or in that country vhen lands in gavelkind are devised. Doe v. Laming, 2 Burrows, 1100. And a devise in remainder to the heir (in the singular) is not within the ule. Archer's Case, 1 Coke, 66; In re Amos [1891] 3 Ch. Div. 159. The

latures and courts which abrogated the rule acted shortsightedly. The example was set by the Revised Statutes of New York, and has since been followed in Virginia, West Virginia and Kentucky, Massachusetts and Maine, Connecticut, Michigan, Wisconsin and Minnesota, Tennessee and Missouri, Alabama, Mississippi, California, the Dakotas and New Mexico, having in Kentucky been held not to be in force, even before its abolition by statute; in Rhode Island the words "issue" or "children" are declared to be words of purchase; and in New Hampshire, New Jersey, Ohio, Kansas, and Oregon the rule is repealed as to devises, in order to effectuate the intent of the testator, but not as to deeds of conveyance.[115]

case of Doe v. Laming has been much criticised; but as the remainder was limited "to his heirs, female as well as male," and females and males could not be heirs together, the words were really not words of inheritance, and the decision is plainly correct.

[115] Massachusetts, Pub. St. c. 126, § 4; Maine, Rev. St. c. 73, § 6 (see Read v. Hilton, 68 Me. 141); Connecticut, Gen. St. 1821, § 2953; New York, Rev. St. pt. 2, c. 1, tit. 2, § 28; Virginia, Code, § 2413; West Virginia, Code, c. 71, § 11 (the rule was in force till 1849, and as to wills and deeds made before that time. Chipps v. Hall, 23 W. Va. 504); Kentucky, Gen. St. c. 63, art. 1, § 10 (was never in force in that state. Turman v. White, 14 B. Mon. 560); Tennessee, Code, § 2814 (in force till 1852. Williams v. Williams, 11 Lea, 652; Hurst v. Wilson, 89 Tenn. 270, 14 S. W. 778, at least if the testator died before the date of repeal); Michigan, 2 How. Ann. St. § 5544; Wisconsin, Rev. St. § 2052; Minnesota, Gen. St. 1878, c. 45, § 28; Gen. St. 1894, § 4389 (practically never in force in these three states. See Gaukler v. Moran, 66 Mich. 353, 33 N. W. 513); Alabama, Code, § 1829; Mississippi, Code, § 2446 (dating back to 1857); Missouri, Rev. St. §§ 8838, 8911 (rule never recognized by her supreme court); California, Civ. Code, § 779 (since first enactment of "Field Code"); Dakota, Terr. Civ. Code, § 236; New Mexico, Comp. Laws 1884, § 1425. In Connecticut the ordinary words for raising an estate tail in a devise have at an early day been construed as a life estate and remainder. Borden v. Kingsbury, 2 Root, 39. For effect of repeal in New York, see Moore v. Littel, 40 Barb. 488; New Hampshire, Pub. St. c. 186, § 8; Rhode Island, Pub. St. c. 182, § 2; New Jersey, Revision, "Descent," 10; Ohio, Rev. St. § 5968; Kansas, Gen. St. par. 7256; Oregon, Hill's Ann. Laws, § 3093. In Cloutman v. Bailey, 62 N. H. 44, a doubt is intimated whether the rule was ever in force in New Hampshire; but it was recognized in Dennett v. Dennett, 43 N. H. 499, and in Crockett v. Robinson, 46 N. H. 454. Like the statutes, so the decisions of courts are less favorable to the application of the rule to wills than to deeds; yet, as is said in Auman v. Auman, 21 Pa. St. 347: "Even in a will supposed to

Though a North Carolina statute construes any limitation to the heirs of a living person as meaning his children, which, if fully enforced, would repeal the rule in Shelley's Case, it has nevertheless been held very recently to be still the law, and has been applied in what might be called an extreme case.[116] The tendency in those states which still uphold the rule has been to allow it to be more easily evaded in the construction of wills than of deeds, as the latter are supposed to be drawn with more attention to form;[117] and where an executory contract (such as marriage articles) speaks of a conveyance to be made to A. for life, and that the remainder is to be limited to his heirs or to the heirs of his body, it has, even in England, for a long time been the rule that the conveyance must be made so as to effectuate the intention; that is, the life estate will be settled on A. for life, with remainder to such person or persons as shall at the time of A.'s death be the heir or the heirs of his body, and to his or their heirs and assigns for ever.[118] Such words would most probably create a strict settlement, and put it out of the power of A. or of his execution creditors to dispose of the whole fee.[119]

be made when the testator is inops consilii, the word 'heirs' has a fixed sense, which will adhere to it until it is explained away." So, also, Doebler's Appeal, 64 Pa. St. 9. "We must not hesitate." Bassett v. Hawk, 118 Pa. St. 94, 11 Atl. 802.

[116] Code N. C. § 1329. See cases cited below in note 122. This section of the Code was enacted in 1856. See doubt in Jenkins v. Jenkins, 96 N. C. 254, 2 S. E. 522. Other cases pass on the rule, and it was enforced without question as to its existence in Ex parte McBee, 63 N. C. 332, as to a deed made in 1865. Starnes v. Hill (N. C. 1893) 16 S. E. 1011, seems to carry out the statute, turning heirs into children.

[117] Hochstedler v. Hochstedler, 108 Ind. 506, 9 N. E. 467, and passim.

[118] 4 Kent, Comm. 240; Lord Glenorchy v. Bosville, Cas. t. Talb. 3, 1 White & T. Lead. Cas. Eq. 1. Hare and Wallace, in their notes on the case, say they can find no American case in which, on a mere intention to provide for children in marriage articles, a strict settlement is decreed, but they quote from states in which the rule in Shelley's Case is fully recognized, cases in which executory contracts were withdrawn from it; Wood v. Burnham, 6 Paige, 513; Saunders v. Edwards, 2 Jones, Eq. (N. C.) 134; Tallman v. Wood, 26 Wend. 9; Choice v. Marshall, 1 Kelly (Ga.) 97; Wiley v. Smith, 3 Kelly, 551; Loving v. Hunter, 8 Yerg. (Tenn.) 4; Garner v. Garner, 1 Desaus. Eq. (S. C.) 437,—to which may be added the late case of Henderson v. Henderson, 64 Md. 85, 1 Atl. 172.

[119] In a deed, if the grantor wishes the heir of the first taker to have the

There is in the states which fully recognize the rule, or which acted upon it until they repealed it by statute, great diversity as to the consistency with which the courts follow it out. None go so far as Pennsylvania, Indiana, and Illinois, while Ohio has frittered it away even as to deeds, though it is repealed only as to devises; and the rule is rather weak in the Carolinas.[120] In the states which follow the rule closely the grant or devise is not taken out of the rule by words clearly indicating the testator's intent that the first taker shall have only a life estate, the phrase "and no longer," after the limitation for life, or words forbidding alienation, or securing the estate to the heirs, are held immaterial; in fact, the latter clause may, by creating a fee in the first taker, defeat the heirs.[121] That a statute turns estates tail into fee simple, and

remainder after his life by purchase, he must be very precise; for such language as "heirs at his death," "heirs then living," may not suffice where the rule is lived up to. Criswell's Appeal, 41 Pa. St. 288; Cockins' Appeal, 111 Pa. St. 26, 2 Atl. 363. The point in the text was for the first time decided directly in Earnhart v. Earnhart, 127 Ind. 397, 26 N. E. 895. See, however, to the contrary, Richards v. Bergavenny, 2 Vern. 324.

120 In Indiana the rule was recognized in cases quoted hereafter in 1 Ind. and 5 Ind., and has been steadily maintained ever since. See, however, as to testator's intentions, McMahan v. Newcomer, 82 Ind. 565. Illinois, in the older cases (Baker v. Scott, 62 Ill. 86, and Butler v. Huestis, 68 Ill. 594) did not carry the doctrine out very steadily, but has retrieved the lost ground, except as far as the statute defining estates tail, defeats its operation. In South Carolina the rule was first recognized in Dott v. Cunnington, 1 Bay, 453, and Carr v. Porter, 1 McCord, Eq. 60; but the doctrine has lately been relaxed. Ohio declared the rule part of its law in McFeely v. Moore, 5 Ohio, 466. It is here and in New Jersey in force only as to deeds. And in Reddish v. Carter, 1 Cinc. R. 283, the word "heirs" was on very slight grounds construed into "children." As in both these states an estate in tail is turned into a life estate, with remainder in fee to the first set of lineal heirs, the rule defeats itself whenever the remainder is given to heirs of the body, and not to plain heirs. In Maryland the rule was first recognized in Horne v. Lyeth, 4 Har. & J. 431, but has been avowedly relaxed, as stated, in Henderson v. Henderson, supra. See, for the limit of the rule in Pennsylvania, Guthrie's Appeal, 37 Pa. St. 9. Very strong ground in favor of the rule is also taken in a case affecting chattels in Florida. Watts' Adm'r v. Clardy, 2 Fla. 369.

121 Allen v. Craft, 109 Ind. 476, 9 N. E. 919 (where the rule is called "inexorable"); Andrews v. Spurlin, 35 Ind. 262; Hageman v. Hageman, 129 Ill. 164, 21 N. E. 814 (relying as to futility of restrictive words on 1 Prest. Est.

thus renders them subject not only to sale, but also to devise, is no reason against applying the rule when the limitation after the life estate is to "the heirs of the body."[122] The word "nearest," when prefixed to "heirs," does not mean "immediate," so as to turn them into takers by purchase.[123] More difficulty arises from the clause often added "to be equally divided between them." This clause shows that the plural in "heirs" is not meant for the succession in time, but by reason of the plurality of heirs at the testator's death. It might be literally complied with, by dividing the estate per capita among those who are the first taker's heirs, though in a descent from him they would take in different proportions. Yet in Pennsylvania, Indiana, Illinois, Maryland, and in the older cases in South Carolina, these words have been held to be unavailing against the "inexorable" rule;[124] while the later cases in South Carolina, and, as it seems, the uniform line of authorities in North Carolina, Georgia, and Florida, has deemed these words sufficient to overcome the rule.[125] The word "issue" is the equivalent of "heirs of the body," and, like the latter words, raises an estate tail.

281); Bender v. Fleurie, 2 Grant's Cas. 345. Belslay v. Engel, 107 Ill. 182, in which the rule was made to yield to the intention of the testator on the authority of Perrin v. Blake in the king's bench before the reversal, is distinguished, but in fact overruled. So, in California, before the statute, restrictive words were held immaterial. Norris v. Hensley, 27 Cal. 439.

[122] Clarke v. Smith, 49 Md. 106; Bender v. Fleurie, supra; Carpenter v. Van Olinder, 127 Ill. 43, 19 N. E. 868. "Begotten heirs and heiresses" is the same as heirs of the body. Leathers v. Gray, 101 N. C. 169, 7 S. E. 657; one judge dissenting, because it is not a technical word of inheritance.

[123] Ryan v. Allen, 120 Ill. 648, 12 N. E. 65.

[124] Clarke v. Smith, supra; Cockin's Appeal, 111 Pa. St. 26, 2 Atl. 363 (a hard case). The equal amount to be given to all heirs living at time of death was referred to the sets of heirs of the two life tenants. So in Virginia, while the rule was in force. Moore v. Brooks, 12 Grat. 135. Cooper v. Cooper, 6 R. I. 261; Crockett v. Robinson, 46 N. H. 454. And so in New Jersey, then as to wills, and still as to deeds. Kennedy v. Kennedy, 29 N. J. Law, 185. Williams v. Foster, 3 Hill (S. C.) 193; quoting Jesson v. Doe, 2 Bligh, 1.

[125] Fields v. Watson, 23 S. C. 42; Jenkins v. Jenkins, 96 N. C. 254, 2 S. E. 522; Herring v. Rogers, 30 Ga. 615. The one division per capita among the immediate heirs breaks the line. Middleswarth v. Blackmore, 74 Pa. St. 414 ("dying without legal issue," before the Maryland act of 1862 giving to these words a new meaning); following Dickson v. Satterfield, 53 Md. 320, and Thomas v. Higgins, 47 Md. 439 (case of deed). Russ v. Russ, 9 Fla. 105.

In some of the states a remainder to "issue" after an estate for life is no better than a remainder to heirs—notably in Pennsylvania and Indiana—unless the contrary meaning of the word is clearly indicated.[126] In other states "issue" (when found in a will) is treated as a word of purchase. It was so treated in New York, while "the rule" was in force. It is admitted that this word or the phrase "lineal descendants" have not as much force as "heirs," and will more easily yield to the plain intention of the devisor or grantor.[127] The word "children" is properly a designation of persons, and, as such, a word of purchase.[128] In fact, it has been said that even the word "heirs," if it appears from the whole instrument that it was used in the sense of "children," may become a "word of pur-

[126] Allen v. Markle, 36 Pa. St. 117 (the words were "legitimate offspring"); quoting a number of earlier Pennsylvania cases, and Denn v. Puckey, 5 Term R. 306; Carroll v. Burns, 108 Pa. St. 386 ("lawful issue"); Andrews v. Spurlin, 35 Ind. 262 ("descendants"); Allen v. Craft, supra (arguendo); Armstrong v. Michener, 160 Pa. St. 21, 28 Atl. 447 (to A. for life, after his death to his issue, then to his next of kin, gives a fee). In Shalters v. Ladd, 141 Pa. St. 349, 21 Atl. 596, and 163 Pa. St. 509, 30 Atl. 283, the word "issue" was held, in the context, not to mean heirs. In O'Rourke v. Sherwin, 156 Pa. St. 285, 27 Atl. 43, where other parts of a devise were thought to make "issue" a word of purchase, it was said that it is a word of limitation.

[127] Mendenhall v. Mower, 16 S. C. 308 (in a declaration of trust drawn by a learned judge); Henry v. Archer, Bailey, Eq. 536; McIntyre v. McIntyre, 16 S. C. 290 ("issue of them and their heirs"); Cushney v. Henry, 4 Paige, 345. Always a word of purchase in New Jersey. Price v. Sisson, 13 N. J. Eq. 168; Henderson v. Henderson, 64 Md. 185, 1 Atl. 72, and the old case of Chelton v. Henderson, 9 Gill, 432 ("to J. D. for life, and, if he should have lawful issue, to that issue in tail, if not to T. D. in fee"); Boykin v. Ancrum, 28 S. C. 486, 6 S. E. 305. In a deed the word "issue" was always treated as a word of purchase, the word "heirs" being indispensable for an estate of inheritance. Doe v. Collis, 4 Term R. 299. See Price v. Sisson, 13 N. J. Eq. 168.

[128] Shearman v. Angel, Bailey, Eq. 351; M'Lure v. Young, 3 Rich. Eq. 559; Bannister v. Bull, 16 S. C. 220; Dudley v. Mallery, 4 Ga. 52; Gernet v. Lynn, 31 Pa. St. 94; Tate v. Townsend, 61 Miss. 316 ("to descend" to the children means simply "to go"); Jordan v. Gatewood, 1 Ind. 82; Kenniston v. Leighton, 43 N. H. 309 (where an attempt was made to carry the line to the child of an unborn child). In another case of an attempted perpetuity, A. for life, then to his children, and then to their descendants (Caldwell v. Willis, 57 Miss. 555), the court refused to discriminate, and made even the word "children" one of limitation, vesting the fee in A. Williams v. Sneed, 3 Cold. 533.

chase."[129] However, there are some Indiana cases in which "children" have been construed into heirs;[130] and though, after a devise to several, the word "children" is used in the remainder after the life estate first granted, it may appear further on that "heirs" were meant, and that the children of each were named only to prevent survivorship.[131] Where the deed or devise in a will begins with a grant or devise "to A. and his heirs," the usual words for creating a fee, the remainder given after the first taker's death must be limited in very precise language to persons who can take as purchasers, in order to cut down the fee.[132] To make the heirs or heirs of the body a new stem of descent by adding words of inheritance—"and to their heirs"—is generally unavailing. This is in fact a point that arose in the devise passed on in Shelley's Case.[133] Sometimes a remainder is given to male heirs, or to the heirs of the body of the first taker, by a named wife or husband,—words which would be fitly employed to create a special estate tail. In most of our states an estate tail, whether special or general, is turned into a fee; and

[120] Ridgeway v. Lanphear, 99 Ind. 251; Brumfield v. Drook, 101 Ind. 190; Doe v. Jackman, 5 Ind. 283 ("children or heirs of the body," understood in the former sense, took a remainder). The words "male heir" in Harris v. Potts, 3 Yeates, 141, meant evidently a particular son, and so construed. Findlay v. Riddle, 3 Bin. 139, is a strong case, but not in harmony with later Pennsylvania authorities. In Doe v. Laming, 2 Burrows, 1100, Lord Mansfield held "his heirs, female as well as male," to mean sons and daughters. Chew's Appeal, 37 Pa. St. 23, excluding some of the heirs by name or designation, makes the others take as purchasers. In re Dorney's Estate, 136 Pa. St. 142, 20 Atl. 645.

[130] Fletcher v. Fletcher, 88 Ind. 418; remainder to "respective children" being construed as being only meant to negative survivorship between two devisees. See, also, King v. Raa, 56 Ind. 1; Glass v. Glass, 71 Ind. 392; Biggs v. McCarty, 86 Ind. 352.

[131] In re Browning, 16 R. I. 441, 16 Atl. 717. The statute denying the application of the rule amounts to little after the decision in Boutelle v. City Sav. Bank (R. I.) 26 Atl. 53, being restricted to cases where a simple not where a fee tail is limited to the heirs.

[132] Allen v. Craft, supra, note 121. Hochstedler v. Hochstedler, supra, note 117, quoting from Preston on Estates: " 'Heirs' is a powerful word."

[133] Andrews v. Lowthrop, 17 R. I. 60, 20 Atl. 97 (to A. and to his heirs, and their heirs and assigns, forever, in a will, within the rule). "His heirs male and to their heirs male." Carroll v. Burns. 108 Pa. St. 386; George v. Morgan, 16 Pa. St. 95; and passim in other cases cited in notes to this section.

thus, by the operation of the statute to this effect, and (if the gift to the first taker is for life) of the rule in Shelley's Case, the estate goes to the general heirs by descent, unless disposed of by the deed or will of the first taker; and, at all events, otherwise than the grantor or devisor intended.[134] A life estate to the husband and remainder to the heirs of the wife, of course, do not coalesce; but an estate devised to husband and wife for their lives, and remainder to their heirs, which is presumed to mean their joint heirs, do unite into a fee.[135] A life estate with remainder to heirs in the rents and profits is the same as if given in the land itself; and, if both estates are made to be equitable, it is the same as if both were legal.[136] But where the life estate is equitable only (especially if under an active trust), and the remainder to heirs is legal,—in North Carolina also where the first taker is to have only the use during life,—the two estates, being of dissimilar natures, do not grow together into a fee.[137]

[134] Wayne v. Lawrence, 58 Ga. 15; McKenzie v. Jones, 39 Miss. 233; Cooper v. Cooper, 6 R. I. 261; Griffith v. Derringer, 5 Har. (Del.) 284; Simpers v. Simpers, 15 Md. 160; Dart v. Dart, 7 Conn. 250. "Next male heir" need not mean heir of the body, and raises estate in fee simple. McIntyre v. McIntyre, supra, where the first person so designated in the singular took a fee simple in remainder.

[135] Cockin's Appeal, supra, note 124; Steel v. Cook, 1 Metc. (Mass.) 281.

[136] Cannon v. Barry, 59 Miss. 289 (under will made before Revision of 1857, which first repealed the rule in Mississippi); McKenzie v. Jones, 39 Miss. 230; Martin v. McRee, 30 Ala. 116 (before repealing statute, separate estate to wife and trust in favor of her heirs). Leading English cases for applying the rule to executed and naked trusts are Wright v. Pearson, 1 Eden, 119; Jones v. Morgan, 1 Brown, Ch. 206; overruling Bagshaw v. Spencer, 2 Atk. 246. The distinction between executory and executed trusts was announced in Papillon v. Voice, 2 P. Wms. 471. See 4 Kent, Comm. 219, 220. See, also, Wayne v. Lawrence, supra.

[137] Kiene v. Gmehle, 85 Iowa, 312, 52 N. W. 232 (separate estate, etc., but put partially on the ground of intention); Appeal of Reading Trust Co., 133 Pa. St. 342, 19 Atl. 552; Ware v. Richardson, 3 Md. 505 (wife's estate a "separate estate"); Jenkins v. Jenkins, supra (but an estate "to A. for his own use and benefit" is not a trust estate. Siceloff v. Redman, 26 Ind. 251); Thurston v. Thurston, 6 R. I. 296; Austin v. Payne, 8 Rich. Eq. 9; Gadsden v. Desportes, 39 S. C. 131, 17 S. E. 706.

The rule in Shelley's Case applies to leaseholds,—that is, the life estate with remainder to heirs becomes an absolute interest;[138] and in like manner to lands which the will orders to be turned into money, and which equity treats as personalty. While the question under "the rule" arises generally as against grantees from the first taker, it sometimes takes this shape: that, the estate tail created under the old law being turned by the statute into a fee simple, subsequent remainders are shut out.[139] Another incident of the estate of inheritance built up under the rule is dower to the wife or curtesy to the husband of the first taker, even should the fee thus arising be defeasible and actually defeated.[140] A gift to a woman "and her present heirs" must, under the maxim, "nemo est haeres viventis," mean the same as to "her and her children." It would not raise the question between strict settlement and estate in fee, but the named devisee, and the children, designated either as such or as "present heirs," would take together as tenants in common; though, under many circumstances, especially if the person named has no children at the time of the grant or devise, such words are otherwise construed, as will be shown elsewhere.[141]

A few words should be said about the states which have not expressly abolished the rule in Shelley's Case, but in whose printed reports no cases can be found recognizing the rule. First, in Georgia, there is an enactment in force since 1859, by which the words "heirs," or "heirs of the body," or "lineal heirs," or "lawful heirs," or "issue," or any similar words, when used in limitations over, are held to mean "children" (with representation to predeceased children), whether the parent be alive or dead. This is a most effec-

[138] Hughes v. Nicklas, 70 Md. 484, 17 Atl. 398, based on English cases applying "the rule" to money in the funds; and the older case, in the same state, of Horne v. Lyeth, 4 Har. & J. 431; Seegar v. Leakin, 76 Md. 500, 25 Atl. 862; Little's Appeal, 117 Pa. St. 14, 11 Atl. 520.

[139] Chelton v. Henderson, 9 Gill (Md.) 432. But the fee raised by "the rule" may be defeasible. Kennedy v. Kennedy, 29 N. J. Law, 185.

[140] Cooper v. Coursey, 2 Cold. (Tenn.) 416 (curtesy).

[141] Fountain County, etc., Co. v. Beckleheimer, 102 Ind. 76, 1 N. E. 202; Hunt v. Satterwhite, 85 N. C. 73. See, as to "children" thus named meaning heirs, and raising estate tail, Wild's Case, 6 Coke, 17; Chrystie v. Phyfe, 19 N. Y. 344; Cannon v. Barry, supra; Lee v. Tucker, 56 Ga. 11.

tual way of repealing the rule.[142] In Texas and Arkansas the rule has been acknowledged by the courts, but in the latter state and in Vermont (if in force there) it is of very little use; for whenever it would raise an estate tail this is converted by the statute into a life estate in the first taker, with remainder in fee to his heirs.[143] In the District of Columbia it is presumably in force to the same extent as in Maryland. Iowa has worked out its jurisprudence from that of Michigan, where the rule never was in force;[144] and it hardly fits the states of the far West, in which husband and wife take by descent from each other, even in the presence of issue and the word "heirs" no longer indicates community of blood.[145]

§ 22. Future Estates, Other Than at Common Law.

At common law an estate of freehold, in the very nature of things, could not be created to begin at a future time, whether fixed by date, or depending upon an event either certain or uncertain; for the primary mode of conveyance was livery of seisin, which took effect without any writing, and invested the party thus enfeoffed at once with the freehold. The rule did not apply to uses; for A., the owner, could enfeoff B. in fee, to hold to the use of A. himself during his life, and after his death to the use of C. In this manner the beneficial ownership would change only at a future time, named in the so-called deed "to lead the uses." When the statute of uses turned "uses into possession" (i. e. annexed the title to the use), the legal estate could thus be made to begin in futuro; and the same result followed

142 Georgia (Code, § 2249). The enforcement was never very strict. Thus, the untechnical words "heirs from her body" were deemed sufficient to modify "heirs of the body." Kemp v. Daniel, 8 Ga. 385. Courts try to carry out testator's intentions. Mallery v. Dudley, 4 Ga. 52.

143 Moody v. Walker, 3 Ark. 147; Myar v. Snow, 49 Ark. 125, 4 S. W. 381; Act 1837 (now section 643 of Mansfield's Digest); Moore v. City of Waco, 85 Tex. 206, 20 S. W. 61; Vermont (§ 1916). So, also, in Colorado and New Mexico. See section on "Estate Tail."

144 Whether it is in force is left purposely undecided in Pierson v. Lane, 60 Iowa, 60, 14 N. W. 90. Hanna v. Hawes, 45 Iowa, 439, and Kiene v. Gmehle, supra, seem to recognize the rule, but, by bringing in the questions of intent, nullify it.

145 See, infra, chapter on "Title by Descent," § 32.

from the statute of wills. As we have in the United States no common-law conveyances, but land passes either by will, or by deed taking effect under the statute of uses, or by statutory grants similar to such deeds, the rule against estates beginning in the future fell to the ground by itself; but it has, for greater certainty, been abolished by statute in very many states.[146]

More for the purpose of the old nomenclature, than for any practical distinction, we here reproduce, in a short outline, from an old edition of Kent's Commentaries, the classification of future estates which, in the palmy days of English conveyancers, could be raised under the statute of uses, and, in analogy to them, under the statute of wills; sparing our readers, however, all trouble about the now exploded doctrine of scintilla juris,—that spark of right which many lawyers and judges supposed to flicker through the frame of the feoffee to uses for one moment, before the statute transferred the fee to the cestui que use:

1. "Shifting or secondary uses take effect in derogation of some other estate, and are either limited by the deed creating them, or authorized to be named by some person named in it. Thus, if an estate be limited to A. and his heirs, with a proviso that if B. pay to A. one hundred dollars, by a given time the use of A. shall cease, and the estate shall go to B. in fee, the estate is vested in A. subject to a shifting or secondary use in fee to B. So, if the proviso be that C. may revoke the use to A., and limit it to B., then A. is seised in fee, with a power to C. of revocation and limitation of new uses." [147] The shifting of uses by the execution of a "power" will be treated in a separate chapter. "These shifting uses are common in all settlements," Chancellor Kent proceeds; "and in marriage settlements the first use is always to the owner in fee till the marriage, and then to other uses." Marriage settlements made by the parents of bride or groom with limitation of future estates are, however, so rare in the United States that few, if any, cases growing out of

[146] Rev. St. N. Y. pt. 2, c. 1, tit. 2, § 24: "A freehold estate, as well as a chattel real, may be created to commence at a future time;" copied in Michigan, Wisconsin, Minnesota, California, the Dakotas, etc.

[147] 4 Kent, Comm. 296, citing Mutton's Case, Dyer, 274b; Spencer v. Duke of Marlborough, 3 Brown, Parl. Cas. 232; Nicolls v. Sheffield, 2 Brown, Ch. 218.

them have come before courts of error so as to pass into the printed reports.

2. "Springing uses are limited to arise on a future event, where no precedent estate is limited, and they do not take effect in derogation of any preceding interest. If a grant be 'to A. in fee, to the use of B. in fee, after the first of January next,' this is an instance of a springing use, and no use arises until the limited period. The use in the meantime results to the grantor, who has a terminable fee. A feoffment to A. in fee, to the use of B., in fee, at the death of C., is good, and the use would result to the feoffor until the springing use took effect by the death of C.[148] Under the modern statutes, under which a freehold may be made to begin in futuro, the feoffee may be left out altogether."

3. "Future or contingent uses are limited to take effect as remainders. If lands be granted to A. in fee, to the use of B. on his return from Rome, it is a future contingent use, because it is uncertain whether B. will ever return." [149]

4. "If the use limited by deed expired, or could not vest, or was not to vest but upon a contingency, the use resulted back to the grantor who created it." [150]

Almost the only contingency in which, in modern practice, an estate is made to shift, is that the first taker of the fee dies under certain circumstances; the most usual of them being that he dies without issue living at the time of his death; more rarely, that he dies before another person, or that he dies under age, or unmarried, or "under age and unmarried," etc. The fee of the first taker, which is thus made to shift, is the "defeasible fee" already spoken of in another section. The gift of the estate to which it shifts, which may be in fee, or for a smaller estate, or for such smaller estate with remainder in fee, being much oftener made by will than by deed, is known in this country generally as an "executory devise,"

148 Id.; citing Woodliff v. Drury, Cro. Eliz. 439; Mutton's Case, supra; Roe v. Tranmer, 2 Wils. 75.

149 Id. 298; citing no cases, but referring to Gilb. Uses (Sugd. Ed.) pp. 152–158; 1 Prest. Abst. p. 105, and 2 Prest. Abst. p. 151.

150 Id. 299; citing Co. Litt. 23a, 271b; Sir Edward Clere's Case, 6 Coke, 17b; Armstrong v. Wolsey, 2 Wils. 19.

even when it is contained in a deed of settlement.[151] The first recognition of the executory devise as a fee made to begin upon the contingency of the first taker of the fee dying under named conditions was achieved only after a hard struggle. The more regular mode of limiting the estate would have been to bestow an estate tail on the first taker, with a remainder over in fee or in tail. This could have been barred by a common recovery. The object of the executory devise, or use in the nature thereof, was to keep the future estate from being thus barred, and thus to tie up the land for another generation. The victory for this "fee limited upon a fee" was the first in a long struggle, of which more will be said in the next section.[152] Nothing prevents the limiting of successive executory devises, each after vesting being defeated by the next.[153] An executory devise, or estate in the nature thereof, is deemed a more distant or weaker interest in land than even a contingent remainder, and is considered, until the contingency has arisen, hardly more than "a possibility coupled with an interest." Nevertheless, it may be devised, and such has been the law in England since early in the eighteenth century. It may, in modern times, be conveyed or "assigned," even to an assignee for the benefit of creditors; but where the law subjects to execution only estates "in possession, reversion, or remainder," it would seem that the "possibility" arising from an executory devise cannot be sold under execution.[154] Just as the tendency of the law is, in case of doubt, to prefer a vested to a contingent remainder, so the latter will be preferred to the executory devise, under the notion that the remainder would sooner vest, and thus render the full ownership certain, restoring the land to the channels of trade.[155] Under the Revised Statutes of

151 Goodell v. Hibbard, 32 Mich. 47.

152 Pells v. Brown, Cro. Jac. 590.

153 Higgins v. Dowler, 1 P. Wms. 98, on successive executory devises.

154 Rev. St. N. Y. pt. 2, c. 1, tit. 2, § 35: "Expectant estates are descendible, devisable, and alienable, in the same manner as estates in possession." This includes executory devises, which are not known under that name in the New York statutes, while shifting uses, along with all other uses, are expressly abolished. See, on this question, chapter on "Grants, Future and After-Acquired Estates."

155 2 Washb. Real Prop. p. 751; Criley v. Chamberlain, 30 Pa. St. 161; Manice v. Manice, 43 N. Y. 303.

New York and the laws of Michigan, Wisconsin, and Minnesota (which are, as to estates in land, copied from them), an executory devise or kindred estate is embraced under the general name of "expectant estate"; but it is known also as a "remainder," and will pass when referred to by that name in deed or will.[156]

Cross remainders are thus defined by Chancellor Kent, who therein follows Preston on Estates: He premises that by deed they must be created by express words, while in a will they may be raised by implication, but this has no bearing on the nature of the estate, when once created. He proceeds: "If a devise be of one lot of land to A., and of another lot to B., in fee, and, if either dies without issue, the survivor to take, and, if both die without issue, then to C. in fee, A. and B. have cross remainders over by implication; and, on the failure of issue of either, the other, or his issue, takes, and the remainder to C. is postponed." To the reader not deeply versed in the old land lore, the cross remainder here seems to be given with enough expressness. He proceeds: "So, if different parcels of land are conveyed to different persons by deed, and by the limitation they are to have the parcel of each other when their respective interests shall determine, they take by cross remainders." He then points to a complexity which will often arise when there are more than two parties to whom the gift or devise is made, after two or more have died, in the proportions, which pass over: For the share which passes on the death of A. to B. may not always, on the death of B., be treated in the same manner as B.'s original parcel. On the contrary, the tendency of the courts is to make every estate vest at the earliest moment. Hence, whenever the language of the grant or devise permits it, the shares which on the termination of the first life, go to the other donees will be considered as owned by them in fee.[157] It will be noticed that the example first given by

[156] Pond v. Bergh, 10 Paige, 140.

[157] 4 Kent, Comm. 201; 2 Bl. Comm. 381; Chadock v. Cowley, Cro. Jac. 695; 1 Prest. Est. pp. 94, 98. The difficulty in cross remainders comes in where the donees or devisees are more than two, and the lot or share of one has gone to the others, to determine whether or not the parts of these lots or shares go to them in fee, or whether they are still under the sway of the will or deed, creating the remainder. Mr. Preston, and Kent after him, compare the difficulty in fixing the proportions at a second or subsequent death with those

Kent is of executory devises, rather than of remainders, properly so called, and in practice cross remainders are nearly always of the former nature. Moreover, in the great majority of cases, it is not one tract of land which is given to A., and another which is set aside to B., but aliquot shares, generally equal shares in the same land; and this renders the calculation of the parts belonging to each set of heirs or descendants after two or more of the cross remainders have taken effect so much more complicated. A gift, by deed or will, to "survivors" among a class of designated persons, must be distinguished from that of cross remainders. Such a gift goes to those who are still alive at the time of some future event (generally either a testator's death, or the death of some life tenant), and then vests in all those remaining at the same time, with no room for cross remainders among them.[158]

§ 23. Estates on Condition.

We must next speak of conditions,[159] either precedent or subsequent, laying out of view those "conditional gifts," which are turned

arising among coparceners under the old English rule of "seisina facit stipitem." We may rather refer to the conflicting views under the laws of Massachusetts, New Hampshire, and other states on the question whether the share of the parental estate passing from one minor child to another is or is not, upon the death of that other child, to be treated as "parental," which will be discussed in the law of descent.

158 O'Brien v. O'Leary, 64 N. H. 332, 10 Atl. 697.

159 The older law writers, including Kent (see 4 Comm. 121), first divide conditions into "conditions in law" and "conditions in deed." If the tenant for life or years aliened by a common-law conveyance (feoffment, fine, or common recovery), he forfeited his estate, and the reversioner came in at once. In like manner, if the dowress or life tenant committed waste, her estate in the place wasted was forfeited, and went at once to those in reversion. Common-law conveyances have long gone out of use; and forfeiture for waste, though recognized by law in many states, is never resorted to. And, ever since the decay of the feudal system, no condition in law has been implied in a lease, for life or years, of forfeiture or of re-entry, for nonpayment of rent; such a condition must be expressed. "Conditions by deed," in the meaning of this classification, embrace those by will or devise. It is strange that the books have never classified conditions as negative or positive, which, as to conditions subsequent, has very important bearing. An estate may be given to A. "if he will marry B.," or "as long as he will reside on the land," or on the other hand "unless he

into estates tail, and those grants of an estate to become void upon the payment of a sum of money by the grantor, which are such in form only, but in fact securities for debt. There is a condition precedent when an estate is to begin upon its fulfillment. At common law, when a freehold estate could not be made to begin in futuro, a simple condition precedent could most readily affect a term for years, which could always be made to begin in futuro; also an estate in remainder, if the event happened during the time of the particular estate. But an estate might also be limited to A. in tail (or for life), to pass from him to B. upon a named contingency, which would then be a conditional limitation. But under the statute of wills or of uses an estate may be limited to A. on his marriage with B., or upon the payment by him of a sum of money, and the estate will not take effect, unless the condition is fulfilled; and it is said that such condition must be literally performed, and that equity has no power to relieve against the failure to perform it,[160] unless the failure has arisen through the contrivance of the party in adverse interest, under circumstances amounting to fraud.[161]

Subsequent conditions are those which operate on an estate already vested, and defeat it. They are very frequent in leases, which are by such conditions to come to an end by failure to pay the rent on a named day, or upon the tenant's assigning or subletting without license. In this country, where leases for lives, in husbandry,

should marry B." In the former case there may be excuses for delay, or even for noncompliance; but in the latter there can be none for disregarding the restraint, unless the restraint be unlawful. This distinction should have been kept in mind. An example of a positive condition is Tilden v. Tilden, 13 Gray, 103 ("to keep in good repair" held to be broken by not rebuilding after a fire); also two cases stated in the text of Kent's Commentaries,—Police Jury v. Reeves, 6 Mart. (N. S.) 221, and Hayden v. Stoughton, 5 Pick. 528. On the other hand, a devise of a lot to a creditor, because the testatrix disliked treating her obligation as a debt, was construed as a condition precedent that the creditor would not treat it as such, and the estate was defeated by his bringing suit. Hapgood v. Houghton, 22 Pick. 480. A condition precedent may result in lengthening a life estate into a fee. Karchner v. Hoy, 151 Pa. St. 383, 25 Atl. 20.

160 Kent (4 Comm. 125) cites Popham v. Bampfeild, 1 Vern. 83. The position is stated ever since as settled.

161 Sharon Iron Co. v. Erie, 41 Pa. St. 341; Murray v. Harway, 56 N. Y. 337.

are almost unknown, such conditions are attached only to terms for years. Equity generally relieves against a clause of re-entry or forfeiture in a lease for nonpayment of rent on the day, but not against forfeiture for assigning or subletting without license.[162] Conditions, either precedent or subsequent, may affect an estate in remainder before it comes into possession.[163] A condition subsequent, at the common law, always resulted to the benefit of him who, by conveyance or devise, imposed it, or to the benefit of his heirs; that is, upon the estate given determining, there was a reversion, not a remainder. And now, as shown above, when the condition making an end to A.'s estate turns it over to B., this is more correctly called a "conditional limitation."[164] An estate subject to a condition subsequent can be alienated by grant or devise, remaining liable to be defeated in the hands of the grantee or devisee.[165]

Courts, in all cases of doubt, construe conditions as being subsequent, rather than precedent, so that estates may vest at the earliest moment.[166] There are, however, cases where the estate would

[162] In Peachy v. Duke of Somerset, 2 White & T. Lead. Cas. Eq. 1082, the distinction is laid down, complainant being a copy holder, that equity would not relieve against the forfeiture for making unauthorized leases, felling timber, etc., though compensation was offered. Relief is given for nonpayment of money where the compensation can be clearly admeasured. Among the English cases cited in the notes is Hills v. Rowland, 4 De Gex, M. & G. 430, where equity refused to relieve a lessee for not cultivating land in a husband-like manner; Macher v. Foundling Hospital, 1 Ves. & B. 188, for carrying on a trade without license, or who assigns without license. So, in the United States, equity has refused to relieve the lessee against forfeiture for assigning. Green v. Bridges, 4 Sumn. 96. For other American cases we refer to books on "Landlord and Tenant." And see, as to relief for nonpayment of rent, section 17 of this chapter.

[163] Birmingham v. Lesan, 77 Me. 494, 1 Atl. 151.

[164] Co. Litt. 246b; 4 Kent, Comm. 126.

[165] This clinging of the condition to the estate in the hands of even remote alienees is spoken of as the condition "running with the land." Wilson v. Wilson, 38 Me. 18; Taylor v. Sutton, 15 Ga. 103 (a somewhat confused, unsatisfactory case); Winnepesaukee Camp-Meeting Ass'n v. Gordon (N. H.) 29 Atl. 412 (even to conditions which may be imposed thereafter); O'Brien v. Barkley, 78 Hun, 609, 28 N. Y. Supp. 1049 (an odious condition held to be subsequent, so as to defeat it).

[166] Hooper v. Cummings, 45 Me. 359 (provided he fence the land, and keep it in repair); Finlay v. King, 3 Pet. 346 (devise to A. on condition of his mar-

sooner come into possession of some one for whom it is intended (rather, cases of conditional limitation), by construing the condition as precedent; and there are other cases in which the fulfillment of the condition is the only purpose of creating the estate, and the land is only to be enjoyed in the shape into which the condition will bring it, and this must be then held to be meant as precedent, without much regard to the grammatical structure.[167] There are no recognized sets of words which will create the one or the other kind of conditions. The matter is always one of intent, to be gathered from the whole instrument.[168] To prevent still further the

rying a daughter of B. and R., held a condition subsequent, though "on marrying" would have been precedent). The utmost length was reached in Fremont v. U. S., 17 How. 542, in construing a Mexican grant, where even the condition that the departmental assembly must assent was held to be subsequent (Campbell and Catron, JJ., dissenting). Den v. Presbyterian Church, 20 N. J. Law, 551. The burden of proof is on him who claims under the condition. Den v. Steelman, 10 N. J. Law, 193, 204. But "that he live on the land, and return to the county of O.," held precedent. Reeves v. Craig, 1 Winst. (N. C.) 209. Wheeler v. Walker, 2 Conn. 196, where the payment of a sum charged on a devise of land was held a condition precedent, is not good law now. In Miller v. Board of Sup'rs (Miss.) 7 South. 429, giving land to the use of a county and a town does not raise a condition that it shall revert on the removal of the county seat from the town. In Curtis v. Board of Education, 43 Kan. 138, 23 Pac. 28, a conveyance of land for school purposes, and no other, is said to raise a trust, not a condition.

[167] Den v. Brown, 7 N. J. Law, 305 (devise to I., but, should he never return, to M., held a devise in praesenti to M., with a limitation over to I. on condition precedent that he return); City of Stockton v. Weber, 98 Cal. 433, 33 Pac. 332 (gift of tract with some graves to city, on condition of exhuming the bodies, and improving into park, condition precedent); Bennett v. Culver, 97 N. Y. 250 (land clearly given for cemetery only, no title vests till it is established); Tennessee & C. R. Co. v. East Alabama Ry. Co., 73 Ala. 426 ("deed to have effect only," etc.). We shall speak hereafter of relief against the inconsiderate use of "or" for "and".

[168] Burnett v. Strong, 26 Miss. 116; Craig v. Wells, 11 N. Y. 315; Parmelee v. Oswego & S. R. Co., 6 N. Y. 74. This was a grant of saline lands by the state, under an act providing: "Any part of such location which at the expiration of said four years shall not be actually occupied by manufactories of coarse salt," etc., "may be again set apart by," etc., "to any other person," etc.: held condition precedent, and title passed only to land covered with salt works; but grants from the state are always construed narrowly against the grantee. "If T. [a grandchild] will stay with testator and his wife till their

divesting of estates, words will often be construed as a covenant, as a trust, or as a mere statement of the consideration, rather than a condition, the nonfulfillment of which might take the land from its owner.[169] The clearest words to make a condition subsequent

death," is clearly precedent. Tilley v. King, 109 N. C. 461, 13 S. E. 936; Martin v. Skipwith, 50 Ark. 141, 6 S. W. 514 (deed of land to county, "provided a jail is erected on it," held subsequent). There may be a condition which is both precedent and subsequent. Clarke v. Calloway, Print. Dec. 46 (a grant of an exclusive ferry privilege, as long as the grantees keep it according to law). But in private dealings a condition which has already served as one precedent will not readily be again enforced as subsequent. Casper v. Walker, 33 N. J. Eq. 35. See, however, in O'Brien v. Barkley (Sup.) 28 N. Y. Supp. 1049, a line of decisions, from Wright v. Tuttle, 4 Day, 313, to Chapin v. School Dist., 35 N. H. 445, to the effect that the word "provided" introduces a condition subsequent, though English authorities are also introduced that the matter depends on the order in which the vesting of the estate and the contingent event must naturally happen.

[169] Noyes v. St. Louis, A. & T. H. R. Co. (Ill. Sup.) 21 N. E. 487 (deed to railroad company "for erection and maintenance of depot" raises no condition); Stone v. Houghton, 139 Mass. 175, 31 N. E. 719 (a "stipulation" is not a condition); Crane v. Hyde Park, 135 Mass. 147 (lot conveyed to town "for school" not a condition); Brown v. Caldwell, 23 W. Va. 187 (consideration that all white Christian communities may have free burial, not condition); contra, Cleveland, C., C. & St. L. R. Co. v. Coburn, 91 Ind. 557 (in consideration that depot be kept on adjoining lot, held a condition); Gallaher v. Herbert, 117 Ill. 160, 7 N. E. 511 (here the grantor's support was taken as a covenant, rather than a condition); Farnham v. Thompson, 34 Minn. 330, 26 N. W. 9 (for purpose of erecting a church, not condition); Horsey v. Horsey, 4 Har. (Del.) 517 ("on condition to pay legacies," a trust and charge); Emerson v. Simpson, 43 N. H. 475 (A., holding land charged with B.'s support, conveys to C., reciting that C. has assumed the task, held consideration only). Rawson v. Uxbridge, 7 Allen, 125, a leading case, quotes from Shep. Touch., "Every good condition requires an external form," and says: "It must be expressed in apt and sufficient words, which, according to the rules of law, make a condition; otherwise it fails, unless language is used which ex proprio vigore impart a condition, or the intent of the grantor is clear and unequivocal. If it may be covenant or condition, the courts incline against the latter (Co. Litt. 205b, 219b; Merrifield v. Cobleigh, 4 Cush. 178, 184). Proper words are: 'So as,' 'provided,' and 'on condition,' made clear by a clause of forfeiture or limitation over. In purely voluntary gifts, devises and grants from the crown, a declaration that it is given for a purpose may imply a condition. But there is no authority that a private grant for a purpose imposes a condition subsequent. Such words will rather create a trust." The case was

are: "the estate shall be forfeited," or "the land shall revert." [170]

The enforcement of a condition subsequent is in the nature of a forfeiture; hence it can only come from those who have a direct interest,—those in reversion, when it is a pure condition, or those to whom the estate is "limited over," in the case of a conditional limitation. A mere trespasser or intruder cannot set up the forfeiture as "outstanding title." [171] It has even been held that the right to take advantage of the breach of a condition subsequent cannot be assigned, but that the reversioner must enter himself before he can convey; certainly that he must make his demand for surrender of possession. (But in California the statute makes it transferable in express words.) [172] Thus, where a railroad com-

of an old deed to the town for a burial ground, which the heirs sought to recover, because it had been diverted from the purpose. In Gibson v. Armstrong, 7 B. Mon. 481, a deed in the form prescribed by the Methodist Church having been made by the seller of the ground, the court said: "There no condition could be assumed that the land should ever revert." And conditions subsequent are not to be inferred from the smallness of the consideration. Olcott v. Gabert, 86 Tex. 121, 23 S. W. 985. See, also, Laberee v. Carleton, 53 Me. 211; Gadberry v. Sheppard, 27 Miss. 203. But to support a named person is enforced as a condition when necessary. Thomas v. Record, 47 Me. 500. Conditions not construed into covenant, except to avoid forfeiture. Underhill v. Saratoga & W. R. Co., 20 Barb. 455. So construed, with that view, in Elyton Land Co. v. South & N. A. R. Co. (Ala.) 14 South. 207. Paying legacies is rather the subject of a trust than of a condition, as the enforcement of the trust attains the only possible intent. Newson v. Thornton, 82 Ala. 402, 8 South. 461.

[170] Pepin Co. v. Prindle, 61 Wis. 301, 21 N. W. 254; Hoyt v. Ketcham, 54 Conn. 60, 5 Atl. 606. And a condition is not a covenant, and cannot be enforced on behalf of the grantor by specific performance. Close v. Burlington, C. R. & N. Ry. Co., 64 Iowa, 149, 19 N. W. 886; Clarke v. Inhabitants of Town of Brookfield, 81 Mo. 503 (land given to town to revert, unless, etc.).

[171] Norris v. Milner, 20 Ga. 563; Cross v. Carson, 8 Blackf. 138; Smith v. Brannan, 13 Cal. 107; Hooper v. Cummings, 45 Me. 359; Wing v. McDowell, Walk. (Mich.) 179; Dewey v. Williams, 40 N. H. 222. Nor can it be imported into the instrument creating the estate from a previous contract. Douglas v. Union Mut. Life Ins. Co., 127 Ill. 101, 20 N. E. 51.

[172] 4 Kent, Comm. 128 (a leasehold ceases at once when a condition subsequent is broken; but not without an entry or demand for the purpose); Co. Litt. 215a; Boone v. Tipton, 15 Ind. 270; Nicoll v. New York & E. R. Co., 12 Barb. 460 (not assignable). The older authorities require a demand before action. Chalker v. Chalker, 1 Conn. 79; Lincoln Bank v. Drummond, 5 Mass.

pany has failed to comply with the conditions of the land-grant act, by completing its road within the time specified, it still holds the title to the granted land, as against all other persons, until the United States, through their proper organs, demand, and sue for the recovery of, the land.[173]

A condition subsequent has been sustained (perhaps not strictly as a condition), though neither he who imposed it, nor those claiming under him as purchasers, heirs or devisees, had any interest therein, but only the community or the neighbors; such as a clause of forfeiture, if the owner of the estate should obstruct the view, or do anything offensive to the neighbors. But the position is not very clear.[174]

321. See, contra, Plumb v. Tubbs, 41 N. Y. 442. But no re-entry is necessary when the party entitled is in possession. Hamilton v. Elliott, 5 Serg. & R. 378; O'Brien v. Wagner, 94 Mo. 95, 7 S. W. 19. Action held a sufficient demand, under modern practice in suits for land. Cowell v. Springs Co., 100 U. S. 55. The benefit of the forfeiture passes by will. Hayden v. Inhabitants of Stoughton, 5 Pick. 529. Where land is bought for a church or charity from an outsider, who conveys it, the contributors, and not he, are the grantors, to whom the land would revert on condition broken; and they must enter or make demand; Clark v. Chelsea Academy, 56 Vt. 734. Where the condition is to support the grantor, he must enter himself for its breach. A charge at most remains for the default. Berryman v. Schumaker, 67 Tex. 312, 3 S. W. 46. But, where the condition subsequent is that the grantee must do something within a given time, no demand to do the thing is necessary to put him in default, Ellis v. Elkhart Car Works, 97 Ind. 247; except, when the thing to be done is payment of money, it must first be demanded, Bradstreet v. Clark, 21 Pick. 389; contra, Civ. Code Cal. § 1046.

173 Bybee v. Oregon & C. R. Co., 139 U. S. 663, 11 Sup. Ct. 641.

174 Gibert v. Petcler, 38 N. Y. 165 (obstructing views). The court said that since Spencer's Case, 5 Coke, 16 (1 Smith, Lead. Cas. 137), equity had found ways by which those interested in such a condition could find relief, and that, therefore, the title was incumbered, and a buyer need not accept it, but did not really show how the neighbors could take advantage of the condition broken unless by injunction, which would turn the condition into a covenant running with the land. In Sioux City & S. T. P. R. Co. v. Singer, 49 Minn. 301, 51 N. W. 905, it is said a condition against sale of liquor is good only where the grantor retains an interest in its observance, but that such interest will be presumed. In McElroy v. Morley, 40 Kan. 76, 19 Pac. 341, the neighbors for whose benefit a condition against obstructing the outlook was created seemed to be powerless to enforce it. See how the effect of a condition against keeping a tavern on the land was lost in Post

A condition that the owner of land in fee simple or fee tail shall not alien it is void for repugnancy, and as against the policy of the law; and so, that the holder of any estate shall forfeit it if he takes the profits; but conditions which restrict the use of lands in one or the other respect, though they may greatly lessen its value, have been sustained.[175]

v. Weil, 115 N. Y. 361, 22 N. E. 145. Conditions against liquor selling enforced in Jeffery v. Graham, 61 Tex. 481. See, also, Copeland v. Copeland, 89 Ind. 29 (only grantor can enforce conditions).

[175] De Peyster v. Michael, 6 N. Y. 467 (as to fee), states the authorities to date fully. The same principle was settled as to estates tail in Mary Portington's Case, 10 Coke, 42a. The weight of authority forbids even temporary conditions against alienation. See below. But see Gadberry v. Sheppard, supra (conditional limitations over on conveyance during first taker's life sustained); and a limitation to the wife of the beneficiary life tenant, if his estate should be found subject to his debts, in Bull v. Kentucky Nat. Bank, 90 Ky. 452, 14 S. W. 425. In Newkerk v. Newkerk, 2 Caines, 345 (quoted by Kent), land was devised to the testator's children in case they continued to inhabit the town of H., otherwise not. The condition was set aside as unreasonable and repugnant. The condition is said to be repugnant whenever the donor retains no reversion. Mandelbaum v. McDonell, 29 Mich. 78 (where the whole fee is given to H. for life, remainder to B., etc., a condition against alienation for stated time held repugnant and void, both as to the life tenant and the remainder-men). Christiancy, J., insists that there is no English decision since the statute quia emptores which allows a restraint upon alienation even for one day by one who parts with the whole fee. McCleary v. Ellis, 54 Iowa, 311, 6 N. W. 571 (deed of life estate and remainder in fee, no reversion; no restraint allowed), relies on Litt. § 360; Co. Litt. 223a; admits that it might be otherwise where the estate is given in trust for beneficiaries. A temporary restraint on the alienation of a fee is held void in Anderson v. Cary, 36 Ohio St. 506. A rather opposite condition, that whatever was not disposed of by grantee in fee at his death should revert, was held repugnant and void in Case v. Dwire, 60 Iowa, 442, 15 N. W. 265, perhaps without good reason. In Langdon v. Ingraham, 28 Ind. 360, a condition against conveying for a given time or to a named person was sustained. See, on the other hand, Blackstone Bank v. Davis, 21 Pick. 42 (condition against alienation or attachment held void). A condition against the sale of liquor on the premises is sustained, as not repugnant to the fee, in Plumb v. Tubbs, 41 N. Y. 442. Cowell v. Springs Co., 100 U. S. 55. And see case in preceding note; Craig v. Wells, supra, against a distillery. And so as to the erection of a schoolhouse, a livery stable, a machine shop, blast furnace, powder magazine, hospital, or cemetery. Collins Manuf'g Co. v.

When the doing of an impossible or of an unlawful act is imposed on a grantee or devisee as a condition precedent, the estate does not take effect; but, where an estate is to cease unless its holder will do something impossible or unlawful, the performance is excused.[176] And where the condition is not even impossible on its face, but becomes so by subsequent events, its performance will be excused, unless it is of the very essence and purpose of the gift, and sometimes even then.[177] Conditions subsequent are narrowly construed. Equity often relieves against the loss of an estate for breach of condition subsequent, as has been already remarked as to leases; but it never aids to enforce them.[178] While conditions destructive of an estate are otherwise narrowly construed, the fullest effect seems to have been given, at least in one state, to those which are made a part of building schemes, as to the distance at which

Marcy, 25 Conn. 242; Sperry's Lessee v. Pond, 5 Ohio, 389; Nicoll v. New York & E. R. Co., 12 N. Y. 121, and other cases quoted in these. A grant to a cemetery, with condition against selling or letting lots below a named price, is not void under the anti-feudal clause in the constitution of New York. Bennet v. Washington Cemetery (Cir. Ct.) 11 N. Y. Supp. 203.

[176] As to unlawful conditions precedent, see Taylor v. Mason, 9 Wheat. 350. In Arkansas a donation to the county, on condition that the house and lot must remain the county building, is deemed bad as against public policy. Rogers v. Sebastian Co., 21 Ark. 440.

[177] Fremont v. U. S., supra, goes very far in this respect; Finlay v. King's Lessee, 3 Pet. 346 (B. and R., his wife, whose daughter the devisee was to marry, died without ever having a daughter). See, also, U. S. v. Arredondo, 6 Pet. 691 (condition attached to grant by king of Spain); Trumbull v. Gibbons, 22 N. J. Law, 117; Drummond v. Drummond, 26 N. J. Eq. 234.

[178] In Wellons v. Jordan, 83 N. C. 371 (a conditional limitation being stated in two forms, that most favorable to the first taker is chosen); Stevens v. Pillsbury, 57 Vt. 205 (equity prefers compensation to forfeiture); Clarke v. Parker, 19 Ves. 12 (relieves when the party interested in the default has helped to bring it about); s. p. D'Aguilar v. Drinkwater, 2 Ves. & B. 225; Thompson v. Thompson, 9 Ind. 323; Wilson v. Galt, 18 Ill. 432. If the condition is once dispensed with, it is gone. Sharon Iron Co. v. City of Erie, 41 Pa. St. 341. But, on the other hand, where a railroad company is to lose a right of way granted to it should the people of the county vote a tax, a majority signing a petition is an equivalent. Kenner v. American Cont. Co., 9 Bush, 206. A strip of land granted for a street only is not forfeited when an intruder builds on it for a time. Carpenter v. Graber, 66 Tex. 465, 1 S. W. 178.

the several houses of adjoining lot purchasers must be built from each other, or from the street.[179]

Where an affirmative condition subsequent is personal,—such, for instance, as that the holder of the estate must marry a named person,—the better opinion is that, no time being stated in the condition, he has his whole lifetime to perform it in; but, when it affects the value of the land, it seems that performance within a reasonable time would be required.[180]

A condition for some named person's benefit can always be released by that person, and the estate will thus become absolute.[181]

Though everybody should have free access to the courts of his country, a condition in a will that a devise shall cease if the devisee should contest the will is not void as against public policy.[182]

It seems that a devise to the widow as long as she remains a widow (a grant would stand on the same ground) is considered as not creating an estate incumbered by a condition subsequent, but to fix the duration of the estate; durante viduitate being one of the recognized forms of the life estate. Hence the loss of her estate under such a devise upon a second marriage is now everywhere well established, though formerly there seemed to be some doubt on the question.[183]

179 Bagnall v. Davies, 140 Mass. 76, 2 N. E. 786; Attorney General v. Williams, 140 Mass. 329, 2 N. E. 80, and 3 N. E. 214; Payson v. Burnham, 141 Mass. 547, 6 N. E. 708; Hamlen v. Werner, 144 Mass. 396, 11 N. E. 684.

180 Finlay v. King's Lessee, 3 Pet. 346 (arguendo). Contra, Hamilton v. Elliott, 5 Serg. & R. 384 (substantial compliance is enough); City of Quincy v. Attorney General, 160 Mass. 431, 35 N. E. 1066 (to be governed by city authorities, associating one citizen with mayor and council, no harm). A tender of an affirmative condition discharges it. 4 Kent, Comm. 133; Co. Litt. 209b; Jackson v. Aldrich, 13 Johns. 110.

181 Tanner v. Van Bibber, 2 Duv. 550 (condition to support widow); Boone v. Tipton, supra (same). The forfeiture may be waived by acquiescence or "conduct." Ludlow v. New York & H. R. Co., 12 Barb. 440. See "Estoppel in Pais," in a later chapter; Kenner v. American Cont. Co., supra; Carbon Black Coal Co. v. Murphy, 101 Ind. 115; Duryee v. Mayor, etc., of New York, 96 N. Y. 477 (forfeiture waived by conduct).

182 Thompson v. Gaut, 14 Lea, 310. In Hoit v. Hoit, 42 N. J. Eq. 388, 7 Atl. 856, a condition charging a devise with all costs if the devisee contests the will was held valid.

183 Hibbits v. Jack, 97 Ind. 570; Coppage v. Alexander's Heirs, 2 B. Mon.

Where a gift or devise is made to an unmarried woman, with a condition that the estate shall cease upon marriage, the condition, being in restraint of marriage, is said to be against the policy of the law; and it has generally been held that, unless the instrument imposing the condition says also to whom the estate shall go in case of disobedience, the condition is deemed to have been inserted in terrorem only, and may be disregarded. Here is a distinction against the heirs of the donor, and in favor of the strangers whom he may name by way of conditional limitation, for which no good reason can be given, but which seems to be well established, for the cases are very rare in which the condition without limitation over has been deemed valid.[184] Partial restrictions on marriage,

313; Pringle v. Dunkley, 14 Smedes & M. 16. Parsons v. Winslow, 6 Mass. 169, to the contrary, is overruled by Knight v. Mahoney, 152 Mass. 523, 25 N. E. 971, in accordance with modern English decisions, and on reason, as the interest of the children may be endangered by the marriage of the widow. Kent (4 Comm. 129) speaks of the estate durante viduitate as a "collateral limitation." According to 2 Bl. Comm. 155, which is based on Co. Litt. § 380, and 1 Coke, Inst. 234, there is this practical difference: that under a limitation the estate ceases ipso facto, under a condition only by entry of the grantor.

[184] Otis v. Prince, 10 Gray, 581. Here land was devised to a grandson in fee, with a limitation over to "his heirs" should he marry. The limitation over, being bad by reason of nemo est haeres viventis, was held as none, and the condition disregarded as in terrorem. But for the ill favor shown to the condition, "heirs" might have been construed as "presumptive heirs." According to the supreme court of Pennsylvania in Com. v. Stauffer, 10 Pa. St. 350 (which is followed in McCullough's Appeal, 12 Pa. St. 197), the doctrine that conditions in restraint of marriage are void is unknown to the common law, and therefore can only be applied to legacies over which the chancellor has a power concurrent with the ecclesiastical courts, whose jurisprudence is derived from the civil through the canon law, but not to devises of land, nor, it would seem, to legacies charged primarily on land. But the case first named arose on a devise to the widow during widowhood, which has always stood on different ground. However, in Waters v. Tazewell, 9 Md. 297, a provision in a marriage settlement, forfeiting the husband's interest upon remarriage, was held void. In Maddox v. Maddox's Adm'r, 11 Grat. 804, a member of the Society of Friends made a devise to his niece M., with a proviso that she should remain a member of that society. She married, and ceased to be a member of that society. Held, the condition is an unreasonable restraint upon marriage, and void. In the English and American notes to Scott v. Tyler, 2 White & T. Lead. Cas. Eq. 144, conditions in restraint of marriage are fully discussed, mainly as to those annexed to bequests of personalty. The weight of au-

such as not to marry a named person, or any one of a named family, are generally sustained, even without a limitation over, but are narrowly interpreted;[185] and so as to conditions against marrying without consent of parents, or of those who stand in loco parentis.[186]

A condition subsequent, that the estate shall come to an end whenever the taker, who is then separated from his wife, or from her husband, should again cohabit with her, or with him, is clearly void, as against public policy, being a bribe to the donee to violate his or her plighted faith and lawful duty.[187]

Although the law does not favor conditions destructive of an estate, and equity even less, yet when the condition is lawful, and its meaning plain, no relief can be given against its operation simply because the holder of the estate has paid out his money either upon the purchase, or in the erection of valuable improvements.[188]

The condition of "dying without issue" will, further on, be treated separately and fully, as it stands on different ground from all other conditions.

§ 24. Perpetuities.

At common law a life estate cannot be limited to a child unborn at the time when a conveyance takes effect, or when it becomes operative by the death of a testator. Only an estate of inheritance, fee simple or fee tail, is ordinarily given as a contingent remainder to an unborn person. Should a life estate be thus given, a remainder

thority is that a condition against marriage within the age of minority without consent of guardians or older relatives is not void. Such a condition may often protect an orphan girl against the wiles of greedy suitors seeking her hand for her money.

185 Phillips v. Ferguson, 85 Va. 509, 8 S. E. 241 (marry in A.'s family means one of A.'s children, but the condition against it is valid).

186 Denfield, Petitioner, 156 Mass. 265, 30 N. E. 1018 (estate to be distributed, and share to a female, provided she remains single, is valid, though no limitations over; but it is accomplished as condition precedent if she is single at time of distribution).

187 O'Brien v. Barkley, 78 Hun, 609, 28 N. Y. Supp. 1049; Whiton v. Harmon, 54 Hun, 552, 8 N. Y. Supp. 119 (distinguishing Cooper v. Remsen, 5 Johns. Ch. 459); Wilkinson v. Wilkinson, L. R. 12 Eq. 604; Potter v. McAlpine, 3 Dem. Sur. (N. Y.) 108.

188 Rowell v. Jewett, 71 Me. 408.

cannot (such is the better opinion) be limited after it. A contingent remainder may follow any number of successive life estates to persons in being, or it may be limited after one or more estates in tail. But the first tenant in tail, when he comes into possession, might cut off all the remainders by a common recovery; and, if he had the co-operation of the life tenants, he might do so even before coming into possession. Thus the alienation of the estate could not be postponed beyond a life or lives in being, when the settlement was laid out by will or deed, because after the life or lives in being all the estates or interests would be certain or vested. But the ultimate remainder-man, or reversioner in fee simple or fee tail, might be a child of tender years when his estate vests, or even a child en ventre sa mere; and under the statute 9 & 10 Wm. IV. c. 16, such a child is capable of taking a future estate by purchase. During gestation, and during his infancy, the power of alienation would be suspended. On these grounds, astute land lawyers succeeded, after a long struggle, in extorting from the English courts in successive cases, first the validity of an executory devise after one life; then after several lives in being; then for such lives and the time of gestation added; and at last for "one or more lives in being, and twenty-one years and the time of gestation thereafter"; and this additional time might be interposed, not for the infancy of the ultimate remainder-man or reversioner, but 21 years, as it is said "in gross," and where a posthumous child comes into question, the period of gestation besides. As the identity of the ultimate taker under the executory devise or future use is often unknown during all this period, the absolute property could not be aliened until its end, but the restraint on alienation could go no further.[189] The rule is mainly intended to prevent the

[189] 4 Kent, Comm. 264–267, giving the cases in which executory devises were recognized and extended; Pells v. Brown, Cro. Jac. 590 (one life); principle of several simultaneous lives, Goring v. Bickerstaffe, Poll. 31; Case of Duke of Norfolk, 3 Ch. Cas. 1 (executory devise of term of years); Scatterwood v. Edge, 1 Salk. 229; Lloyd v. Carew, 2 Show. Parl. Cas. 137, reversing same case in Finch, Prec. 72 (one year after lives in being); Luddington v. Kime, 1 Ld. Raym. 203 (to include birth of posthumous son; opinions divided). And the present doctrine was established in Stephens v. Stephens, 2 Barnard. 375; Cas. t. Talb. 223; Atkinson v. Hutchinson, 3 P. Wms. 258; Long v. Blackhall, 7 Term R. 100; 2 Bl. Comm. 174. In Cadell v. Palmer (1833) 10 Bing. 140, all

vesting of an executory devise, or of a future estate under the statute of uses,—of like nature,—from occurring at a point of time later than the rule. And it makes no difference that no lives at all are named. An estate to A. in fee, and, if a certain event should happen within 22 years (independently of any one's being still alive) then A.'s fee to cease, and the estate to go to B., or to B.'s heirs, would outrun the rule as much as if a number of lives in being were interposed before the running of the 22 years.[190] The statutes of Kentucky, Iowa, and Georgia (the two latter leave out the 10 months) state the old rule in these words: "The absolute power of alienation shall not be suspended by any limitation or condition whatever for a longer period than during the continuance of a life or lives in being, and twenty-one years and ten months thereafter."[191] And such would naturally be the law of those states which have not legislated on the subject. By the statutes of New York, Michigan, Wisconsin, and Minnesota, the power of alienation is said to be suspended "when there are no persons in being by whom an absolute fee in possession can be conveyed"; and this cannot be for a longer period than during the continuance of two lives in being at the creation of the estate, except that a remainder in fee may be made to take effect on a prior remainder in fee "in the event that the persons to whom the first remainder is limited die under the age of twenty-one years," or other event happening before their reaching full age. Mark the reduction of "one or more lives in being" to only two lives, and the 21 years to the case of infancy. Under this statute a suspension

the judges certify to the house of lords as settled laws that the 21 years are independent of infancy, but the months for gestation are allowed only "when it exists."

190 1 Jarm. Wills, 231, resting on Palmer v. Holford, 4 Russ. 403 (Sir J. Leach) where all the children living 28 years after the testator's death were to take the fund; quoted in a leading American case,—St. Amour v. Rivard, 2 Mich. 294. So held as to personalty in Smith v. Edwards, 88 N. Y. 92. On the other hand, the number of lives is immaterial. Hale v. Hale, 125 Ill. 399, 17 N. E. 470.

191 Kentucky, St. 1894, § 2350; Iowa, § 1920; Georgia, § 2267. Recognized in Missouri, Lockridge v. Mace, 109 Mo. 162, 18 S. W. 1145; Illinois, Waldo v. Cummings, 45 Ill. 421; Tennessee, Brown v. Brown (1888) 86 Tenn. 277, 6 S. W. 869, and 7 S. W. 640; and passim in cases quoted below from Massachusetts, Pennsylvania, Maryland.

of free power of disposition for any length of time, measured only by years, and independent of lives or infancy, whether during the outstanding of a contingent future estate, or while the beneficial interest is separated from an active trust, is unlawful and void.[192] In Indiana, California, and the Dakotas, the number of lives in being is not limited; but the additional 21 years, as in New York, are allowed to precede the ultimate remainder-man only to the extent that they are covered by the infancy of a preceding remainder-man.[193] In all these states, except Indiana (New York, Michigan, Wisconsin, Minnesota, California, and the Dakotas), the statute says, expressly, that a devise or grant which will result in an unlawful perpetuity is void in toto.[194] The restriction in Connecticut would be the sharpest and shortest, but for the nature of the estate tail in that state. No estate can be limited to a person unborn, other than the immediate issue (that is, children only, not grandchildren) of persons in

[192] New York, 1 Rev. St. pt. 2, c. 1, tit. 2, §§ 15, 16; Michigan, §§ 5533, 5534; Wisconsin, §§ 2039, 2040 (amended in 1887 by adding the words "and twenty-one years thereafter"); Minnesota, c. 45, §§ 15, 16. Where land is given in undivided shares, the lives count separately on each share. Tiers v. Tiers, 98 N. Y. 568; Saxton v. Webber, 83 Wis. 617, 53 N. W. 905; Purdy v. Hayt, 92 N. Y. 446; Palms v. Palms, 68 Mich. 355, 36 N. W. 419; where a number of other New York cases, down to Ward v. Ward, 105 N. Y. 68, 11 N. E. 373, and Kennedy v. Hoy, 105 N. Y. 134, 11 N. E. 390, are quoted, and where the separateness of each share is sustained even among unborn grandchildren; so that each share may be kept back by the trustees, to be turned over on his becoming of age. As to years without lives, see Cruikshank v. Home for the Friendless, 113 N. Y. 337, 21 N. E. 64. Garvey v. McDevitt, 72 N. Y. 566; a lease for three lives, the lessor retaining the reversion, does not violate the New York rule, for lessor and lessees jointly can at any moment convey the whole fee. Case v. Green, 78 Mich. 542, 44 N. W. 578.

[193] Indiana, §§ 2962, 6057; California, Civ. Code, § 715; Dakota Territory, Civ. Code, § 201. A limitation after indefinite failure of issue is the most obvious example. Huxford v. Milligan, 50 Ind. 542. A closer question is presented in Amos v. Amos, 117 Ind. 20, 19 N. E. 539.

[194] New York, 2 Rev. St. § 14; Indiana, § 2962; Michigan, § 5533; Wisconsin, § 2042; Minnesota, c. 45, § 14; California, Civ. Code, § 772; Dakota Territory, Civ. Code, § 229. In California and the Dakotas the future estate is void if "by any possibility" it may extend beyond the limits. See, as to the New York statutes restricting contingent remainder in a leasehold estate, Henderson v. Henderson, 46 Hun, 509. For a devise not obnoxious to the New York statute, but on its verge, see Bird v. Pickford, 141 N. Y. 18, 35 N. E. 938.

being, which evidently means persons named in the deed or will. It seems that a life estate might be thus given (a fee or lesser estate).[195] The Ohio statute says, "immediate issue or descendant" and allows unborn grandchildren, as well as children, to take the remainder.[196] In Alabama the lives must be no more than three, unless there are life estates given to the donor's children, or wife and children, and the additional time is limited to 10 years.[197] In New York it has been held that it is unlawful to suspend the power of alienation by keeping up an active trust beyond the time otherwise allowed;[198] and this state, along with Michigan, Wisconsin, and Minnesota, also forbids the limiting of life estates to persons not in being. When a remainder—even a vested remainder—is limited after more than two life estates, all the life estates after the second are thrown out.[199]

The general principle is this: that a devise or grant of a future estate is bad, under the rule against perpetuities, not only when such estate must necessarily take effect too late, or in a manner forbidden, but also when, in the natural course of events, it might take effect

[195] Connecticut, § 2952; Beers v. Narramore, 61 Conn. 13, 22 Atl. 1061. Repeal of rule in Shelley's Case does not affect the law against perpetuities. Leake v. Watson, 60 Conn. 498, 21 Atl. 1075.

[196] Ohio, § 4200; Turley v. Turley, 11 Ohio St. 173.

[197] Alabama, § 1834, dating back to 1834.

[198] Everitt v. Everitt, 29 N. Y. 39 (the land was by the will converted into money, but the rule as to perpetuities is the same as to both). In Garvey v. McDevitt, 72 N. Y. 556, four years independent of life or infancy was deemed enough to cut off subsequent devise. But a trust till youngest of living grandchildren come of age was held valid. Hawley v. James, 5 Paige, 318. Even an indefinite time for winding up trust after lives ended, and without regard to infancy, is unlawful. Manice v. Manice, 43 N. Y. 303; s. p. Dubois v. Ray, 35 N. Y. 165; Post v. Hover, 33 N. Y. 601; Tucker v. Tucker, 5 N. Y. 408; De Kay v. Irving, 5 Denio, 646; Gott v. Cook, 7 Paige, 521, affirmed 24 Wend. 641 (with the result in some of these cases of defeating subsequent limitations). These decisions would be authority also in Michigan, Wisconsin, Minnesota, California, and the Dakotas.

[199] Minnesota, c. 45, § 17, and corresponding section in other states. In Purdy v. Hayt, 92 N. Y. 446, this is said to be independent of the laws against suspending alienation. If the ultimate remainder is vested, the third life estate is stricken out; if contingent, it fails, and works partial intestacy.

too late, or upon too remote a beneficiary;[200] and if the limitations are too remote, on their face, e. g. in giving the income to unborn children till they reach the age of 25 or 27 years, it matters not that all of them are born early enough to reach that age within 21 years after the end of a life in being.[201] And a fortiori, the court cannot apportion the future estate, sustaining it as to those reaching that age within the period, and defeating it as to the others.[202]

What is the result when the rule against perpetuities is violated? Aside from the statutes already quoted, which define the forbidden perpetuity, and its result, so to say, in one breath, Indiana directs

[200] Beers v. Narramore, supra, the devise being to the lineal heir of a named life, who might turn out to be a grandchild instead of a child, and therefore incapable under Connecticut law. "If, by possibility, the event may not happen," made the test in Donohue v. McNichol, 61 Pa. St. 73. This was, however, a plain case of a life estate to unborn issue. It turned out that the first taker for life died without issue. Ford v. Ford, 70 Wis. 19, 33 N. W. 188, uses the words "under any and all circumstances." Women having children at 50, who would delay the vesting of the estate, not deemed impossible. Stout v. Stout, 44 N. J. Eq. 479, 15 Atl. 843; In re Millner's Estate, L. R. 14 Eq. 245; Proprietors of Church in Brattle Square v. Grant, 3 Gray, 142 (executory devise which may possibly not vest, etc.); Sears v. Russell, 8 Gray, 86 (though the event carrying it beyond the limit is highly improbable); Hawley v. James, 16 Wend. 61, 120 (limitation "which by possibility," etc., void); Donohue v. McNichol, 61 Pa. St. 73. Contra, Longhead v. Phelps, 2 W. Bl. 704 (probably overruled); Tiers v. Tiers, supra (where the possibility was very slight); Palms v. Palms, 68 Mich. 355, 36 N. W. 419 (event highly improbable).

[201] Leake v. Robinson, 2 Mer. 364, where the limitations affected the income under an active trust; Proctor v. Bishop of Bath and Wells, 2 H. Bl. 358; Jee v. Audley, 1 Cox, Ch. 324, 2 Ves. Jr. 365. Beers v. Narramore, supra.

[202] Thomas v. Gregg, 76 Md. 169, 24 Atl. 418. This and other cases illustrating the point generally arise under powers, and require for their understanding a knowledge of the subject treated in the first section of the chapter on "Powers." Several will be quoted there, and in the section on "Validity and Substantial Execution of Powers." They arise where a contingent estate is limited after the lives of several children, some of whom are born before, and some after, the death of the first taker. See, also, Lockridge v. Mace, 109 Mo. 162, 18 S. W. 1145, Lockridge v. Mariner, 109 Mo. 169, 18 S. W. 1146, and Leake v. Robinson, supra. But where life estates in common with cross remainders were given to two, and a subsequent life estate, the ultimate remainder was held good as to one-half, as only two lives would pass over the half of the longest liver. Purdy v. Hayt, supra.

that, where a life estate is given "subsequent to those persons entitled to take" (that is, to a person unborn), it shall be thrown out, and the remainder shall take effect at once, while Georgia gives an absolute fee to the last taker, whose limitation is not too remote, which might turn a life estate into a fee simple.[203] These statutory provisions hardly reach the case of a too remote executory devise. Aside of them, there are two classes of cases,—that of an executory devise, or springing use, and that of a contingent remainder. Where the former is void for remoteness, it is simply stricken out of the will or deed. It is said to be an innovation upon, and infringement of, the common law; and, unless the conditions are fulfilled upon which alone it is permitted, no mercy is shown to it. Where the executory devise is to defeat a previous fee given in the same instrument, that fee becomes absolute, if the contingency is too remote. If there is no previous estate at all, the remoteness of the executory devise leads to intestacy. The heirs simply retain their land.[204]

But it is otherwise where contingent remainders are created by deed or will, in excess of the rule, which, as to these estates, knows nothing of the additional 21 years, but allows them to be limited only after a life or lives in being, and, where estates tail are unchanged, after successive estates tail. It is not rare that men unacquainted with the law, or hoping to circumvent it, write wills, or insist on having them written, in which they devise successive life estates to several generations of unborn issue, or to successive eldest sons of eldest sons. The devise cannot stand as written. Some courts have applied a cy pres ("as near as can be") doctrine, like that which the English chancery applies to impracticable gifts for charitable uses. They will carry out the testator's intention as far as they can; that is, they give a life estate to the first taker, with an estate tail to his issue or his eldest son, which would, in Connecticut, Ohio,

203 Rev. St. Ind. § 2963; Code Ga. § 2667.

204 And all limitations even after the remote devise also fall to the ground. Proctor v. Bishop of Bath and Wells, supra (executory devise to son of T. P. who should first take holy orders, which none could before 24 years of age, with devise over should he have no such son). The cases quoted in notes 198–200 illustrate the result. For the distinction against executory devises, see Leake v. Robinson, supra. In Saxton v. Webber, 83 Wis. 617, 53 N. W. 905, the estate devised next preceding the unlawful perpetuity was sustained.

etc., secure those of the third generation; others have awarded an estate tail to the first taker;[205] while some courts have disapproved the cy pres doctrine altogether. And in a well-reasoned American case, where a testator parceled out his lands among his children, each child to have the use only during his life, the court held all the devises void from the very beginning, and awarded a partition of the lands under the law of intestate descent.[206]

A vested remainder stands on very different ground from a contingent remainder, or an executive devise. Only the enjoyment is deferred, but the vested remainder is assignable, and can be levied on and sold for debt; and, the owner being known, it does not stand in the way of aliening the whole fee. Hence some of our states have held that the rule against perpetuities is inapplicable to a vested remainder. No one, indeed, would claim that a remainder could not be granted to a living man, in fee, to take effect in 25 years, the estate for the term having been granted to another, and such a term might follow one or more lives. The named grantee in remainder might be dead when the estate comes into possession, in which case his heirs would take by descent from him, and would be bound by his conveyance.[207] It has also been held in Pennsylvania that, where

[205] Pitt v. Jackson, 2 Brown, Ch. 52 (shaken by Smith v. Lord Camelford, 2 Ves. Jr. 698), and Vanderplank v. King, 3 Hare, 1, are quoted in cases about perpetuity for the cypres doctrine; but the former turns on the faulty execution of a power. Humberston v. Humberston, 1 P. Wms. 332; Nicholl v. Nicholl, 2 W. Bl. 1159 (attempt to establish a line of second sons); Doe v. Cooper, 1 East, 229, 234; Allyn v. Mather, 9 Conn. 114. In Gibson v. McNeely, 11 Ohio St. 131, the testator, after the endless line of life estates, added that he wished it carried out as far as the law allowed, and it was done.

[206] St. Amour v. Rivard (1852) 2 Mich. 294, based mainly on Monypenny v. Dering, 16 Mees. & W. 418 (attempt to establish primogeniture in gavelkind lands). In the latter case the cypres decisions are disapproved, but not overruled, and the decision that the first taker did not get an estate tail out of the successive remainders to issue is put upon narrow ground. It is here said that, though there may be a contingent remainder for life to an unborn child, there can be no vested remainder after such life estate; Jarman's opinion to the contrary being disapproved (1 Jarm. Wills, 241). As to the treatment of a perpetuity in New York, under their shorter limit, see, also, Kennedy v. Hoy, 105 N. Y. 134, 11 N. E. 390, and the very late case In re Ricard's Estate (Sur. Ct.) 28 N. Y. Supp. 583.

[207] Dulany v. Middleton, 72 Md. 67, 19 Atl. 146; Lunt v. Lunt, 108 Ill. 307.

trustees are appointed for unborn children, a direction that these trustees manage the estate, and pay over the income to the beneficiary to a later age than 21, and thereafter divide it and convey it to the beneficial owners, does not avoid the ultimate gift for remoteness.[208]

Still more favored is the position of the reversioner; that is, an estate may be brought to an end by a condition, where a "conditional limitation" would be too remote. Thus, the donor of a charity may reserve a reversion, if at any time the charitable purpose should be abandoned or become impracticable, to himself and his heirs; but he cannot direct that the fund or lands of the endowment be, in such a case, turned over to another chosen purpose, unless he fixes in the deed of gift or will a time within the rule of perpetuity.[209]

The question of accumulation of rents we must leave undiscussed, as it does not directly concern the title to land. We shall recur to perpetuities again, in connection with powers; also, indirectly, in speaking of charitable uses for which alone perpetuities may, in many states, be created. A full treatment of the subject of perpetuities would require a separate work, like that of Mr. Gray or of Mr. Lewin. Jarman on Wills treats pretty fully all the older English cases, under the head of "Testamentary Power."

NOTE. The statute of quia emptores, which forbade any further subinfeudations, recognized the power of every owner of land to sell or give away the whole or any part, divided or undivided, of his estate, for its whole duration, or for any shorter period. After the statute de donis had been nullified, in its object of fettering the inheritance, by the decision of the judges on common recoveries in Taltrum's Case, the law of perpetuity stood, in its main features, as follows: The owner of a fee might "carve" out of it one or more

[208] Appeal of Oldmixon, 147 Pa. St. 228, 23 Atl. 553; In re Cooper's Estate, 150 Pa. St. 576, 24 Atl. 1057, where the trustees were to act till two-thirds of the beneficiaries should demand a partition; but quaere, whether the restriction on the several children to demand their own after coming of age could have been enforced.

[209] Theological Education Soc. v. Attorney General, 135 Mass. 285; Palmer v. Union Bank, 17 R. I. 627, 24 Atl. 1091 (reason given that the reverter is necessarily vested, and its owner may release the condition). It was, however, held in Jones v. Habersham, 107 U. S. 174, 2 Sup. Ct. 336, that one charity may be substituted to take the place of the first whenever that fails at any indefinite time.

estates for life. He might follow these life estates up with one or more estates tail; and finally give an estate in fee, or, by failing to do so, retain a reversion in fee to himself and his "right heirs." If all of the remainders were vested, being limited to living persons, by name or designation, and the holder of the first estate and all the remainder-men were of full age, they could, by joint act, make a "tenant to the praecipe," and, by a common recovery, bar the whole entail, including remainders and reversion, and sell or resettle the estate. Thus only the first-named remainder-man in tail was needed for action; he could shut out all the later ones. Indeed, all unborn remainder-men, their remainders being contingent, might be barred by feoffment (at least, with the consent of the reversioner in fee), for a contingent remainder was destroyed by the destruction of the particular estate. Thus the alienation of the whole fee could only be prevented, either while some of the estates carved out of it were held by infants (feoffment, however, would be voidable only, not void), or when the owners of some of these vested estates would not agree to the disposition desired by the others. A fee could not be limited upon a fee; hence there was no future estate after an estate of inheritance, which a common recovery would not destroy. But, under the statute of uses, cunning conveyancers invented the springing or shifting use, and executory devise, by which a fee could be limited to begin after a previous fee should be defeated by a foretold event. They also invented "trustees to preserve contingent remainders,"—a shadowy vested remainder to come in before those to unborn children; they might insist upon the forfeiture arising from a feoffment by the holder of the preceding estate. Thus, for a number of lives, and for 21 years and 10 months thereafter, the ultimate owners of the land might be unborn, or at least unknown, and an alienation of the fee wholly impossible. Early American law writers have echoed the words of English chancellors and English land lawyers, in praising these "improvements" in the law of real estate, which have accommodated it to "the necessities of mankind," or rather to the foolish pride of a landed aristocracy, and many American legislatures have sanctioned all the contrivances for tying up the inheritance of land; have expressly authorized the raising of defeasible fees and executory devises; and have saved to settlers and testators the trouble of appointing trustees to preserve contingent remainders, by declaring such remainders indestructible; and they have done all this in the naïve belief that they were treading in the path of law reform. We have shown in the section to which this note is subjoined that some of the states, at least, have acted with more wisdom than others, and have materially abridged the power of dead landowners over their estates.

§ 25. Meaning of Words and Phrases.

1. The words "heirs" and "heirs of the body" are, in the highest sense, technical words, having a well-known meaning. Heirs are

those on whom the law, in case of intestacy, casts the title of a decedent's lands. Heirs of the body are those heirs of a person who are his lineal descendants. These words imply that the person whose heirs are spoken of is dead, for nemo est haeres viventis. But the words are often used in an untechnical sense, a grant being made in a deed "to the heirs of A. B.," who is then alive; and popularly the word "heirs" denotes common blood, though, by the law of the state, a great share, or even the whole, of a decedent's estate may go to the surviving husband or wife, in preference to blood relations.[210] When in a will a testator gives anything, upon the failure of a preceding devise, or otherwise, to his own heirs, the gift amounts to a reversion, or partial intestacy. The word "heirs" must here be taken in its legal sense.[211] But in a gift or devise to the heirs of a third person, the word "heirs" is generally construed to mean "heirs apparent," as otherwise, under the rule of nemo est haeres viventis, the gift would be defeated.[212] And in like manner, where a devise or a future estate in a deed is given, after the death of a named person, to that person's heirs, so that the word can have its legal meaning, the person on whom the law casts the lands of such decedent will take.[213] But when an estate is devised or granted to the heir or heirs of a person then living, or who is expected to be alive when the gift takes

210 Weston v. Weston, 38 Ohio St. 473 (widow included if she inherits); Brower v. Hunt, 18 Ohio St. 311; Richards v. Miller, 62 Ill. 417 (husband included); Rawson v. Rawson, 52 Ill. 62 (widow); Baskin's Appeal, 3 Pa. St. 304.

211 4 Kent, Comm. 506 (a devise to the heir is void if it gives the same estate he would take by descent); 4 Kent, Comm 220 ("heirs" may be word of purchase when the ancestor named is dead at the time of the devise, and will designate the next heirs).

212 Cushman v. Horton, 59 N. Y. 149 (in a bequest, used in the sense of "heir apparent"). So in a devise in Heard v. Horton, 1 Denio, 168; whenever it appears that the testator knew the ancestor was yet living, Carne v. Roch, 7 Bing. 226. Construed, therefore, to mean children. Simms v. Garrot, 1 Dev. & B. Eq. 393. See, also, 4 Kent, Comm. 221. In many cases the context shows that the word "heirs" means simply children. Hughes v. Clark (Ky.) 26 S. W. 187. In Lott v. Thompson, 36 S. C. 38, 15 S. E. 278, "heirs" was construed to mean children, and the children of such children as the devise excluded.

213 On this rests the rule in Shelley's Case, and the construction of the words within it, in the states which do not recognize it. See supra, section 21, note 122.

effect, and more clearly so, when the grant or devise is made to the present heirs of a named person, the word cannot be taken in its technical meaning, and will generally mean children. Thus a gift made by a father by deed to his daughter and to her present heirs, or to her heirs by her husband then living, is a conveyance to her and to the children whom she may have by that husband;[214] and the only question which can arise under such a gift is whether it is confined to the children already born, or whether it shall include those born thereafter, which question is generally answered in the latter way, there being no reason why the donor should be supposed to discriminate against the unborn children.[215] Grandchildren or more remote descendants, whose intermediate parents are dead, would be included in the word "heirs," whenever it means children, along with them, and for such a share as they would take by the law of descent in the estate of the person as whose heirs they are named;[216] but the word would not be construed, in the absence of children or descendants, to include ascendants or collaterals, or the surviving wife or husband, when the gift is made on condition that there are heirs; for, as almost everybody has heirs of some kind, such a condition is always construed in the same sense as having descendants.[217]

2. At common law the word "issue," in a deed, was not a technical term for raising an estate of inheritance,—it was not the equivalent of "heirs of the body,"—but sufficient in the phrase, "if he should die without issue," to cut down a fee simple to a fee tail. In a will this word has always been a good equivalent for "heirs of the body," and sufficient to create an estate tail.[218] A devise to any one's issue is the same as to his lineal heirs, or heirs of his body,—

[214] Pendleton v. Vandevier, 1 Wash. (Va.) 388.

[215] Dean v. Long, 122 Ill. 447, 14 N. E. 34. Compare infra, "to her and her children."

[216] In re Hopkins' Trusts, 9 Ch. Div. 131; Baker v. Bayldon, 31 Beav. 209; Feit's Ex'rs v. Vanatta, 21 N. J. Eq. 84; Comp. note 2a.

[217] See cases referred to in section on "Dying without Issue." In Coots v. Yewell (Ky.) 26 S. W. 179, a grant of the remainder in fee to "the children, heirs, and legal representatives" of the life tenant was said to mean descendants only. See, also, Benson v. Linthicum, 75 Md. 141, 23 Atl. 133; Baxter v. Wann, 87 Ga. 239, 13 S. E. 634.

[218] 4 Kent, Comm. 273, etc. And see, infra, section on "Dying without Issue."

that is, to those of his descendants who are not separated from him by a living intermediate link, and who would therefore inherit such person's land under the laws of descent; and the understanding is always that such descendants would receive the same shares, either per capita or per stirpes, when taking under a deed or will, under the designation of "issue," as they would if the thing given came to them by way of inheritance from such person.[219] We have found only one case in American jurisprudence, in which this rule was broken in upon; a family settlement by which the father gave a tract of land upon his own death to his named and then only son, and "such other issue" as he might then have, being divided into three parts,—one to the grantee of such named son, and the other two to this son's own daughters.[220]

3. The word "children" is, in the great majority of cases when it occurs in a deed or will, taken in its true and legal sense of sons or daughters, with the additional qualification of legitimate sons or daughters.[221] But where a child not born in lawful wedlock is legitimated, either by general law or private act, it may thereafter be designated

[219] It was held in England that issue "must take in the order of primogeniture,"—Roe v. Grew, 2 Wils. 322, where it was for that very reason construed as a word of limitation. Hall v. Hall, 140 Mass. 267, 2 N. E. 700 (children of deceased children take by representation under a gift to issue). A division per capita is not implied by the words "all such issue." Horsepool v. Watson, 3 Ves. 383. Where the word "issue" is used in a deed as a word of purchase, in a state requiring words of inheritance, the several persons who make up the issue can take life estates only. Rochfort v. Fitzmaurice, 2 Dru. & War. 17. And so in South Carolina. See cases collected in Bradford v. Griffin, 40 S. C. 468, 19 S. E. 76. But see act of 1853 of that state, there referred to. A history of the interpretation of the word "issue" is given in Palmer v. Horn, 84 N. Y. 516, 519.

[220] Weehawken Ferry Co. v. Sisson, 17 N. J. Eq. 475 (on appeal; same case, reported in court below). On the meaning of "issue" and the estate taken by them (a life estate only in default of words of inheritance added to "issue") in South Carolina, independent of the act of 1853, see Bradford v. Griffin, 40 S. C. 468, 19 S. E. 76. It is but natural that a gift to issue, where it is a word of purchase, should carry it to the same persons who would take it by limitation, where the ancestor does not divert it by deed or will. Weehawken Ferry Co. v. Sisson, recognizes the general rule.

[221] Collins v. Hoxie, 9 Paige, 81; Shearman v. Angel, 1 Bailey, Eq. 351. Where an illegitimate child inherits from the mother, it would be properly described as her child in a gift or devise. Hughes v. Knowlton, 37 Conn. 429.

as the natural father's or mother's child, son, or daughter.[222] Of course, where, by the whole context of an instrument, it is evident, that a particular natural child, though not legitimated in any way, is meant, its designation by the unmerited name of child, son, or daughter cannot debar it from the giver's bounty.[223] And so, if he speaks of stepchildren as his children, the children of these may take as grandchildren.[224]

4. We have shown elsewhere that "children" may sometimes mean "heirs," and become a word of inheritance. The condition subsequent, "if he die without children," must mean "without issue"; for the donor could not mean to cut down the estate, if there be living descendants of the taker of the fee, the issue of predeceased children.[225] This brings us to the construction of the word "children," when named as grantees or devisees, so as to mean or to include grandchildren. The first construction occurs when there are no children, and the devise must otherwise fail, and the testator must have meant the grandchildren.[226] The inclusion happens oftenest when a testator divides among his own children and the children of one or more predeceased children some or all of his lands, and then proceeds to give "to my children" something else (perhaps the share

[222] Carroll v. Carroll, 20 Tex. 731. In Drane v. Violett, 2 Bush, 155, it is said that "children" or "issue" includes all those who are capable of inheriting. Adopted children are not deemed included in a devise to A.'s children, though he have no other. Schafer v. Enen, 54 Pa. St. 304.

[223] Hill v. Crook, L. R. 6 H. L. 265; Gardner v. Heyer, 2 Paige, 11. It is not enough that the person whose children are to take has no lawful children, for such might still be born. Dorin v. Dorin, L. R. 7 H. L. 568. Dannelli v. Dannelli, 4 Bush, 51, might have been decided as it was, on the ground that the claimant was clearly intended, but went off on the ground that she was legitimate, and thus filled the description of daughter. The word "children" was, upon indications of intention, held to include children born in a void and adulterous marriage. Sullivan v. Parker, 113 N. C. 301, 18 S. E. 347.

[224] In re Hallet, 8 Paige (N. Y.) 375; Barnes v. Greenzebach, 1 Edw. (N. Y.) 41; Lawrence v. Hebbard, 1 Bradf. Sur. (N. Y.) 252.

[225] Parkman v. Bowdoin, 1 Sumn. 359, 366, Fed. Cas. No. 10,763; citing Hughes v. Sayer, 1 P. Wms. 534; Doe v. Perryn, 3 Term R. 484; Wood v. Baron, 1 East, 259.

[226] Feit's Ex'rs v. Vanatta, 21 N. J. Eq. 84; Palmer v. Horn, 20 Hun, 70, 84 N. Y. 516; In re Paton, 41 Hun, 497.

of a child dying before him) in the event of lapse or failure. It seems natural that the latter devise should follow the former, generally the greater and surer. The presumption is not so strong when the children and grandchildren are all those of a third person.[227] The authorities are, however, by no means in harmony. The inclusion of grandchildren among children, under the circumstances above stated, seems to be the rule; but there are exceptions, on not very apparent grounds.[228]

5. But this word "children" gives most trouble in a gift "to A. B. and her children," a phrase which has been twice called "unskillful" by the supreme court of Massachusetts, and one of the meanings of which must be guessed at. Where the first taker, who is generally the wife or daughter of the donor, has children at the date of the deed or will, the literal meaning of this phrase is to make the mother and the children which she then has joint tenants, or tenants in common, of the lands or effects given.[229] If she has none, she takes the gift for life, with a remainder to such children as may be born from time to time, opening for each as it is born.[230] But the former con-

[227] Bowker v. Bowker, 148 Mass. 198, 203, 19 N. E. 213 (devise to seven children and the children of a deceased eighth, with cross remainder if one should die without issue). So Judge Story, in Parkman v. Bowdoin, 1 Sumn. 359, Fed. Cas. No. 10,763, gives this sense to the word "when the structure of the devise requires it," and inclines to give the inheritance to the issue of a dead child. See, also, Prowitt v. Rodman, 37 N. Y. 42; Scott v. Guernsey, 48 N. Y. 106; Barnitz's Appeal, 5 Pa. St. 264; Scott v. Nelson, 3 Port. (Ala.) 452; Dickinson v. Lee, 4 Watts, 82; Dunlap v. Shreve, 2 Duv. 334 (against older Kentucky precedents, and by a forced construction of the statute preventing lapses among devisees of a class). And so grandchildren may include great-grandchildren. Tolbert v. Burns, 82 Ga. 213, 8 S. E. 79. Contra, Hone v. Van Schaick, 3 N. Y. 538.

[228] Churchill v. Churchill, 2 Metc. (Ky.) 466; Sheets v. Grubbs, 4 Metc. (Ky.) 339; Monson v. New York Security & Trust Co., 140 N. Y. 498, 35 N. E. 945.

[229] Annable v. Patch, 3 Pick. 360 ("my daughter S. A. and the children of her body," tenants in common); Allen v. Hoyt, 5 Metc. (Mass.) 324. In the former case it was declared that the devise would open for afterborn children; otherwise the testator would have named them. Gill v. Logan, 11 B. Mon. 231; Cessna v. Cessna, 4 Bush, 516 (where first taker is a man); Bullock v. Caldwell, 81 Ky. 566.

[230] Carr v. Estill, 16 B. Mon. 309, where the contention was that the first taker should take an estate tail, according to Buffar v. Bradford, 2 Atk. 220.

struction is hardly what the unlearned writer of a will or deed could have meant, and, when the children are young and numerous, an awkward arrangement.[231] In Kentucky, where grants and devises in this language have been most numerous, the taking in common has been rejected—First, where the gift is contained in a deed inter partes, and only the first taker is named in the partes, on the technical ground that a person not there named cannot take a present estate;[232] second, when the first taker is the donor's wife, on the ground that the husband, having his children in his mind, dislikes giving his wife an estate in fee, which, upon her second marriage, will pass to strangers in blood. Included herein is the case when the husband, with his own means, buys land, which a stranger, at his instance, conveys to the wife and her children.[233] On the other hand, in California, a deed made to the grantor's wife, "and to her son A. B., and such other children as she may have," was, in the absence of further children, construed, without hesitation or opposition, as a grant of one-half to the wife and one-half to the son, in fee. And in Illinois the rule of the joint estate seems to prevail, and it does undoubtedly in Georgia,[234] while in North Carolina, at

[231] "To A. B. and her children" includes those unborn. Dean v. Long, 122 Ill. 447, 14 N. E. 34.

[232] Foster v. Shreve, 6 Bush, 523; Webb v. Holmes, 3 B. Mon. 404. The reason given bears also on the intent of the grantor.

[233] Turner v. Patterson, 5 Dana, 292; Davis v. Hardin, 80 Ky. 672 (overruling Powell v. Powell, 5 Bush, 619); Koenig v. Kraft, 87 Ky. 95, 7 S. W. 622; Smith v. Upton, 13 S. W. 721. The older cases give some slight separate grounds. The last is based solely on the presumption of the donor giving to his wife only a life estate. In Goodridge v. Goodridge, 91 Ky. 507, 16 S. W. 270, both the wife by name and "her children" were named in the partes; yet a life estate and remainder was adjudged. Frank v. Unz, 91 Ky. 623, 16 S. W. 712. Of course, the word "jointly" removes all doubt. See Proctor v. Smith, 8 Bush, 81. In the English case of French v. French, 11 Sim. 256, the decision for life estate and remainder and against joint holding is put on two grounds: First, a separate estate was given to the mother; secondly, a joint estate, it was thought, would shut out afterborn children, who could, however, take a share in the remainder. In re Harris, 7 Exch. 344, has been quoted on this subject, but merely holds that, under a bequest to a widow for the maintenance of herself and her children, the latter have an enforceable trust.

[234] Brenham v. Davidson, 51 Cal. 352; Dean v. Long, 122 Ill. 449, 14 N. E. 34, supra (note 215), based on Powell v. Powell, supra, which in Kentucky

a time when words of inheritance were required in a deed, a grant to the donor's daughter and her children was construed as giving a life estate to her, and a life estate after her jointly to her children.[235] A remainder limited to such sons, daughters, or children as there should be at the time of the father's death did not, at common law, go to posthumous children, then en ventre sa mere, until the rule was changed in their favor by act of 10 & 11 Wm. III. This matter is, in compilations of statutes and in text-books, nearly always treated as a part of the law of descent, which it is not at all. The English statute is either re-enacted or considered as a rule of property, throughout the United States.[236]

Among the facts of human life which recur with some regularity, and can be almost calculated beforehand, are mistakes made in legal documents, whether these be written by the unlearned parties, by a scrivener, or by a learned lawyer. Some mistakes have occurred so often that the habit of the court to construe them away, so as to get at the supposed intent of the grantor or testator, has grown into a rule of property.[237]

6. It is quite natural, in a will or family settlement, when a gift is made to a child of tender years, to consider that if such child should die under age, so as not to have power to dispose of the thing given him by deed or will, and without issue, the object of the gift would at his death go to collateral heirs, wholly indifferent, and perhaps unknown, to the donor. It is therefore natural to insert after

stands overruled. Jackson v. Coggin, 29 Ga. 403 (relying on Wild's Case, 6 Coke, 16, which contains a dictum on page 18: "If a man devises land to A. and to his children or issue, and they then have issue, etc., they shall have but a joint estate for life"); Hoyle v. Jones, 35 Ga. 40 ("to A. B. and the heirs of her body," held an estate in common); but both of these were cases of devises of slaves. In re McIntosh's Estate, 158 Pa. St. 528, 27 Atl. 1044, 1048 (devise to A. B. [a man] and his children).

235 Blair v. Osborne, 84 N. C. 417.

236 See hereafter in the chapter on "Title by Descent." The section of the English statute 10 & 11 Wm. III. c. 16, § 1, can be found in Alexander's British Statutes in Maryland; also in Abut's Digest for District of Columbia (page 640). See it applied in Shriver v. State, 9 Gill & J. 1. See, also, Soteldo v. Clement (1893; Ohio Com. Pl.) 29 Wkly. Law Bull. 384.

237 The leading motives of this "free interpretation" are two: "Ut res magis valeat quam pereat," and the search for the grantor's or devisor's intent. We shall recur to this when we come to the construction of wills.

the gift in fee to such a child a defeasance and devise over in case such child should die "under age and without issue," or "without having made a disposition by deed, and without issue." The intent in the settler's or testator's mind is: If the child comes of age, or if he (or she) have issue (women often have a child or children before reaching the age of 21), the estate shall remain good. In putting the two conditions into the shape of a defeasance of the estate, the particle "or" ought to be turned into the conjunctive "and"; but this is overlooked, and we find a devise to A. and his heirs, but if he should die without making a "settlement," or without issue, "if he should die under age, or without issue," then to B. There is no more reason for taking the land from the issue of a man or woman who dies at 20 than from the issue of an older parent. It looks, therefore, as if having issue alone was intended to save the estate; and so, if one of the conditions for saving it was the making of a marriage settlement, it would be a fraud on the wife to let this settlement become void because the settler, her husband, afterwards died without issue.[238] Hence the courts have, in such cases, taken the liberty of reading the conjunctive "and" in place of the disjunctive "or" (in one case, the words being placed otherwise, "or" in place of "and"), and have thereby not only avoided a senseless disposition of an estate, but also the infliction of great hardship on helpless, newborn babes. More often, though, such ruling, which has really become a rule of property, has resulted in making the estate indefeasible on the first taker's coming of age.[239] In some cases the mischosen particle was put between the word "unmarried" and either or both of the other terms ("under age and without issue"), and the court like-

[238] Beachcroft v. Broome, 4 Term R. 441, on a case submitted from chancery.

[239] Soulle v. Gerrard, Cro. Eliz. 525; Framlingham v. Brand, 3 Atk. 390 ("dying during minority unmarried, and without issue"); and many other cases quoted in 1 Jarm. Wills, 444, 445, down to Mytton v. Boodle, 6 Sim. 457 (a case of personalty); Turner v. Whitted, 2 Hawks (N. C.) 613; Holmes v. Holmes, 5 Bin. 252 (though the estate was to begin only when the devisee married or came of age); Williams v. Dickerson, 2 Root, 191; Brewer v. Opie, 1 Call (Va.) 184 ("before the age of 21 years or lawful heir"); Sayward v. Sayward, 7 Greenl. (Me.) 210; Jackson v. Blanshan, 6 Johns. 54 (where "and" in one clause was corrected into "or" from the "and" in the other clause). Somewhat akin to these cases is Boyd v. Robinson, 93 Tenn. 1, 23 S.

wise substituted "and" for "or." [240] It has happened, unfortunately, in some cases, that the scrivener, in the fullness of his verbiage, put the words "in either case," "in every such case," before the limitation over, and the courts were unwilling to upset such an express declaration.[241] In one case (that of a deed from father to son, to be void on certain contingencies), but in one case only, a court has read "and" into "or" for the purpose of enforcing a forfeiture, to the loss of a purchaser from the grantee.[242]

7. But with the intent of preserving the fee, the same which in other cases led to the substitution of one particle for the other, the words "without issue" have often been interpolated where a father gave an estate to his child, especially his only child, with a limitation over to collaterals or strangers if the child should die under age; though there was nothing in the deed or will to show that dying without issue was at all before the testator's mind.[243] And where the words of a condition are "if the devisee should die," and a fee has been given to him by any implication,—death being certain, and not the subject of a condition,—it is natural to supply the modifying words "without issue," unless it be a case in which an early death is to be understood, as will be explained in the "Construction of Wills." [244] But, where a limitation over is given in case the first-named devisee (though the grantor's or testator's child) should die before some other event, the meaning expressed is too plain for a court to interpolate the words "without issue," though a literal

W. 72, where an estate was to pass from A. to B. if A. died childless and intestate, and from B. to C. if B. should die childless; "and intestate" was interpolated by the court.

[240] Carpenter v. Heard, 14 Pick. 449; Phelps v. Bates, 54 Conn. 11, 5 Atl. 301 ("during minority, or without family or issue").

[241] Brooke v. Croxton, 2 Grat. (Va.) 506; Parrish v. Vaughan, 12 Bush, 97 (a man has the right to make an absurd will).

[242] Jackson v. Topping, 1 Wend. 388.

[243] Spalding v. Spalding, Cro. Car. 185; Strong v. Cummin, 2 Burrows, 767; Nelson v. Combs, 18 N. J. Law, 27; Baker v. McLeod's Estate, 79 Wis. 534, 48 N. W. 657 (there were no words of inheritance, these being needless under the statute. Case between child of only child dying before age of 21, on one side, and a stranger and a charity, on the other.

[244] Jackson v. Strang, 1 Hall (N. Y.) 1, quoted approvingly in note to 4 Kent, Comm. 536; Selden v. King, 2 Call (Va.) 72 (an estate tail under old rule); Liston v. Jenkins, 2 W. Va. 62.

enforcement will carry the estate over from the testator's blood to strangers.[245] The limitation over to "survivors," which may as we have seen throw light on "dying without issue," is said by Jarman to have, whenever unexplained, its strict and literal meaning;[246] i. e. survivors are those of a named class, who remain alive when a future event takes place, especially when the first taker of an estate dies. Now, when several children or grandchildren are named, and, upon the death of one without issue living at the time of his death, the estate is to go to the survivors, it must mean the others of the same class only, and cannot mean the issue which one of the class, dying before the named first taker, may leave behind him. Hence those of the class taking jointly will have a vested remainder, defeasible only by some ulterior limitation which may be contained in the deed or will, and thus a speedier disposition of the whole fee will be aided.[247]

NOTE. This matter of construing words or phrases generally is not easily separated from the construction of wills, under which head the thread here dropped will be taken up.

§ 26. Dying Without Issue.

It is very common, in family settlements, and still more so in wills, to limit an estate to some one in fee, with the condition subsequent that, "if he die without issue," his estate shall cease, or that the land shall vest in another. The long-established theory as to these words was that they were in use before the statute de donis; that before the enactment of that law the party named took a fee, which was liable to be defeated if at his death he had no issue, but which, if he died leaving issue, became indefeasible. But that statute changed all "conditional gifts" into estates tail, and the words of the condition would thereafter read as if it were written, "if he should die, and his issue should ever become extinct."[248] Under

[245] McKeehan v. Wilson, 53 Pa. St. 74; Butterfield v. Hamant, 105 Mass. 338.

[246] Carter v. Bloodgood, 3 Sandf. Ch. 293.

[247] Harris v. Berry, 7 Bush. 113; Coleman-Bush Inv. Co. v. Figg, 95 Ky. 403, 25 S. W. 888.

[248] See the definition of the "conditional fee" as it stood before the statute de donis. 4 Kent, Comm. 11. The rule as applicable to devises was abolished in England by the "Will Act" (1 Vict. c. 26).

the statutes turning estates tail into fees simple, these words of condition would become altogether nugatory, while even in England, considering the ready means to dock entails, they would amount to very little. The reversions or remainders following an estate tail fall to the ground when the estate tail is turned into a fee by statute, or they may be barred by fine, common recovery, or statutory deed.[249]

In short, in all such cases the intention of the grantor or devisor who imposed the conveyance was wholly defeated, and this upon the theory that he cherished the unlawful intention of tying up the estate for an indefinite time, until the issue of the first taker should fail, and then to let the reversion or remainder come into possession. But if the grantor or devisor set down these words in their natural sense (i. e. that the grantee or devisee should die, having no issue at the time of his death), his intention was clearly lawful, as the condition would necessarily be determined one way or the other at the end of a life in being. It is true, the devisee might be outlived by his issue by less than a year, perhaps by one hour, thus rendering the fulfillment of the condition illusory, yet it is literally fulfilled.[250] Unless the issue survives the first taker for such a very short time, the result of this construction is always to defeat the purpose of the testator or grantor which might have been lawfully

[249] Chancellor Kent (4 Comm. 273) puts the doctrine in this form: "If an executory devise be limited to take effect after a dying without heirs or without issue, the limitation is held to be void, because the contingency is too remote." In other words, he takes it for granted that the meaning of these words is an indefinite failure of issue. As English cases in which the decision was most strongly against the donor's intention may be named Driver v. Edgar, Cowp. 379; Newton v. Barnardine, Moore, 127; Doe v. Bannister, 7 Mees. & W. 292. Among Massachusetts cases recognizing the rule in its general outline may be named Parker v. Parker, 5 Metc. (Mass.) 134; Weld v. Williams, 13 Metc. (Mass.) 486; Abbott v. Essex Co., 18 How. 202.

[250] Jeffery v. Sprigge, 1 Cox, Ch. 62, decided by Lord Thurlow, who thought that the testator meant the limitation over to take effect only on failure of issue. In Pleydell v. Pleydell, 1 P. Wms. 750, Lord Macclesfield thought the rule was created for the purpose of supporting the intention, but admits that it runs counter to the import of the words. Lord Ellenborough, also, in Tenny v. Agar, 12 East, 253, thought the intention of keeping out the remainder-man till failure of issue plain. Same reason was given in early American cases. Bells v. Gillespie, 5 Rand. (Va.) 273; Caskey v. Brewer, 17 Serg. & R. 441.

carried out. Hence many of the states (as enumerated in the note) have enacted statutes to this effect (quoting from the Minnesota statute): "When a remainder is limited to take effect on the death of any person without heirs, or heirs of his body, or without issue, the word 'heirs' or 'issue' shall be construed to mean heirs or issue living at the death of the person named as ancestor." [251] And, as these clauses occur most often in wills, the states of New Jersey and Maryland have given the new and truer meaning to the words in question only when found in devises.[252] Some of these statutes are broader than that quoted above, providing, not for the case only in which a remainder is limited, but more generally for every limitation over, which often is a reversion; that is, the fee first granted is determined without creating any other estate in place of it. In fact, the limitation over, when allowed, is an executory devise, not a remainder.[253] In two states (Ohio and Connecticut) the English rule has never been recognized, and no repealing statute has been found necessary.[254] In most of the other states the old rule has

[251] New York, 1 Rev. St. pt. 2, c. 1, tit. 2, § 22; Michigan, § 5538; Wisconsin, § 2046; Minnesota, c. 45, § 22; Virginia, § 2422; West Virginia, c. 71, § 10; North Carolina, § 1327; Kentucky, c. 63, art. 1, § 9 (St. 1894, § 2344); Tennessee, § 2815; Missouri, § 8837 (from an act of 1825); California, Civ. Code, § 1071; Nevada, implied in section 2613 about posthumous children; Dakota Territory, Civ. Code, § 617; Idaho seems to be implied by section 2837; Montana, Comp. Laws, div. 5, § 279; South Carolina, § 1862; Georgia, § 2251; Alabama, § 2181; Mississippi, § 2448 ("every contingent limitation"); New Mexico, Comp. Laws 1884, § 1424. The Georgia statute of 1854 was applied to a will written in 1850, the testator dying in 1855. Stone v. Franklin, 89 Ga. 195, 15 S. E. 47.

[252] New Jersey, "Wills," 25; Maryland, art. 93, § 317 ("die without issue, die without leaving issue"). The New Jersey act is in force since 1861. See the old rule enforced in Davies' Adm'r v. Steele's Adm'r, 38 N. J. Eq. 168.

[253] Some of the decisions in favor of the English rule are put on the ground that the law prefers a remainder (as it would be after an estate tail) to an executory devise, such as a new estate taking effect on the death of the first taker on the defeat of his fee. Willis v. Bucher, 3 Wash. C. C. 369, Fed. Cas. No. 17,769. Such a preference is stated in 4 Kent, Comm. 263.

[254] Parish's Heirs v. Ferris, 6 Ohio St. 563, broadly says: "If he die without issue" means "living at his death." Stevenson v. Evans, 10 Ohio St. 307 (analogous as to succession to "children and their children," meaning those living when the first set die). Niles v. Gray, 12 Ohio St. 320 ("die without any legiti-

been enforced without any regard to the supposed intention of the testator or grantor: whether the grant aside of the condition has words of inheritance or not, and whether or not the words are such as to raise a fee simple or a fee tail.[255] Slight modifying words or phrases have generally been unavailing: such as the particle "then," which would indicate that the further ownership of the estate is to be determined at once upon the first taker's death;[256] or coupling with the condition of dying without issue that of dying under age, or demanding that "he should live to have lawful issue."[257] Where a devise is made to several, and the limitation over is to the survivors, this would indicate clearly that it takes effect at the time of death; but even on the effect of such a clause the authorities are divided: those in Pennsylvania and part of those in Massachusetts upholding the technical rule even against such clear indication;[258] while by others in Massachusetts and by those in New Jersey a limitation to the survivors has been recognized as fixing the

mate heirs") only reaffirms 6 Ohio St. 563. Morgan v. Morgan, 5 Day, 517 ("dying without children" to be given its natural import); quoting Doe v. Perryn, 3 Term R. 494, for the reluctance of Lord Kenyon about the English rule; Hudson v. Wadsworth, 8 Conn. 348 ("without lawful heirs of his body"). These decisions are approved in Goodell v. Hibbard, 32 Mich. 47, though Michigan has solved the question by statute.

255 Morehouse v. Cotheal, 21 N. J. Law, 480 (devise in fee reduced to estate tail by limitation); Hayward v. Howe, 12 Gray, 49 (no words of inheritance). In Pennsylvania the leading case is Eichelberger v. Barnitz, 9 Watts, 447. Shoofstall v. Powell, 1 Grant, Cas. 19; Shoemaker v. Huffnagle, 4 Watts & S. (Pa.) 437; Hansell v. Hubbell, 24 Pa. St. 244 (no words of inheritance, "if he die without children or heirs"). In New Jersey, before the statute, Condict's Ex'rs v. King, 13 N. J. Eq. 375. In Mississippi, in a case arising before the statute (Hampton v. Rather, 30 Miss. 193), the words were "should he be called away by death without lawful heir."

256 Hall v. Priest, 6 Gray (Mass.) 18.

257 Chew's Lessee v. Weems, 1 Har. & McH. (Md.) 463; Arnold v. Brown, 7 R. I. 188. ("It is an established rule"); quoting 2 Jarm. Wills, 173.

258 Braden v. Cannon, 24 Pa. St. 158; Covert v. Robinson, 46 Pa. St. 274; Moody v. Snell, 81 Pa. St. 359; going back to Haines v. Witmer, 2 Yeates, 400,—all cases of cross remainder. A fortiori when to be divided among other sons. Lapsley v. Lapsley, 9 Pa. St. 130; Brown v. Addison Gilbert Hospital, 155 Mass. 323, 29 N. E. 625; Nightingale v. Burrell 15 Pick. 104.

time at the first taker's death.[259] But such words as "without leaving issue alive" would probably be recognized everywhere as fixing the time.[260] In the leading English case the time was fixed by putting the condition that the first taker should die without issue "living," then to the remainder-man.[261] The substitution of "heirs of the body" or of "heirs" simply for issue is immaterial; for as practically everybody has some heirs, and the limitation over is nearly always to a kinsman of the first taker, the word heirs must mean children or descendants; and "without heir" is the same as "without heirs." [262]

Where the failure of issue or heirs is modified,—"no heirs but J. S.," "none but her husband,"—it becomes clear that the matter must be determined at the first taker's death.[263] And it would seem that coupling the condition of dying without issue with that of dying under age should also have the effect of clearly fixing the time, but the authorities herein are by no means agreed.[264] A life estate to the first taker, with remainder in fee to his children, and, if he dies without issue, then over, seems clearly to indicate that the remainder over is to be determined at the first taker's death.[265] Although the rule which construes the limitation upon "dying without issue" into an estate tail in the first taker is closely connected, both in reasoning and purpose, with the rule in Shelley's Case, yet the repeal of the latter by statute has not generally affected the deci-

[259] Richardson v. Noyes, 2 Mass. 56; Brightman v. Brightman, 100 Mass. 238; Den v. Allaire, 20 N. J. Law, 6; Den v. Howell, Id. 411. So, also, in Kentucky before the statute. Deboe v. Lowen, 8 B. Mon. 616.

[260] Den v. Schenck, 8 N. J. Law, 29.

[261] Pells v. Brown, Cro. Jac. 590.

[262] Goodright v. Pullyn, 2 Ld. Raym. 1437; Wright v. Pearson, 1 Eden, 119, Amb. 358; Roach v. Martin, 1 Har. (Del.) 548; Waples v. Harman, Id. 223 (heirs and issue); Sutton v. Miles, 10 R. I. 348; Albee v. Carpenter, 12 Cush. 382 ("without issue or heirs"); Osborne v. Shrieve, 3 Mason, 391, Fed. Cas. No. 10,598 ("leaving no male heirs"). The devise in this case was first given to I. S. and his male heir and his male heirs. The "male heir" was given a remainder in tail in his own right, on the authority of Archer's Case, 1 Coke, 66.

[263] Appeal of Barry (Pa.) 10 Atl. 126.

[264] Busby v. Rhodes, 58 Miss. 237 (issue at time of death). Contra, the old case of Ray v. Enslin, 2 Mass. 354.

[265] List v. Rodney, 83 Pa. St. 483.

sions of the court upon the former.[266] In the states which have abolished the rule by statute, there has been some resistance, as the acts are not always clearly expressed; yet, as they are on the side of the testator's intention, they have been uniformly enforced.[267]

A man whose wife bears a child within the period of gestation after his death cannot be said to die without issue. The English statute on the subject (9 & 10 Wm. IV. c. 16) is supposed to be either re-enacted, or its substance is considered to be in force, in every state of the Union. In some states the section of the law which gives a new construction to the words "dying without issue" directs that one who has a posthumous child does not die without issue.[268]

Where an estate in fee is given by way of remainder after an estate for life, with a condition added, that upon such taker's dying without issue the property is to go over to another, the contingency has reference to the time of coming into possession of the property which must be at the death of the life tenant; at least, where no intent to the contrary is shown. This rule is fully established by some modern English cases,[269] and has been followed in some American cases; at least, in states in which the words of such a condition do no longer create an estate tail. And it would

[266] Hayward v. Howe, 12 Gray (Mass.) 49.

[267] Sims v. Conger, 39 Miss. 231; Johnson's Adm'r v. Citizens' Bank, 83 Va. 63, 1 S. E. 705.

[268] So in Mississippi, § 2448; Minnesota, c. 45, §§ 30, 31 (the former section providing generally that the posthumous child has the same rights under limitations of estates as if born in the lifetime of his father; the other, that its birth defeats a remainder or reversion depending on dying without issue). And so, in New York (1 Rev. St. pt. 2, c. 1, tit. 2, §§ 30, 31), Michigan, and Wisconsin, at the corresponding places. No New England state has such a statute; but the right of a posthumous child to take an estate under a deed or will immediately on its father's death, as if then born, has never been denied, even in states like Missouri, where the posthumous child of an intestate's collateral kinsman cannot take by descent. Aubuchon v. Bender, 44 Mo. 560. See, also, California, Civ. Code, § 698; Dakota Territory, Civ. Code, § 190; Kentucky, Gen. St. c. 63, art. 1, § 15 (St. 1894, § 2350); Tennessee, § 3275; South Carolina, § 1846, etc. The provision in some states is put among the rules for construction of wills; in others, among those for conveyances, or generally regarding estates in land.

[269] Slaney v. Slaney, 33 Beav. 631, where the rule is no longer argued, but treated as settled.

be so where the remainder in fee is limited to take effect on another event than death, such as the remarriage of a widow, or the taker's own attainment of full age.[270]

§ 27. Joint Ownership of Land.

Land may be owned either by a single person, or by two or more persons, with the right to enjoy it at the same time, and in undivided parts. When a single person owns land, or any estate less than the fee simple, he is said to hold it in severalty. When there are several owners, they are either coparceners (which name was given at common law to several daughters or coheiresses, or heirs taking through heiresses a joint inheritance); or they are joint tenants, if their estate is created by deed or will by such words that it begins for all, and seemingly ends for all, at the same time, and the share of each is only indicated by the number of the proposed part owners; or, lastly, they are tenants in common if their estates do not arise by joint inheritance, and are not created by the same deed or will, so as to take effect, and apparently end, at the same time, or even when it is so created, if the instrument conferring the estate gives to each an aliquot share of the whole. For instance, when I give to A., B., and C. a farm, each to own one-third thereof; or when a coparcener or joint tenant aliens his share, the purchaser is a tenant in common with the others. Of course, when the shares given to several are unequal, they can only be tenants in common.[271] There is, moreover, a fourth species of joint ownership, closer than joint tenancy, namely that arising from

[270] Thackston v. Watson, 84 Ky. 206, 1 S. W. 398; Pruitt v. Holland, 92 Ky. 641, 18 S. W. 852 (death or remarriage). In Edwards v. Edwards, 15 Beav. 361, followed in Slaney v. Slaney, 33 Beav. 631, the event was the taker's reaching full age.

[271] The short account "of a joint interest in estates" in 4 Kent, Comm. 356–371, gives much more of the old law than is now of any practical use. It appears that in some cases there could be a joint estate, though the different shares inured under the same deed or will at different times. If A., B., and C. hold as joint tenants or parceners, and A. conveys to D., he becomes a tenant in common as to one-third, while B. and C. remain joint tenants or coparceners among themselves as to two-thirds, but hold them as tenants in common as to D. Where a corporation is made a part owner, the holding is "in common," not joint. Dewitt v. San Francisco, 2 Cal. 289.

a gift or devise to husband and wife already married, or which is made to them on the eve of, and in contemplation of, their marriage. While joint tenants are said to hold per my and per tout, husband and wife hold their joint land per tout (by the entirety) only, with no right in either to demand partition.[272] Among coparceners and joint tenants, the possession of one is the possession of all (and so, a fortiori, husband and wife), and when they are dispossessed they bring their real action jointly: and, in an ejectment, the nominal plaintiff sues upon the joint demise of all. But "the right of entry" of tenants in common is supposed to be several, each for his undivided share. He must bring his separate real action, and in ejectment the nominal plaintiff must declare on a separate demise from each of the tenants in common.[273] The most striking incident of joint tenancy at common law is that of survivorship. When one of the joint tenants dies his share goes to the others,—not even subject to his widow's dower. Only upon the death of the last survivor, the law of descent, or the effect of his will, comes into operation. In short, upon the death of all the others, the last survivor becomes the owner in severalty of the whole estate.[274] But while a joint tenant can, by any act taking effect in his life, alien his share and make his alienee a tenant in common, husband and wife, holding land by entireties, cannot do so; but unless they join in a deed

[272] See 2 Bl. Comm. 115, as to the origin of this estate from gifts in frankmarriage. Whether or not at common law an estate can be given to husband and wife to hold as joint tenants or tenants in common is learnedly discussed by the majority of the court and a dissenting judge in Baker v. Stewart, 40 Kan. 442, 19 Pac. 904; 4 Kent, Comm. 363; Washburn, in 1 Real Prop. 425, and Bishop, in 2 Mar. Wom. § 285, taking the affirmative position. See, contra, Whittlesey v. Fuller, 11 Comm. 337. Neither can sell or mortgage. Naylor v. Minock, 96 Mich. 182, 55 N. W. 664.

[273] One tenant in common as sole lessor. Robinson v. Roberts, 31 Conn. 145; Bryan v. Averett, 21 Ga. 401. Such tenants join on separate demises. Hicks v. Rogers, 4 Cranch, 165; Innis v. Crawford, 4 Bibb, 241. One coparcener was allowed to maintain ejectment for her share on her separate demise, on the ground mainly that there is no provision for summons and severance in an action of ejectment. Jackson v. Sample (1800) 1 Johns. Cas. 231. The power of single coparceners to make leases is discussed in this case and in the English precedents quoted.

[274] 4 Kent, Comm. (2d Ed.) 360; 2 Bl. Comm. 183.

parting with the whole estate, and thus defeat the "entireties," the survivor alone must take the land.[275]

At common law a writ of partition was given only to parceners, upon whom the joint interest was thrown by operation of law, not to joint tenants or tenants in common, who become such by purchase, and who, it was thought, ought to abide by the terms of the purchase until they can agree upon the separation of their interests, and make a voluntary partition. But very early English statutes gave the writ of partition to every joint owner seeking partition, and courts of equity, when they took hold of this kind of relief, made no distinction, always excepting husband and wife, who do not hold by halves at all. There is, however, a natural reason for making partition among parceners quick and easy, as their case, especially in this country, where all children share alike, is the most frequent, and some of them are generally infants; hence many of the states give to their probate court a jurisdiction to divide descended estates, which these courts have not over other estates, owned jointly.[276]

Our statutes have left but little of all the distinctions. In many of the states (as will be shown in the chapter on "Descent") joint heirs are called tenants in common, instead of parceners; where procedure is governed by modern codes, and the action of ejectment is abolished, all classes of part owners join in a suit for land, or fail to do so, if they do not choose to join, in the same manner; in the New England states in which writs of entry upon disseisin are brought for the recovery of land, coparceners, joint tenants and tenants in common alike, are authorized by statute to join.[277]

Survivorship, the strongest of these distinctions, has been almost abolished in most of the states (all but those specially named hereafter) by statutes (some of them dating back to 1785) which require

[275] If land was given to A. and B., his wife, and C., and A. and B. had one-half, and C. the other, the death of A. or B. would not benefit C. by survivorship. Well stated in argument in Stilphen v. Stilphen, 65 N. H. 136, 23 Atl. 79. See Mander v. Harris, 27 Ch. Div. 166. Husband's interest cannot be sold separately. Rogers v. Grider, 1 Dana, 242.

[276] Section 4107, Rev. St. Idaho, names all three classes, and enables them to sue or defend jointly or severally. Stimson's Am. St. p. 120.

[277] See Massachusetts, Pub. St. c. 173, § 7; Maine, c. 104, § 9. Those of either class may join or may sever. Woolfolk v. Ashby, 2 Metc. (Ky.) 288. Compare Craig v. Taylor, 6 B. Mon. 457.

express words in an instrument that gives a landed estate to several, in order to raise a joint tenancy,—the takers, in the absence of such express words, to be tenants in common;[278] in other states, by directing that there shall no longer be any survivorship, except among those holding the legal title in trust, though they be still known as joint tenants;[279] or, lastly, by abolishing the estate of joint tenants

[278] The Massachusetts revision, c. 126, § 6, makes the words "as joint tenants" sufficient to raise a survivorship (see Miller v. Miller, 16 Mass. 59: "Jointly and severally" do not create a joint estate); Maine, c. 73, § 7, to same effect; Rhode Island, c. 172, § 1 ("or unless other words be used, manifestly showing the intention," etc.); New Hampshire, c. 137, § 14 (about the same); Vermont, § 1916. New York, Rev. St. pt. 2, c. 1, tit. 2, § 44 ("unless expressly declared to be in joint tenancy"; and the same words are used in the corresponding section in the laws of Michigan, Wisconsin, and Minnesota. For effect of tenancy in common on relation between devisees, see Everitt v. Everitt, 29 N. Y. 39, 72); New Jersey, "Conveyance," 78; Delaware, c. 86, § 1; Maryland, art. 50, § 13; Kentucky, Gen. St. c. 63, art. 1, § 14 (unless it manifestly appears that survivorship was intended); Mississippi, Code, § 2441 (similar); California, sections 683 and 686 are of same effect as in New York, but section 1350 seems to abolish joint tenancy as to devises altogether; Dakota, Civ. Code, § 179; Colorado, § 200; Nevada, § 2610; Illinois, Rev. St. c. 30, § 5 ("unless * * * declared * * * not in tenancy in common, but in joint tenancy"); Iowa, § 1939 ("tenancy in common, unless contrary intent is expressed"). While formerly the intention to make a tenancy in common had to be stated, it is the contrary under these acts. Boston Franklinite Co. v. Condit, 19 N. J. Eq. 394.

[279] Georgia, Code, §§ 2300, 2301 (retrospective on their face, and dating back to 1777); Virginia, Code, § 2430; West Virginia, c. 71, § 18 (estate of joint tenant passes on his death, like that of tenant in common); Montana, Gen. Laws, § 1294, retains joint tenants, but abolishes survivorship. In Pennsylvania the survivorship among joint tenants is abolished: Dig. "Joint Tenants," 1 (1812). But a joint tenancy with survivorship may be given by express words. Arnold v. Jack, 24 Pa. St. 57. The act does not apply to devise to two during joint lives. Lentz v. Lentz, 2 Phila. 117. The act is treated in Kennedy's Appeal, 60 Pa. St. 511, as creating a tenancy in common. In Florida survivorship among joint tenants is abolished. Rev. St. § 1819. By the South Carolina statutes, § 1851, the death of a joint tenant severs the tenancy, and his estate is "distributable." Indiana, Rev. St. § 6060, gives the survivor among joint tenants no greater right than if tenants in common. Washington, Gen. St. § 1483: "If joint tenant dies, share to descend" (passed December 23, 1885, in force from date). Oregon, § 2991: "All persons having undivided interests in land are tenants in common" (adopted in 1862).

entirely, except among joint executors or trustees.[280] These acts have generally been retrospective, operating upon joint estates already created, which they might fairly be, without interference with vested rights; for a joint tenant was always at liberty to break the joint estate by conveying his share to a stranger. Of course, after death and survivorship, the legislature could no longer interfere.[281] No such statute has ever been passed in Connecticut, where, in colonial times already "the odious and unjust doctrine of survivorship" was repudiated; nor in Ohio, which received most of its land law from that state; nor in Kansas or Nebraska; nor is such a clause in the present Idaho revision. And in these states, as in Connecticut, it seems that survivorship is unknown, and that a single joint tenant, like a single tenant in common, can bring or defend an action for his share in land.[282] While the ultimate equities of partners and joint creditors were, even before these statutes, exempted from the harsh rule of survivorship, yet convenience seems to require that, wherever any legal title is recognized in mortgages, it should survive to the last among them, for the benefit of the representatives of all; and that land held by partners for partnership purposes should thus survive, for the purpose of paying the partnership debts, and winding up the business of the firm.[283] The estate by entireties between husband and wife is, in most states, not affected by the acts

[280] So in the Pennsylvania act, supra ("not to affect any trust estate"); enforced in Philadelphia & R. R. Co. v. Lehigh Coal & Nav. Co., 36 Pa. St. 204. Secus in Ohio, infra. And see most of the other acts quoted. In North Carolina the act abolishing survivorship among joint tenants, originally passed in 1784, has been construed as not applying to life estates. Powell v. Allen, 75 N. C. 450; Blair v. Osborne, 84 N. C. 417.

[281] See Miller v. Miller, supra; Miller v. Dennet, 6 N. H. 109; Stevenson v. Cofferin, 20 N. H. 150; Cooley, Const. Lim. 360, note 3, and cases there quoted, discussed in Wade, Retro. Laws, §§ 28, 179–185. The New York statute is clearly retrospective; those of New Jersey (1812) and Maryland (1822) clearly prospective only. The Kentucky act of 1796 was held prospective only.

[282] Phelps v. Jepson (1769) 1 Root, 48; Sanford v. Button, 4 Day, 310; Sergeant v. Steinberger, 2 Ohio, 306: "Estates by joint tenancy have no existence in Ohio;" extended even to an estate given to trustees. Miles v. Fisher, 10 Ohio, 1. So recognized for Kansas, in Baker v. Stewart, supra, note 272.

[283] See the words "except mortgages" in the Maine statute, supra, and Crooker v. Crooker, 46 Me. 250, 260; also, in statutes of Massachusetts, Indiana, Wisconsin, Michigan, Minnesota, and Mississippi.

abolishing or curtailing joint tenancies,[284] and its destruction by statute has not been near as general as that of the joint tenancy with survivorship among strangers; [285] and, where it has been abrogated, it was done at a much later date.[286] But in several states

[284] Thomas v. De Baum, 14 N. J. Eq. 37; Buttlar v. Rosenblath, 42 N. J. Eq. 651, 9 Atl. 695; Elliott v. Nichols, 4 Bush, 502 (following Rogers v. Grider, supra); Wright v. Saddler, 20 N. Y. 320; Wentworth v. Remick, 47 N. H. 226; Wales v. Coffin, 13 Allen, 213; Pierce v. Chace, 108 Mass. 254 (where a resulting trust was given to the wife in a moiety, the deed having by mistake been made to the husband alone); Carver v. Smith, 90 Ind. 222; Marburg v. Cole, 49 Md. 402. See, also, New York decisions below, in connection with married women's acts; Gibson v. Zimmerman, 12 Mo. 385; Hall v. Stephens, 65 Mo. 670; Robinson v. Eagle, 29 Ark. 202; Harding v. Springer, 14 Me. 407; Brownson v. Hull, 16 Vt. 309; Bates v. Seely, 46 Pa. St. 248; Fleck v. Zillhaver, 117 Pa. St. 213; McLeod v. Tarrant, 39 S. C. 271, 17 S. E. 773; Georgia, C. & N. Ry. Co. v. Scott, 38 S. C. 34, 16 S. E. 185, 839; Town of Corinth v. Emery, 63 Vt. 505, 22 Atl. 618 (execution sale against husband alone futile); Farmers' Bank v. Corder, 32 W. Va. 233, 9 S. E. 220 (hence the husband's deed to the wife no fraud on his creditors); Den v. Branson, 5 Ired. (N. C.) 426; Berrigan v. Fleming, 2 Lea (Tenn.) 271; Hemingway v. Scales, 42 Miss. 1; Allen v. Tate, 58 Miss. 585; Bennett v. Child, 19 Wis. 362; Jacobs v. Miller, 50 Mich. 119, 15 N. W. 42, which follows earlier Michigan cases quoted in it. The present statutes against joint tenancies in Vermont, Indiana, Michigan, Wisconsin, and Indiana except estates given to husband and wife. On the contrary, the statutes against joint tenancy in Illinois and Iowa have been held broad enough to abolish the estate by entireties. Bracken v. Cooper, 80 Ill. 221; Smith v. Osborne, 86 Ill. 606; Hoffman v. Stigers, 28 Iowa, 302, under statute: "Conveyances * * * create a tenancy in common, unless a contrary intent is expressed." The Oregon statute making every owner of an undivided interest a tenant in common seems to embrace husband and wife; also that of Georgia. In Michigan, where the statute expressly saves this tenancy, a deed made to a man and woman who are married creates it, though it does not describe them as husband and wife. Dowling v. Salliotte, 83 Mich. 131, 47 N. W. 225. Messrs. Sharswood and Budd, in their Leading American Cases on Real Property, give Thornton v. Thornton, 3 Rand. (Va.) 179, as the leading case in favor of the position in the text. The reader will find in it much of the Black letter law on the subject. But see below as to the abrogation of this estate in Virginia.

[285] Compare the states from which decisions are quoted in preceding note with the repealing acts given below.

[286] In Massachusetts, by Acts 1885, c. 237, about 100 years after the other act; Kentucky, by the Revision of 1852; Virginia, by Code 1887, § 2430. The cases under statutes abolishing or supposed to abolish "entireties" (e. g. Stil-

the ground has been taken that statutes abolishing the disabilities of married women, and depriving the husband of marital rights in the wife's lands, do implicitly destroy all distinction between a grant or devise to husband and wife and a like grant or devise to two strangers, and that where such statutes are in force the former as well as the latter must be construed as giving to each of them a moiety or undivided half of the estate as tenants in common. This position, after a seeming approval, has been rejected in New York upon a comparison of all the acts referring to husband and wife by the court of appeals of that state.[287] The matter is left in but little doubt in other states; Massachusetts, Pennsylvania, Mississippi, and Kansas having decided, like New York, that the married women acts have not changed the tenancy by entireties, and the opposite doctrine in New Hampshire not being sustained by any decision upon the title to land.[288] In Connecticut and in Ohio the

phen v. Stilphen, supra, note 275) show that they are never construed as retrospective, and cannot be such; for, as the rights of each spouse are inalienable without its consent (while each joint tenant may by his grant sever the joint tenancy), these rights are vested and beyond legislative control. In the states which have gotten from Spanish or French sources the law of "community property," such as Texas, Louisiana, California, Nevada, Idaho, Washington, Arizona, and New Mexico, there is no room for the estate by entireties.

[287] Meeker v. Wright, 76 N. Y. 262 (reversing 11 Hun, 533; distinguishing Torrey v. Torrey, 14 N. Y. 430, etc.) supported a conveyance made by the husband not to a stranger, but to his wife, and her obligation to him. In Bertles v. Nunan, 92 N. Y. 152, the question had to be met; and it was held that the common-law incidents of marriage are abolished only one by one; and Laws 1880, c. 472, was referred to, which still recognizes the estate by entireties; also, Zorntlein v. Bram, 100 N. Y. 12, 2 N. E. 388. On a divorce a vinculo, husband and wife become tenants in common. Stelz v. Schesck, 128 N. Y. 263, 28 N. E. 510.

[288] Pray v. Stebbins, 141 Mass. 219, 4 N. E. 824; Baker v. Stewart, 40 Kan. 442, 19 Pac. 904; Dowling v. Salliotte, 83 Mich. 131, 47 N. W. 225. Clark v. Clark, 56 N. H. 105, was on a transfer of notes. Stilphen v. Stilphen, 65 N. H. 126, 23 Atl. 79, perhaps extends it to land, but decides for the entireties, by holding that the married women's acts were not retrospective in their effect. The argument on behalf of the entireties in this case is able and comprehensive. Bates v. Seely, supra, note 284; Diver v. Diver, 56 Pa. St. 106. And the husband has no moiety, even during the joint life, to sell for his debt. McCurdy v. Canning, 64 Pa. St. 39. In Mississippi (where it is abolished as to conveyance since Code of 1880), Gresham v. King, 65 Miss. 387, 4 South. 120.

English doctrine of entireties between husband and wife has never been adopted. A grant to A. B. and C. B., his wife, makes them joint tenants, and the husband can sell his one-half, subject to his wife's dower, like any other joint tenant.[289] What kind of joint ownership is conferred upon several grantees or devisees (husband and wife, or strangers), and in what proportions they take the estate, must be decided, in all cases, from the face of the writing itself, and not upon parol evidence, or upon the circumstances or condition of the parties.[290]

Where a survivorship (absolute or conditional) is created by express words among several (more than two) tenants in common, it does not run through to the end, but the parts of each share which, upon the death of the one dying first, go to his companions, vest in them indefeasibly; that is, if A., B., and C. are to own land in common, with survivorship, and A. dies (whether before or after division), half of his share, or one-sixth of the whole, goes to B., and one-sixth to C. Now, when B. dies only his original one-third goes to C., while the one-sixth taken by survivorship goes to B.'s heirs.[291] Where the remnants of Indian tribes hold lands in the older states, they are generally under such tutelage that the interests of the individuals are not separable from the mass; the ownership being in the whole community, and inalienable. But from time to time this tutelage has been relaxed, and the members of such communities have in some instances (as in that of the Herring Pond Indians, of Massachusetts) been declared by law tenants in common of their lands; and this gives them, like other similar owners, the right to a division, with all its incidents.[292]

Not only joint tenants and coparceners, but even tenants in com-

289 Whittlesey v. Fuller, 11 Conn. 337. See, also, Huntington v. Birch, 12 Conn. 149, Sergeant v. Steinberger, 2 Ohio, 305, and Wilson v. Fleming, 13 Ohio, 68, in which cases the supreme court of Ohio speaks of the estate by entireties as if it was a joint tenancy which "does not exist" there.

290 Treadwell v. Bulkley, 4 Day (Conn.) 395; Campau v. Campau, 44 Mich. 31, 5 N. W. 1062; Morse v. Shattuck, 4 N. H. 229; Jacobs v. Miller, 50 Mich. 119, 15 N. W. 42; Gardenier v. Furey, 50 Hun, 82, 4 N. Y. Supp. 512.

291 Hilliard v. Kearney, 1 Busb. Eq. (N. C.) 221; quoting Pain v. Benson, 3 Atk. 78; Ex parte West, 1 Brown, Ch. 575. Such survivorship is generally conditioned on death without child or death under age.

292 Drew v. Carroll, 154 Mass. 181, 28 N. E. 148.

mon, are supposed to stand so far in a confidential relation to each other that they are not allowed to undermine each other's interests by buying up outstanding estates, and especially not by allowing the land to be sold for taxes, and acquiring the tax title. The law gives each cotenant a lien on the whole land for whatever expense he may be put to in saving the estate of himself and his fellows, and with this security he must be satisfied. At least, such is the prevailing rule. In fact, the cotenant who is alone in possession may be regarded, as to the shares not his own, as the tenant at will of the others, and owes them a duty in that character.[293] Where one of the cotenants, before any division with his fellows, treats some parts of the whole tract as specially his own, and erects improvements upon it, a court will, in directing a partition, or in acting upon an informal division, see to it that the part improved shall, as far as it can be fairly done, be set aside for the share in severalty of him who made the improvements.[294]

[293] Cohea v. Hemingway, 71 Miss. 22, 14 South. 734; Hannan v. Osborn, 4 Paige, 336; Thruston v. Masterson, 9 Dana, 234. See, contra, Burch v. Burch, 82 Ky. 622.

[294] Alves' Ex'rs v. Town of Henderson, 16 B. Mon. 132, 165.

CHAPTER IV.

TITLE BY DESCENT.

§ 28. Nature and Objects of Descent.

The act of the law which, upon the death of a person owning lands or other hereditaments, vests them in one or more other persons, is known as a "descent," when the person or persons are pointed out by the law, not by the last will of the owner. In its widest sense, this definition would take in the rights of a surviving husband or wife to curtesy and dower, or to the homestead, under modern statutes; but these rights, especially that of dower, are generally treated as not falling within the meaning of descent.

The person upon whom the ownership of land is thrown is called the "heir." Under the English common law, the heir was generally but one person; and the plural, "heirs," was meant to designate the line of heirs, one after the other. In the United States, however, where in most cases a descent is "cast" on more than one person, the word "heirs," when used in deeds, wills, or statutes, is almost always understood as meaning those who conjointly "take" the

landed estate of the dying owner. This is the technical meaning of "heir" or "heirs"; but from the context the word is sometimes construed in some other sense.

When land is devised to the testator's heir or heirs in the same quantity and quality of estate in which he or they would take it in case of intestacy, the devise is nugatory, and the heir is "in" by descent.

While the common law vests the personal estate of one who dies without a last will or testament in his administrator, and gives to the relatives, beneficially interested, nothing but the right to have distribution, after burial and administration expenses and debts are paid, the real estate of the decedent is at once "cast" upon the heir or heirs; that is, at the moment of the death of the former owner of the land, his heir becomes the owner. This change of ownership is a "descent cast."

The common-law rule which vests the land at once in the heir is unchanged in many American states,[1] while others have abolished the distinction between lands and personalty, vesting a trusteeship over both in the administrator or in the probate court, and putting off the heirs till the land is "distributed" to them.

In New Hampshire, such was already the practice in colonial times, and is so yet.[2] In the present statute of Connecticut the word "descent" is not used at all; the difference between land and personalty is only recognized as to real estate which has come to the intestate from a parent or kindred, and by reference to curtesy and dower. After all debts are paid, "the residue of the real and personal estate shall be distributed according to the value at the time of distribution"; and it does not appear that the estate of each kind must be divided separately.[3] South Carolina and Georgia, soon after the Revolution, adopted nearly the same system, when

[1] So in West Virginia; Laidley v. Kline, 8 W. Va. 218. Land goes for no purpose to the administrator, and a judgment for the intestate's debt against the latter is no proof against heirs.

[2] The administrator takes possession of the lands. See Bergin v. McFarland, 6 Fost. (N. H.) 533. Yet even in New Hampshire the title vests in the heirs. Lane v. Thompson, 43 N. H. 321.

[3] Gen. St. Conn. 1888, §§ 630–639. For a history of the law, see Clark v. Russell, 2 Day, 112; also, United States supreme court in Ricard v. Williams, 7 Wheat. 59, 114.

they remodeled their law of descent on the basis of the English law for the distribution of personalty.[4] Louisiana, starting out with the Spanish law, soon adopted a code based on that of France, and naturally put a "succession" to both immovables and movables in the place where the common law has the two independent systems of descent and of distribution. California, which had lived for a long time under Spanish law, was willing to adopt, almost in bulk, David Dudley Field's Code, in which succession takes the place of descent and distribution. And its example was followed by the Dakotas, Montana, Idaho, Utah and Oklahoma; also in Nevada, and New Mexico, in which latter two states, however, the statute employs the word "descent." In the Field Code states, the "real and personal property of one who dies without disposing of it by will passes to his heirs, subject to the control of the probate court and to the possession of any administrator." [5] In Kansas, distribution alone is known, and no descent; and, after allotting the homestead, "the remainder of the real estate and personal effects not necessary for the payment of debts shall be distributed." [6] The statute of Iowa is similar. In Indiana, the personalty is made to descend like land; and the administrator has nearly the same powers over both. In Michigan, the estate of the decedent goes in the first instance into the hands of a court, which, after paying debts and charges, allots the unused remnant to the heirs.[7] Wisconsin fol-

[4] The references to the canons of descent will be given in note at end of section 31. The first section or article introducing the canons of descent generally indicates the view that is taken of the devolution of lands. The administrator in Georgia takes possession of the land, and brings ejectment suits in his name. Doe v. Kennon, 1 Kelly, 579. In Georgia the power of the administrator as against heirs and purchasers from heirs is defined by sections 2485 and 2486 of the Code.

[5] Civ. Code Cal. § 1383; Ter. Code Dak. § 777; Gen. St. Nev. § 2981; Code Idaho T. § 532; Comp. Laws Utah 1888. § 2739; St. Okl. § 6892. Nevada uses the common-law terms "descend and be distributed," but the effect is the same. See Meeks v. Hahn, 20 Cal. 620; Acts N. M. 1887, c. 32, § 1.

[6] Gen. St. Kan. par. 2562. Under paragraph 2898, the administrator, on failure of assets, applies for leave to sell "the real estate of the deceased," not that of the heirs.

[7] Comp. Laws Mich. § 4496; Dickinson v. Reynolds, 48 Mich. 158, 12 N. W. 24. And see next note. See, contra, under older act, Marvin v. Schilling, 12 Mich. 356.

lows the lead of Michigan, though not to its full extent;[8] Alabama goes not quite so far.[9]

On the other hand, in Virginia and North Carolina, with their offshoots, Kentucky, West Virginia, and Tennessee; in New Jersey, Delaware, and Maryland,—the lands of the intestate vest in the heir at once; neither the administrator nor the probate court can meddle with them; only in a suit (generally before the court of equity) against the heirs can the lands be subjected to the payment of debts. In Washington, also, the statute speaks the language of the common law, and the canons of descent and of distribution are set out separately.[10] In Massachusetts, Maine, Vermont, Rhode Island,[11] Pennsylvania,[12] and Illinois,[13] the land vests in the heirs, but the administrator sells lands for debt by order of a probate court; and the heir cannot by alienation or incumbrance defeat such a sale. In

[8] The administrator may take possession of lands. Jones v. Billstein, 28 Wis. 221; following Michigan decision under a similar law in Streeter v. Paton, 7 Mich. 341. See an early Indiana case against the deed from the heirs,—Elliott v. Moore, 5 Blackf. 270.

[9] Masterson v. Girard, 10 Ala. 60.

[10] In Spaight v. Wade, 2 Murph. 295, under an old North Carolina statute, lands, having been sold for the heir's own debts, were held no longer bound for the ancestor's debts. In New Jersey it was held that lands bought in good faith from the heir cannot be sold thereafter for ancestor's debts. Den v. Jaques, 10 N. J. Law, 259. In the states here named in the text the title of the heirs can only be divested in regular proceedings to which they are made parties, and any alienee from the heir would have to be made party as terretenant.

[11] As to the law of the New England States, see Wilkinson v. Leland, 2 Pet. 627, from Rhode Island and the cases there quoted; Gore v. Brazier, 3 Mass. 523, 542; Wyman v. Brigden, 4 Mass. 150, 155; Drinkwater v. Drinkwater, Id. 354, 359, to the effect that the administrator's power of sale is not defeated by alienation. Under chapter 134 of the Massachusetts Public Statutes, the administrator is entitled to possession when he has obtained license to sell for debt.

[12] In Pennsylvania the heirs have only the surplus after the payment of debts. Blank's Appeal, 3 Grant Cas. 192. But, if there is only one heir and no debts, administration is needless, and the heir can make title. McLean v. Wade, 53 Pa. St. 146.

[13] Vansyckle v. Richardson, 13 Ill. 171 (heir cannot incumber the land as against the ancestor's creditors). For a declaration of heirship by the probate court, see Keegan v. Geraghty, 101 Ill. 26.

New York, the distinction between descent and distribution is kept up; and though a judgment for the ancestor's debt is a higher lien than one for the debt of the heir, yet, by express direction of the statute, a deed made by the heir, to a purchaser in good faith, before notice of lis pendens, or judgment roll filed, will be respected.[14] In Texas, a conveyance by the heirs prevents a sale on summary order of the probate court, because the administrator can, under the statute, sell only the "decedent's lands"; but the deed of the heir would probably not stand good against a suit of the ancestor's creditors to subject the land.[15]

Even in states in which the power of the administrator is quite extensive, as in Michigan, Wisconsin, and Alabama, it is the rule that when he neither takes nor claims possession, in a contest between the heirs or devisees on one side, and strangers in title to the estate on the other, the former have the right of possession, and may maintain ejectment.[16] In Florida, also, lands are assets in the hands of the executor or administrator, though he can only take possession of them by order of court. He represents the inheritance so far that he alone may be made a party defendant to the foreclosure suit by a mortgagee and the heirs are bound by the decree and sale had in such suit. But the deed of the heir passes the title subject to the decedent's debts.[17] In states like Connecticut or Kansas, in which land passes through administration like chattels, the purchaser of land from the heir has no greater rights than the pur-

[14] Code Civ. Proc. N. Y. §§ 1853, 1854; 2 Rev. St. N. Y. pt. 3, tit. 3, c. 8, § 51. See Covell v. Weston, 20 Johns. 414. See, further, on this subject, in sections on "Sale by Administrator under License."

[15] Mitchell v. Dewitt, 20 Tex. 294; Morris v. Halbert, 36 Tex. 19. And land vests at once in the heir, subject to debts. Chubb v. Johnson, 11 Tex. 469.

[16] Campau v. Campau, 19 Mich. 116; Jones v. Billstein, 28 Wis. 221; Masterson v. Girard, 10 Ala. 60. This matter will be referred to hereafter in treating of sales by administrator under "license." In New Hampshire, where the powers of the administrator over descended land are very full, it is said to vest at once on the ancestor's death in the heir. Lane v. Thompson, 43 N. H. 321.

[17] Code Fla. 1892, §§ 1817–1819; Merritt v. Daffin, 24 Fla. 320, 4 South. 806; see also Belton v. Summer, 31 Fla. 139, 12 South. 371. And, on the other hand, Stewart v. Mathews, 19 Fla. 752.

chaser of a chattel from the distributee has at common law; i. e. nothing but an equity, subject to all charges. But, where the common law is unchanged, the heir takes possession at once, having the "right of entry"; the administrator cannot meddle with the rents; the land can only be subjected to the ancestor's debts by a regular suit, to which the heirs are made parties. Until such action is brought, either on behalf of one or of all the creditors, the debts of the ancestor are not a lien on the descended lands; and, if one has purchased from the heirs in good faith, he takes as good a title as if he had bought the lands of a man who is himself in debt, but for whose debt no lien has yet arisen.

This is the statutory rule in New York, and has been laid down judicially in New Jersey and North Carolina. The authority of the supreme court of the United States,[18] followed in Illinois, runs the other way; but it was rendered in a case from Connecticut in which the heir to land was even then hardly more than a distributee. The supreme court looked on the law which subjects descended lands to sale for the ancestor's debts as raising an inchoate lien, like a power given to executors by will to sell the lands which are allowed to descend, and intimated that the title of the purchaser from an heir might be displaced by an administrator's sale at any time within the time for limiting actions for land.

In states in which the personal representative cannot meddle with the lands at all, and he or a creditor can subject them to the payment of debts only by an administration suit, in the nature of a bill in chancery, making the heirs and terre-tenants parties, upon the allegation of a deficit of assets, the rule of the supreme court would be intolerable. At least, when the shorter period for bringing an administration suit has elapsed, the alienee should be safe from disturbance, though single creditors might perhaps still have the statutory right to subject the descended lands to their own claims. It is to be wondered that both statutory provisions and judicial decisions on this highly important question are so scanty.

At one time, corporate shares in companies like railroads, whose assets are mainly lands and franchises, were deemed real estate; but it is not believed that such is now the law in any state, Kentucky

[18] Ricard v. Williams, 7 Wheat. 59, 114, from Connecticut.

having provided to the contrary in 1871, and Georgia cleared up all doubts on the subject by an act of 1893.[19]

There is in most of the American states no estate of inheritance, except the estate in fee simple, either absolute or defeasible, as an estate in tail is generally by statute turned into a fee simple. In some states, words which would under the statute de donis create a fee tail raise a life estate in the first taker, with remainder in fee in the heir; while in a very few states a fee tail still exists, descending by special rules, but rare and unimportant. An estate held by the decedent for the life of another goes in most states, as personalty, to the administrator; but in Massachusetts, North Carolina, Minnesota, Nebraska, Oregon, Washington, and Arizona, and, notwithstanding a contradiction in the statute, probably also in Wisconsin, the statute of descents in express words embraces these estates.[20] A mining claim, though resting on no better law than the "rules and customs of miners," is real property for all purposes, and subject to the laws of descent like land.[21]

An equitable fee, an equitable right to have a conveyance of land in fee, an equity of redemption, goes to the heir as land held in fee,[22] though the statute of descents may only speak of land of which the decedent died seised. Even where the equity grows out of a bond for title, which at law must go to the administrator, the interest in the land goes entirely to the heir; and the acts of the administrator will be held void when they interfere with the heir's equity.[23] Entries and surveys, under the land laws of Virginia, North Carolina, and states having similar systems,[24] located land war-

19 Sess. Acts 1893, c. 224.

20 The first clause in the statute of descents generally states what descends. In Wisconsin, section 2030 makes an estate pur auter vie descend. Section 2270 calls the remnant after the grantee's death personal estate.

21 Belk v. Meagher, 104 U. S. 279, 283.

22 Asay v. Hoover, 5 Pa. St. 21 (equity of redemption). See Nicholson v. Halsey, 1 Johns. Ch. 417, and innumerable cases in which the matter is taken for granted.

23 Myrick v. Boyd, 3 Hayw. (Tenn.) 179; Stephenson v. Yandle, Id. 109. See, contra, Godfrey v. Dwinel, 40 Me. 94; Code Miss. 1892, § 1546.

24 Hansford v. Minor's Heirs, 4 Bibb (Ky.) 385; Moore v. Dodd, 1 A. K. Marsh. (Ky.) 140; Workman v. Gillespie, 3 Yeates (Pa.) 571; Morrison v. Campbell, 2 Rand. (Va.) 206. Compare, Bond v. Swearingen, 1 Ohio, 395.

rants,[25] and certificates of purchase at a tax sale, go to the heir.[26] On the other hand, the legal title held by a trustee for the benefit of others, and the estate of a vendor of land who has been paid in part only, and has not yet made his deed, go to the heir only in trust for the administrator.[27]

On common-law grounds it has been held that a ferry license is a hereditament; so is a church pew.[28] A lease for a long term, for instance, for 99 years, goes as personalty. But, by statute in Ohio, a "perpetual lease, renewable forever," and in Massachusetts a lease for 100 years, or a longer term, of which 50 years are still unexpired, descends like a fee.[29]

We cannot discuss the lengthy provisions borrowed by the Louisiana Code from the French law as to the unworthiness of heirs. But the question has been very lately raised in Nebraska, whether a relative who had murdered the intestate could take the inheritance; and it was first held in the negative, on the authority of a New York decision excluding a legatee who had poisoned his grandfather from a bequest in his will. But on rehearing the supreme court of Nebraska decided that it had no power to ingraft exceptions on the statute of descents; and the same was held in North Carolina as to dower. A late statute in Mississippi adopts the rule that no one can inherit from a person whom he has killed; the estate must descend as if the homicide had never lived, thus excluding his issue along with him.[30]

[25] Armstrong v. Campbell, 3 Yerg. (Tenn.) 201; Shanks v. Lucas, 4 Blackf. 476.

[26] Rice v. White, 8 Ohio, 216.

[27] Berrien v. McLane, 1 Hoff. Ch. (N. Y.) 421; Martin v. Price, 2 Rich. Eq. 412; Vincent v. Huff, 8 Serg. & R. 381.

[28] Lewis v. Town of Gainesville, 7 Ala. 85; McNabb v. Pond, 4 Bradf. Surr. (N. Y.) 7.

[29] Murdock v. Ratcliff, 7 Ohio, 119; Rev. St. Ohio 1890, § 4181; Pub. St. Mass. c. 121, § 1 (from Rev. St. 1836).

[30] Shellenberger v. Ransom, 31 Neb. 61, 47 N. W. 700, which relies on Riggs v. Palmer, 115 N. Y. 506, 22 N. E. 188, was reopened, and upon rehearing (59 N. W. 935) the contrary opinion given. So, also, Owens v. Owens, 100 N. C. 240. Code Miss. § 1554, disinherits the parricide.

§ 29. The Common and the Civil Law.

The course of descent is in every case determined by the law in force at the time of the former owner's death. It often becomes necessary to go back to laws long repealed or modified, in tracing a title through a course of several descents; and it is always useful to know the old law, in order to understand fully the statutes now in force.

Before going into the history of American legislation, we must begin with the English common law of descent, under which all the original states, except New Hampshire, Massachusetts, and Connecticut, lived before the Revolution.

I. Under the common law, a distinction was made between lands purchased by the decedent and those coming to him by descent. As to the former, he was from necessity the stock of descent; as to the latter, he was such only if he was seised,—"seisina facit stipitem,"—that is, if he had seisin in law, no freehold estate being outstanding (for a reversioner or remainder-man after a freehold estate is not seised); and if he had, moreover, seisin in fact, or actual possession, that which Coke so well defines as the "possessio fratris." Unless the intestate had such seisin in law and in fact, not he, but the last ancestor who had such seisin, would be the propositus from whom the descent must be counted. But, among the collateral heirs of him who formed the stock or root of descent only those could take who were of the blood of the purchaser,—generally, though illogically, called "the first purchaser,"—and who were by that blood his nearest heirs. Thus, if A. purchases land in fee, and it descends to B., who is seised, and from him to C., who never is seised, and he dies, the fee will pass by descent to the heir or heirs of B.; but, if B. has no issue, to such collaterals only as are of the blood of A., and the nearest in blood to A.[31]

[31] See Bl. Comm. bk. 2, c. 14. Kent, in his Commentaries on American Law (volume 4, § 65), sets forth the common-law canons of descent, and characterizes them as harsh and cruel, but simple and certain. A good exposition of what is meant by seisin in the maxim "seisina facit stipitem" (in other words, to constitute a possessio fratris) can be found in Green v. Liter, 8 Cranch, 229. The maxim is also well explained in Kelly's Heirs v. McGuire, 15 Ark. 555. Perhaps the statement of the text that seisin is immaterial as to an estate

II. The estate passes at common law to the eldest son of the propositus, if he has any sons; if not, to all his daughters in coparcenary, the eldest daughter having some privileges of first choice in making division. Should the eldest son have died before the father, or should one or all of the daughters (there being no son) have died in the father's lifetime, the issue of such predeceased child would come in his or her place by representation,—always per stirpes, or by stems; that is, if all the daughters were dead, the issue of each would take the parent's share; and so on to more distant descendants. But the issue again must be the eldest son, if there are sons; daughters taking in coparcenary only in the absence of sons.

III. In the absence of issue, the lands go to the eldest brother of the propositus; and, in the absence of a brother or issue of a brother, to the sisters in coparcenary, with the same rule of representation as there is among lineals. The brothers and sisters must be of the whole blood.

IV. If there are no brothers or sisters of the whole blood, or their issue, the estate does not go to the father, but to the brothers and sisters of the whole blood of the father, and to their issue as before; and, on failure of these, to the brothers and sisters of the paternal grandfather and their issue, as before; and so ad infinitum.

V. If the estate had come by descent, it must remain in the blood of the ancestor from whom it had come, which would alter the case materially, if it had come ex parte materna, that is, from the mother or a maternal kinsman.

VI. A purchased estate might go to the kindred by the mother's side only, if there were no kindred on the father's side at all.

which has come by purchase does not cover the whole ground. It should be added that the heir is determined, not as of the intestate's death, but as of the time when the estate vests in possession. The matter may be still of interest in Maryland, the District of Columbia, and North Carolina. We refer the reader to Coke upon Littleton (Thomas' edition). The inheritance from brother to brother is deemed direct; hence, if both are subjects, the alienage of their father is immaterial. When the ordinary heir is an alien, the one next in remoteness is admitted, if he is a subject. The statute of 11 & 12 Wm. III. c. 6, did away with the obstacle of inheriting through an alien when both transmitter and heir are subjects. For the English authorities, see cases in United States supreme court; Levy v. M'Cartee, 6 Pet. 102, and M'Creery v. Somerville, 9 Wheat. 354.

VII. Collaterals by the half blood cannot take at all,—even where the estate has come by descent, and the collaterals are of the blood of the transmitting ancestor; even where their exclusion leads to an escheat.[32]

VIII. A bastard (one not born in lawful wedlock) is filius nullius, and cannot take from any one by descent, nor transmit his own estate at death, except to his own lawful issue.

IX. The posthumous child of the intestate could always take at common law; even the posthumous child of a kinsman born after the intestate's death might succeed by way of a "shifting inheritance."

X. Where the intestate left an heir, not in his nature the nearest, or heir apparent, the inheritance might be displaced afterwards by the birth of a nearer heir. For instance, if his next heir at death was an uncle, the inheritance would be displaced by the subsequent birth of a sister; and, again, by the birth of a brother; or, if there was only one sister at his death, a second sister born thereafter would come in for one-half as coparcener.

XI. Wife and husband could not inherit land from each other, even to save an escheat.

XII. An alien could not transmit nor take land by descent, not having inheritable blood; nor can a subject derive descent from a subject through an alien intermediary.

This harsh and inhuman system was at least simple and free from doubt. It agreed with the old Roman law in this: that on failure of issue the next agnate, i. e. nearest kinsman connected with the decedent by male ancestors only, took the estate; but in the old Roman law only descendants or lineals took by representation, while the brother (and sister?), as the nearer, excluded the nephew. In ancient Rome and in feudal England the main end of the law was

[32] The rule excludes those of the half blood entirely, even where the estate comes from a parent, and the half-brother is the son of that parent. For instance, in the case of land coming from A.'s mother to A., preferring the brother of A.'s mother to her son by another husband than B., is among all the common-law canons the most irrational. Connecticut had before the Revolution followed this rule, though not living under the common law of descent; but in the early case of Clark v. Russell, 2 Day (Conn.) 112, the colonial decision was overruled, on the ground that among "next of kin," as defined by the statute of distribution, there is no distinction between whole and half blood.

to build up the gens or house. But at Rome primogeniture was unknown. The daughter, it seems, inherited with the son, and even the mother, if in the power of the husband, would count as a child, and thus inherit.[33]

The Hebrew law, as sketched in the Pentateuch and elaborated in the Mishna, is based on principles not unlike those of the common law, as to the tracing of kinship. But the eldest son gets only a double share; and among collaterals there is no primogeniture at all. Males in the same degree are preferred to females; representation by stems holds good throughout, both among lineals and collaterals. The father and other male ascendants (only in the father's line) are not excluded; on the contrary, the ancestor always precedes his children. The half blood on the father's side is as good as the full blood; the half blood by the mother's side does not count at all. Here, as in the common law, the daughter of a deceased son has precedence over the son of a deceased daughter.[34]

But the Roman law, which has affected European and American legislation, is not that of the Twelve Tables, which was in vogue in

[33] Prof. R. Sohm (Institutes of Roman Law) gives the first canon of the Twelve Tables thus: "Si intestato moritur cui suus heres non escit proximus agnatus familiam habeto." He thinks a daughter would under this canon take as suus heres. A wife who was in manu must have taken a child's share under the old law. The child of a predeceased daughter, not being in manu, could not have taken as suus heres. Ulpian puts it: "Mulier autem familiae suae et caput et finis est." A kinswoman more remote than a sister was not reckoned an agnate.

[34] See Numb. xxvii. 8–11; Deut. xxi. 16 (which denies to the father the right of changing the shares of his sons by will). The canons of descent laid down in the Mishna (Baba Bathra, c. 8) prefer the father or ascendant to his issue; while the text in Numbers, assuming that no one has an allotment till after his father's death, passes by ascendants altogether. The common law also saw no room for an ascent of the inheritance. In the old Roman law there was no occasion for it, for the filius familias could have no property of his own; and, if the father emancipated him, he remained his patronus, and would on the son's death without issue succeed in that capacity. The Jewish law (Baba Bathra, c. 9, § 1) gives to the daughters alimony out of the father's estate, which must swallow up every small estate ("the daughters must be fed though the sons go begging"), as now is the case in America by reason of the allowance to the widow and minor children, and of the homestead. The common law had no such feature for tempering its harsh exclusion of the daughters from all share in the father's land.

the early republic; nor that jurisprudence which during its growth in the later republic and early empire had sloughed off many of its harsh features; but the new law as Justinian laid it down in the 118th and 127th of his Novels. The cognatic kinship, which runs alike through females and through males, in the mother's as well as in the father's line, takes the place of the agnatic. The rule of representation per stirpes is retained among descendants, whether they be of the same or of different degree. The wife no longer takes a child's part; for the marriage relation had been so far changed that the wife is never in manu of the husband, and thus on the footing of a child. On failure of issue, the estate goes, secondly, to the ascendants jointly with the brothers and sisters of the whole blood, and to the issue of such brothers and sisters. Among ascendants, only the nearest take; if either father or mother be alive, no grandparent takes anything; among several grandparents, the division is made in lineas; the paternal and the maternal line will take equal shares. The issue of each brother or sister take the share of a predeceased brother or sister per stirpes. But when there are both ascendants, and brothers or sisters or their issue, the ascendants take per capita each the share of a brother; and so does the issue of one brother or sister. When there are only nephews and nieces, they take per capita; the division per stirpes among collaterals taking place only when it is unavoidable. The third class, after the failure of the first and second, is that of brothers and sisters of the half blood, and the issue of such brothers and sisters, with the same rules of representation as in the second. The fourth class embraces other cognati or kindred in the nearest degree, counting them both ways; that is, from the propositus or decedent up to his ancestor, and from the ancestor down to the heir. Thus a great-uncle stands in the fourth degree, counting three to the great-grandfather, and one down from him; and a first cousin or grandnephew is also in the fourth class; but the grandnephew comes in as heir in the second class. An uncle or aunt will, as standing in the third degree, exclude a first cousin, the child of a deceased uncle or aunt; the latter being in the fourth degree. In the fourth class, no distinction is made between those of the whole and those of the half blood.

Adopted children, if "fully" adopted, would inherit, not only from the adopting father, but through him from his father. Natural chil-

dren might be made legitimate by the father's subsequent marriage with the mother, and acknowledgment. Natural children inherit from and transmit to the mother; and receive, together with their mother, in the absence of lawful issue, one-sixth of the succession, under the 89th Novel. Husband and wife succeed each other only on the failure of all kindred by blood; except that under Novels 53 and 117 the dowryless "poor widow" of a wealthy husband takes, on the failure of issue, one-fourth absolutely, or, when there are three or fewer children, one-fourth for life; if more than three, a child's share for life.[35]

The Spanish law was in force in Louisiana at the time of the purchase; and, of course, in Florida. The Spanish-Mexican law which till 1840 regulated the descent of land in Texas, and for a short time in California, and until quite recent times in New Mexico and Arizona, recognized the one-fourth of the poor widow, to be forfeited by her leading a lewd life or marrying again within a year after the husband's death. The preference of the whole over the half blood is also carried out.[36] The French Civil Code of 1803, which was closely followed by the first Code of Louisiana, lays down canons of descent very similar to those of the Novels. But collaterals of the half blood are not postponed to those of the whole blood; only the latter take "in both lines," which gives them rather more than double

[35] See, for a clear exposition of the law of the Novels, Heineccius, §§ 681–702, or Sohm's Institutes of Roman Law, § 98 II.

[36] Boone v. Hulsey, 71 Tex. 176, 9 S. W. 531; Wardlow v. Miller, 69 Tex. 395, 6 S. W. 292; quoting Schmidt, Law of Spain and Mexico. This one-fourth (cuarta marital) cannot exceed 100 pounds of gold in value. The old Spanish law of descent is fully discussed in Garret v. Nash, Dall. Dig. (Tex.) 498. It is said that the forfeiture by remarriage within the year is abrogated. The children were necessary heirs. The father could not adopt a stranger, or devise more than one-fifth of his estate away from his children. Teal v. Sevier, 26 Tex. 516. In 1836 (Spanish law) brothers of the half blood were postponed to the whole blood. Wardlow v. Miller, supra. See, for Mexican law in California, Emeric v. Alvarado, 64 Cal. 529, 2 Pac. 418. In the Louisiana purchase the Spanish law superseded the French in 1769. See Beard v. Poydras, 4 Mart. (La.) 367. For a full discussion of the Spanish law of descent, especially on the question of half blood, see Cutter v. Waddington, 22 Mo. 206. Under the Spanish law, a bastard not resulting from adultery or incest, and his mother, could inherit from each other (bastardo espurio). Pettus v. Dawson, 82 Tex. 18, 17 S. W. 714.

shares. Father and mother do not take virile shares with brothers and sisters, but, if both are alive, one-half of the estate; if only one lives, one-fourth; both of them take all when there are no brothers and sisters, or issue of such. If only one is alive, the share of the other goes to his or her kindred. Higher ascendants are postponed to brothers and sisters, and take per capita. Among kindred in the same degree those connected through the nearest ancestor of the intestate are preferred; e. g. a cousin to a great-uncle. Publicly acknowledged natural children come in for a share, which ranges from a third to three-fourths of what a lawful child would get, according to the remoteness of the other heirs from the decedent. Husband and wife come last, before the state. The share of the poor widow is unknown; but the "community of acquests" well supplies its place.[37]

In England, at the time of the settlement of the American colonies, and far down in the seventeenth century, the personal effects of those dying, with or without testament, were administered under the supervision of the ordinary or bishop's surrogate, who followed, in the main, the canons of succession laid down in the late Roman or civil law, till parliament took the matter in hand, and in 22 & 23 Car. II. enacted the statute of distribution, which distributes the "surplusage," mainly in agreement with those canons; compounding them with English customs, by which the widow has a pars rationabilis, generally one-third of his personal estate, or one-half on the failure of issue. The law was amended in the reign of James II. so as to excuse the husband who administers on his wife's estate from accounting to her next of kin; in other words, he was to retain the whole personal estate of his deceased wife.[38] The word "degree" in

[37] Code Civ. arts. 731–735. The law regarding status of children is found in earlier parts of the Code.

[38] 22 & 23 Car. II. c. 10, found at large in Williams on Executors. Aside of London and the province of York, where it dealt only with the "dead man's part," untouched by the custom, and thus duplicates the reasonable share of the wife, which is borrowed from these very customs, the statute gives the "surplusage" thus: One-third to the wife; the residue to the children of the intestate "and such persons as legally represent" them if dead. Then follow rules as to advancements. "And in case there be no children, nor any legal representatives of them," then one-half to the wife, "the residue to be distributed equally to every of the next of kindred * * * who are in equal degree, and those who equally represent them: provided, that there be no

the statute of distribution is construed as in the civil law, counting up to the common ancestors, and down to the claimant. In the canon law the degrees are counted only in the longer of the two lines, or in one of two equal lines; thus, a cousin is in the second line, a granduncle or grandnephew in the third. But there is no canon law of succession, and it is hard to say what is meant by the "canon law as understood in England in 1776," to which reference is made in the canons of descent in the Civil Code of Georgia.[39]

The territory of New Mexico until 1884 retained its Spanish-Mexican laws. Common-law principles were then introduced in many

representation admitted among collaterals, after brothers' and sisters' children." In case there is no wife, the whole goes as the residue is directed to go as above. The half blood takes equally with the whole blood. A posthumous sister takes. Wallis v. Hodson, 2 Atk. 114. A later statute (29 Car. II. c. 3, § 25) directs that the husband administering on his wife's goods need not distribute; and a later statute (1 Jac. II. c. 17) directs the distribution of the share coming to a child from the father, on its death, among the mother and other children of the same father.

[39] 2 Bl. Comm. pp. 504, 516, quoting Finch, Prec. 593. But this construction was undoubted. In fact, as the canons of succession, except as to the widow's part, are so closely modeled upon Justinian's law, there was no good reason for construing, "nearness" and "equal degree" otherwise than in the terms of that law. Mr. Christian, the editor of Blackstone, is right in pointing out the utter irrelevancy of the great commentator's reference to the common-law degrees in the chapter on descent; for at the common law the order of descent depends, not on the fewness of the degrees between intestate and heir, but only on the nearness to the intestate of the common ancestor, from whom the heir traces his own descent, without regard to the distance of that heir's descent from the common ancestor. Blackstone has, by dragging in the canon-law degrees, needlessly confused, not only many law writers, but also the legislature of Georgia, and induced many writers of statutes to add a section in which it is expressly declared that degrees of consanguinity shall be reckoned by the rules of the civil law. The only reference in the corpus juris canonici is in a decretal of Collestine III. (chapter 119, A. D.), sent to answer an inquiry whether a man who is removed in the sixth or seventh degree may marry a woman removed from such ancestor in a nearer degree; and a decretal of Gregory IX. (chapter 1232, A. D.), which says that "a man descended in the fifth degree from the ancestor may marry a woman descended from him in the fourth degree, because in whatever degree the more remote person is related to the ancestor in that he is related to all of his descendants." Neither decretal alludes to descent. We shall recur to this subject in the section on "Remote Kindred."

branches of jurisprudence; a law of descent following modern American lines was enacted in 1887.[40]

§ 30. Course of American Legislation.

The three states of New Hampshire,[41] Massachusetts,[42] and Connecticut[43] never lived under the rule of primogeniture. They adopted, towards the end of the seventeenth century, the canons of the English statute of distribution for the disposition of the lands as well as of the goods of the decedent, except as to the rights of husband and wife. In Rhode Island and in the middle and southern states the common-law rules of descent were in force till abrogated, during or soon after the Revolution, on political grounds. The canons of the civil law of succession were known to the statesmen and lawyers of the day, through the English statute of distributions, and through Blackstone's Commentaries; and thus a system lay at hand leading to the subdivision of estates by equality among males and females, and among older and younger children. New Jersey, in 1780, was the first to enact her new law of descent, which deviates as little as possible from the common law, while carrying out the great object of equality; New York followed in 1782, but recast the act of that year in 1786. North Carolina in 1784 passed two acts (chapters 10 and 22) embracing the new system. It passed from there into Tennessee. Maryland acted in 1783; her system passed in February, 1801, into the District of Columbia, where it has since remained unchanged. Virginia, embracing then Kentucky and West Virginia, adopted in 1785 her new descent act, drawn by Jefferson, to take effect January 1, 1787. The feature of keeping ancestral estates in the blood of a former owner was left out entirely, but was partly restored in 1790.[44] The new

[40] Acts 1887, c. 32.

[41] See New Hampshire acts of July 12, 1782, and February 23, 1786.

[42] The Massachusetts act of 1782 gave to the eldest son a double share, which provision was soon stricken out. It also introduced the principle of making the descended "portion" of one of several children, dying under age, go to the other children. The law of descent was revised by act of 1805 (chapter 90). Defects in that were remedied by an act of March 12, 1806.

[43] The Connecticut colonial act of 1699, framed on the English statute of distribution, was in force till 1784, and but slightly changed then.

[44] 12 Hen. St. at Large, p. 138, c. 60; also, 1 Litt. Laws Ky. 557, or 1 Morehead & B. St. Ky. 562.

system was introduced in Rhode Island in 1798, in South Carolina in 1791, and so in the other original states.[45] The five states of the old Northwest began life under the ordinance of June 13, 1787, which bears at its very head a law for the equal division of descended lands as the groundwork of a free commonwealth; a law which is short, but comprehensive enough, in the opinion of the supreme court of the United States, to supersede the common law of descent in all its features.[46] Texas lived under the Spanish law of succession, already referred to, till it enacted on the 28th of December, 1840, a statute on the American model, which was remodeled in 1842, so as to free it from the English distinction between descended and purchased estates.[47] While Louisiana substituted a French Code for the Spanish law, the governor and council of the Missouri territory in 1807 enacted a law based mainly on that of Virginia.[48]

As the new statutes mixed in different parts, the features of the common, of the civil law, and of the statute of distributions, with other provisions of American growth, the variety among them became so great that as early as 1832 Chancellor Kent expressed himself as almost unable to grapple with it.

Among the changes effected by that time may be stated the following, aside from the abolition of primogeniture, and of the preference of males over females:

I. The rule that "seisin makes the stock" of descent was abolished in New York by the Revised Statutes, which took effect on the 1st

[45] This South Carolina act and the Georgia act of 1801 are in force yet in their main features. The sections of the acts are marked in the late revisions.

[46] Section 2 says "that the estates both of resident and nonresident proprietors in the said territory, dying intestate, shall descend to and be distributed among their children and the descendants of a deceased child in equal parts, the descendants of a deceased child or grandchild to take the share of their deceased parent in equal parts among them; and, where there shall be no children or descendants, then in equal parts to the next of kin in equal degrees," etc., with representation for collaterals, and distinction between whole and half blood. The supreme court of the United States, in Bates v. Brown, 5 Wall. 710, held that this section made a complete law of descent, superseding all the canons of the common law. The ordinance of 1787 is generally printed in revisions for the five states of the old Northwest.

[47] See chapter on Descent in 1 Pasch. Dig. Laws Tex. 1875.

[48] Livington's Civil Code of Louisiana reintroduced French in place of Spanish law.

of January, 1830, but had been acted on up to that time. It seems to exist, said Chancellor Kent as late as 1832, in Vermont, New Hampshire, Maryland, and North Carolina, and in none of the other 20 states; but he was probably mistaken as to Vermont and New Hampshire, and the names of these states are dropped in later editions.[49]

II. The representation among lineals, when they all stand in equal degree (no children left, but only grandchildren), was such that they took per capita; only when they stood in unequal degree (e. g. children and grandchildren), it was per stirpes, except in the four states of Rhode Island, North and South Carolina, and Louisiana. The number of states following the common-law rule of representation is now much greater. At that time only two states had introduced the widow or widower as heirs, in competition with the decedent's issue: South Carolina and Georgia. Their laws, as they stood at that time, are but little changed at this day.

III. The parents are allowed to inherit on failure of issue, either before or concurrently with or after the brothers and sisters and descendants of such brothers and sisters; while at common law an ascendant could never take a landed estate as heir. And here the distinction between ancestral estates, coming either on the father's or on the mother's side, and "purchased" estates, comes in for the

[49] The rule "seisina facit stipitem" has been abolished in England by statute, along with the rule which forbids the ascending of an estate. In a country in which the descent on several children is the rule, and not the exception, the return to the person last seised for a stock is utterly intolerable. A. has three children, B., C., and D., and dies, having granted a life lease on land of which he was seised. Each child inherits one-third. But, before the children can take possession, B. dies. His one-third must descend as coming from A., the person last seised. Hence B.'s children will share it with C. and D., and get only one-ninth of the whole instead of one-third. It will be the same when A. was seised in law, but B. died while some one was wrongfully in possession. In short, whenever there is room for the "principle" to come in, it will result in cutting down B.'s issue from one-third to one-ninth; or, if A. had six children, from one-sixth to one thirty-sixth. While the rule still prevailed in New York (before 1830), it was held that the immediate owner of wild or vacant land was sufficiently seised. Jackson v. Howe, 14 Johns. 405. And so said arguendo in Green v. Liter, 8 Cranch, 244, 249. Some modern statutes, like that of Missouri, speak of the intestate as "seized of lands," without any thought of reviving the old rule.

first time; for some of the American statutes treat estates that have come by gift or devise from a parent, as well as those that have come by descent, as ancestral. Several states (Virginia, Kentucky, Massachusetts, Maine, New Hampshire) regarded the origin of the estate only where the intestate was an infant.

IV. On failure of issue and of parents, the estate would go to the brothers and sisters and their issue; and Chancellor Kent believes that these were universally preferred to the grandfather and grandmother. It was certainly so expressed in the Revised Statutes of New York. In some states, however, there was no representation beyond the children of brothers and sisters; grandnephews must come in as next of kin in the fourth degree. In New Jersey and North Carolina grandparents were excluded altogether. The distinction between whole and half blood had been abolished in many states, and nowhere was the half blood wholly excluded. As to purchased estates, the half blood was equal to the whole blood in Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, New York, Illinois, North Carolina, Tennessee, and Georgia. In Virginia and Kentucky the half blood take half portions. In other states brothers and sisters of the half blood were postponed to those of the whole blood.

V. In default of these classes of kindred, the grandparents might come in by the laws of most of the states; but never in New York, New Jersey, and North Carolina. The grandparents take either concurrently with, or in preference to, uncles and aunts.

VI. The estate went equally to the brothers and sisters as well of the father as of the mother and to their issue, while at common law it went to the latter only when no kindred on the father's side could be found. But there are exceptions to the more liberal rule even now.

VII. Chancellor Kent here refers to the descent of lands coming ex parte paterna to the collaterals on the father's side, and of those coming ex parte materna to the collaterals of the mother. We may add that from an early day Massachusetts, New Hampshire, and Maine gave the example of carrying the preservation of ancestral, or rather parental, estates in the blood no further than giving the share of a dying child to its brothers and sisters on the transmitting side, to the exclusion of the surviving parent, and of the half blood

on the wrong side, while they made no distinction when the descent fell on more remote kindred.

VIII. Among more distant heirs, the reckoning by degrees as under the civil law and under the English statute of distributions was introduced at an early day in many states aside of those New England states which had regulated descents of land by those rules even before the Revolution; but it will be seen that even now the common-law principle of going back from the decedent to his nearest ancestor, and down from that ancestor alike to near and to remote issue, or the combination of that principle with the civil-law rule, is still in force in many states.

IX. The harsh rules about children born out of wedlock had even in 1832 been much relaxed, partly by allowing the father to legitimate an antenatus by marrying the mother, partly by recognizing the bastard at least as the child of his mother, or even as the brother of her other children.

X. The doctrine of a shifting inheritance fell into desuetude when the rules of descent were drawn up in the form of statutes, in which nothing was said about divesting the estate of those who at the moment of the intestate's death might be his next heirs.

XI. The laws against aliens were mitigated in many states, at least, in favor of those residing in this country; while treaties with other countries removed the disability of alienage from many who otherwise could not have taken lands by descent.[50]

Since 1832 the American law of descent has diverged further from the common law in the following directions:[51]

[50] While the drift and intent of legislation was to soften the disabilities of aliens, the effect in New York, at least, was the opposite way. The statute of descent of 1786 covered the whole ground, and an act of 1788 repealed all British statutes. Thus, the act of 11 & 12 Wm. III. c. 6, allowing citizen to inherit from citizen through alien ancestor, was repealed. So held in Levy v. M'Cartee, 6 Pet. 102. And so the law stood till 1830. Hence the importance of re-enacting this statute of Wm. III., even where the disability of both transmitter and heir is taken away

[51] Kent quotes the following cases on the law of descent as it stood in 1832: For the descent from the last owner, Cook v. Hammond, 4 Mason, 467, Fed. Cas. No. 3,159; Hillhouse v. Chester, 3 Day (Conn.) 166; Gardner v. Collins, 2 Pet. 59; for the common-law doctrine, Chirac v. Reinicker, Id. 613, 625; and in New York, before the Revised Statutes (that is, before 1830), Jackson

1. Many states have degraded the rights of the heir from ownership into a distributive share.

2. The rights of inheritance of wife or husband have been greatly enlarged, and are now recognized in fully half the states.

3. The "homestead" has been introduced, with special rules of descent in favor of the widow and infant children. (See sections on "Homestead.")

4. In a number of states of the far Northwest community property has been introduced. (See chapter on "Title by Marriage.")

5. The mother has been put more on an equal footing with the father.

6. The rule of representation has been extended in several states; and this is really a reversion to common-law principles.

7. The distinction between purchased and ancestral lands has been dropped in many places where it was formerly acknowledged, and the rule that seisin makes the stock been repealed in one of the two states that held to it in Kent's time.

8. The legitimation of children and the inheritance between bastards and their mothers or acknowledging fathers has been greatly extended.

9. The disabilities of aliens have been almost wholly removed; however, with some notable exceptions, and lately with some backward steps.

§ 31. Common Features and Divergences.

But for the greater or less extent in which the wife and husband have been introduced as heirs to each other by the laws of many states, the course of descents would, in the great majority of cases, run through the same channels all over the Union. We may state in short the general principles of the American law of descent in our days, together with the exceptions:

I. Descent does not depend upon seisin, either in law or in fact, but upon title or ownership of an estate of inheritance, be it in possession, in remainder, or reversion, and whether the same be obtained by purchase or by descent, though descended estates, or even those acquired by gift or devise from an ancestor, may descend otherwise than purchased lands. Maryland and the District of Col-

umbia alone seem to have maintained the old doctrine of the possessio fratris.[52]

II. Children, and the issue of children that have died before the intestate, are, in all cases, preferred to ascendants and to collaterals.

III. Neither among children and other descendants, nor among brothers and sisters and other collaterals, is any preference given to the elder over the younger, nor to males over females. The privileges which the eldest coparcener has at common law, to make first choice among the allotted parts, and of buying out the other coparceners in incorporeal hereditaments, are either abrogated or disused. But the canon of the common law which prefers the eldest male to his brothers and sisters survives, in a few unimportant particulars, in a few states:

v. Hilton, 16 Johns. 96; Bates v. Shraeder, 13 Johns. 260; that in New York, before 1830, nephews and nieces took per stirpes in all cases, Jackson v. Thurman, 6 Johns. 322; that, under first Civil Code of Louisiana, collaterals took only on failure of ascendants, Hooter's Heirs v. Tippet, 12 Mart. (La.) 390; Bernard v. Goldenbow, 18 La. 95; for exclusion of uncles and aunts by nieces and nephews, Davis v. Rowe, 6 Rand. (Va.) 355; for equality of whole and half blood in Rhode Island, Gardner v. Collins, ubi supra; for same rule in North Carolina, Seville v. Whedbee, 1 Dev. 160 (where a paternal half-brother inherited land that had come ex parte materna); for the preference for the whole blood as to purchased estates in Maryland under act of 1786, Hall v. Jacobs, 4 Har. & J. 245; Maxwell v. Seney, 5 Har. & J. 23; for like preference of the former owner's blood in ancestral estates, Den v. Jones, 8 N. J. Law, 340; Bevan v. Taylor, 7 Serg. & R. 397; that North Carolina goes back to the first purchaser of descended estates, Bell v. Dozier, 1 Dev. 333; for disability of bastards in Massachusetts, Cooley v. Dewey, 4 Pick. 93; their inheriting from mother, Heath v. White, 5 Conn. 228. The casus omissus in Maryland of estate inherited from a brother, which is neither paternal nor maternal nor purchased, and therefore goes by the rules of the common law, as disclosed in Barnitz v. Casey, 7 Cranch, 456, had already been remedied by statute of 1821 ("by purchase or acquired in any other manner"), and is not mentioned by Chancellor Kent.

[52] Chirac v. Reinecker, 2 Pet. 613, 625, from Maryland, where the statute says "dies seized." The same was held in North Carolina in Lawrence v. Pitt, 1 Jones (N. C.) 344. But the revision of 1873, in the opening words of the canons or rules of descents, embraces all "rights" to which the decedent is entitled. The rule was never recognized in Georgia. Thompson v. Sandford, 13 Ga. 238. In most states its nonexistence is taken for granted.

(a) In New York the canons of descent reach only to the uncles and aunts of the deceased, and to their descendants, and in cases for which they do not provide the common law still prevails. In other words, when a man leaves no uncles or aunts, first cousins, or issue of first cousins, either on the father's or mother's side, then you go for an heir, as at common law, to the eldest brother of the paternal grandfather, or to the eldest among his issue, and, if there is no such brother, to the sisters of that grandfather, and so on.[53]

(b) In New Jersey and South Carolina, under a negative construction of the statute of descents;[54] in Maryland, by its express words,[55]—the estate of a trustee, who has no beneficial interest in the land, goes according to the rules of the common law, and thus generally to only one person, which makes it easier to extinguish the naked legal title.

(c) In New Jersey primogeniture was abolished by an act which supposes the testator to have two or more children, or their issue. It has thus been inferred that if he left only the issue of one predeceased child the common-law rule would prevail among them.[56]

(d) There are some remnants in a few Eastern states of the estate tail; of which elsewhere.

(e) In Maryland, the right to "elect" in partition is reserved to the eldest male, and where there is none to the eldest female.

IV. The issue of the intestate through predeceased children and grandchildren always take shares with the nearer living descendants; and, if issue in unequal degrees are left, the remoter descendants take per stirpes, reaching up at least to the nearest (oldest) living degree.

V. The father and mother of the decedent are nowhere wholly shut out from the inheritance, taking in most states before, or

[53] Rev. St. N. Y. pt. 2, c. 2, § 16. The same clause leaving the common law in force in cases not provided for is in the Arkansas Statutes, but has here the result of preferring the father's collaterals to those of the mother. It was so in Maryland under old statute. See Stewart v. Collier, 3 Har. & J. 289.

[54] The New Jersey statute speaks only of him who is seised of lands in his own right. See cases cited in notes to Revision of 1877, "Descent"; Martin v. Price, 2 Rich. Eq. (S. C.) 412.

[55] Pub. Gen. Laws 1860, art. 47, § 24.

[56] The note to the revision quotes 4 Grif. Reg. p. 1250. So does Chancellor Kent. No reported case is quoted.

along with, brothers and sisters; in a few, after them. Nor are higher ascendants excluded, except in New York, New Jersey, and North Carolina.[57]

VI. The wife and husband come in as heirs at some point in the order of descent; if not sooner, at least on the failure of blood kindred, so as to prevent an escheat; with the exception of Delaware, where the consort inherits land only for life, and of New Hampshire.[58]

VII. An illegitimate child can, in most states (but with quite important exceptions, as will be shown), be rendered legitimate by the intermarriage of its father and mother, and recognition, and thus becomes the heir of the father, and generally of the father's kindred.

VIII. A bastard is not treated as a filius nullius. In nearly all the states he can (at least, on the failure of lawful issue) inherit from the mother, and transmit to her. In some states inheritance is allowed between the bastard or his issue, and the mother or her kindred. In some states a bastard can, by formal, written acknowledgment, be made heir to the natural father.[59]

IX. Collaterals of the half blood are nowhere wholly excluded from the inheritance, unless the lands descended have come to the intestate from an ancestor to whom these collaterals are quite foreign (e. g. lands come to the intestate from the father can, in some states, not go to the half brothers by the mother's side). But in some states they are postponed; in some, they get smaller shares than those of the whole blood.

X. The collateral kindred of the mother fare as well as those of

[57] Taylor v. Bray, 32 N. J. Law, 182; s. c., on appeal, 36 N. J. Law, 415 (on the ground, it seems, that grandparents are not "in consanguinity," as the canon of descent demands). In North Carolina the statute says expressly that ascendants other than a parent shall not inherit.

[58] See the concluding part of next section.

[59] In Connecticut it was held at an early day that, as the common law of descent was never in force in the state, the unreasonable rule of ignoring the relation between a bastard and his mother was foreign to its jurisprudence; that the word "child" in the statute embraces the bastard child as to the mother. Heath v. White, 5 Conn. 228. In other states the rule of filius nullius is in force as far as it is not modified by statute.

the father, with the exception of Maryland, Georgia, and Arkansas, and as to the more distant collaterals in New York.

XI. Posthumous children of the intestate inherit everywhere. The posthumous children of predeceased sons or grandsons, born after the intestate's death, are in most of the states put on the same footing; but in Rhode Island, Maryland, Alabama, Arkansas, and Florida, the capacity to inherit is denied to those en ventre sa mere, unless they be the intestate's own children, while in Missouri, Colorado, Wyoming, and Arizona, posthumous children and descendants are admitted, while collaterals not actually born are excluded.

XII. Aside of posthumous children, the rule of the "shifting inheritance" seems to be abrogated, except in North Carolina. In Tennessee a statute putting brothers, born and unborn, on the same level, has been lately construed to include such brothers as were en ventre sa mere at the intestate's death, and these only.[60]

[60] Maryland, Pub. Gen. Laws 1887, art. 46, § 25; Ark. Dig., supra. A child en ventre sa mere is not bound by a decree of partition or sale among the living heirs. Massie v. Hiatt's Adm'r, 82 Ky. 314. See, for exposition of Maryland law, Shriver v. State, 65 Md. 278, 4 Atl. 679. The inheritance by a posthumous child at common law is only one case of shifting inheritance; hence the presumptive heir who is displaced is entitled to the mesne rents. Before the statutes 10 & 11 Wm. III. c. 16, a child en ventre sa mere could not take a contingent remainder, limited to begin at his father's death. When the object is to let a child en ventre sa mere inherit, whether it be descendant or collateral, the aptest words are those of the California statute (also in force in the Dakotas, Idaho, etc.): "A child conceived, but not yet born, is to be considered an existing person," etc.; or the clause in the Massachusetts laws: "Posthumous children are considered as living at the death of their parent." For words excluding posthumous heirs other than the intestate's own children, see Gen. St. R. I. c. 176, § 3, or descendants, Rev. St. Mo. § 4466; Ark. Dig. § 2523; Rev. St. Fla. § 1815. In Kentucky the awkward words "born of his widow" (Gen. St. c. 31, § 7) seem to restrict their benefit to intestate's own child. The tendency in favor of all posthumous children was shown in Missouri in Aubuchon v. Bender, 44 Mo. 560, where such a child was allowed to take a contingent remainder notwithstanding the clause in the statute forbidding such children to take as collaterals. In Ohio and Pennsylvania all children begotten before the intestate's death have capacity to inherit. In other states a child is to be treated as if born before its own father's death, which covers the whole ground. In some states the time limit of 10 months (which used to mean 280 days) raises the presumption of legitimacy for this and other purposes. The common-law rule in favor of the posthumous child

XIII. Resident aliens, and, above all, those who have declared their intention to become citizens, are almost everywhere put on a level with citizens. The common-law rule that one subject cannot inherit from another subject through an alien intervening kinsman is everywhere abrogated. In many states the disability of alienage is entirely done away with. Moreover, the treaties of the United States confer on the citizens and subjects of many countries the right to take lands in the United States, if entitled to inherit but for their alienage. This makes the cases of the possible exclusion of aliens comparatively rare.

Special laws for the descent of the homestead, or for the disposition of "community property," will be treated in different chapters; the doctrine of advancements in a separate section.

Louisiana has its "necessary heirs"; elsewhere only the widow, or the widow and children taking the homestead, are protected in any way against disposition by last will. The Louisiana law on necessary heirs must be omitted. The conflict between the widow's heritable rights and the husband's will belongs to another chapter.

To avoid, in the following sections, too frequent references to the statutes of each separate state on the different canons of descent, a footnote is subjoined, showing the chapter and section, or the number of the consecutive chapter or article, in the Code, Revision, or the Compiled Laws of each state or territory of the Union.[61]

NOTE. Since the preparation of this chapter, Michigan has adopted the following new canons of descent for the lands of an intestate (see Sess. Acts 1893): "First. In equal shares to his children, and to the issue of any deceased child

is affirmed in Pearson v. Carlton, 18 S. C. 47. In Tennessee, as stated in the text, the posthumous child may gain an advantage over some of his brothers. Melton v. Davidson, 86 Tenn. 129, 5 S. W. 530.

[61] Maine, Rev. St. 1883, c. 75, §§ 1, 2; Id. c. 103, §§ 1, 14; New Hampshire, Pub. St. 1891, c. 196, §§ 1–16; Massachusetts, Pub. St. 1882, c. 124, §§ 1, 3; Id. c. 125, § 1; Vermont, R. L. 1880, §§ 2230–2233; Rhode Island, Pub. St. 1888, c. 187, §§ 1, 2, 4–6; New York, Rev. St. pt. 2, c. 2, §§ 1–20 (enacted in 1828, and slightly amended); New Jersey, Revision, "Descent," pp. 296, 299; Pennsylvania, Brightly's Purd. Dig. pp. 929–934; Delaware, Rev. Code 1874, c. 85, §§ 1, 2; Ohio, Rev. St. 1890 (Giauque) §§ 4158–4181; Indiana, Rev. St. 1888, §§ 2467–2510; Illinois, Rev. St. 1891 (Cothran's Ann. Ed.) c. 39, §§ 1, 2, etc. (is the act of 1872, slightly amended in 1877); Michigan, How. Ann. St. 1882, recast by an act taking effect October 2, 1889, 3 How. Ann. St., as an

by right of representation; and, if there be no child of the testator living at his death, his estate shall descend to all his other lineal descendants" (with the usual provision of per capita, if in the same degree; per stirpes, if otherwise). "Second. If the intestate leave a husband or widow, and no issue, one-half shall descend to such husband or widow, and the remainder to the father and mother, in equal shares, and, if there be but one parent living, to such parent alone; and if there is no issue, husband, or widow, then the estate shall descend to the father and mother, in equal shares," etc.; "and if the intestate leave no issue, father, or mother, the estate shall descend, subject to the provisions herein made for the widow or husband, if," etc., "in equal shares to his or her brothers and sisters, and the children of deceased brothers and sisters by right of representation. The provision for the widow shall be in lieu of dower, unless she shall, within one year from the appointment of the administrator, begin proceedings for the assignment of dower," etc. "Third. If the deceased shall leave no issue," etc., as above, "his estate shall descend to his next of kin in equal degree, except that those in equal degree claiming through nearest ancestor shall be preferred." The fourth and fifth canons retain the older provisions carrying over parental lands from a child dying

amendment to section 5772a); Wisconsin, Sanb. & B. Ann. St. 1889, §§ 2270–2276; Maryland, Pub. Gen. Laws 1884, art. 47; Virginia, Code 1887, §§ 2548, 2551–2555; West Virginia, Code 1882, c. 94, § 1 (not changed in edition of 1891); North Carolina, Code 1883, § 1281; South Carolina, Rev. St. 1882, §§ 1845–1847, 1850, 1852 (in the "Civil Statutes," 1894, see sections 1980–1986); Georgia, Code, §§ 2484, 1761, 1762, 1764; Kentucky, St. 1894, §§ 1393–1399; Tennessee, Code 1884, §§ 3268–3276; Florida, Rev. St. 1892, §§ 1820–1826 (preceded by three general sections); Alabama, Civ. Code, §§ 2252, 2253 (Canons), 2260; Mississippi, Code 1892, §§ 1543–1549; Missouri, Rev. St. 1889, §§ 4465–4477; Arkansas, Mansf. Dig. §§ 2522 (Canons), 2534, 2591, 2592, 2599 (in the Digest of 1894, see sections 2470–2473 for the canons and main rules); Louisiana, Civ. Code, arts. 888, 902–917; Texas, Rev. St. 1893 (Canons), art. 1688 (Rev. St. 1879, art. 1645); Iowa, Rev. Code 1880, §§ 2440, 2453–2458; Kansas, Gen. St. 1889, pars. 2609–2621; Minnesota, 1 Stat. c. 46; also same chapter in volume 2; Nebraska, Cobbey's Consol. St. 1891, §§ 1124–1135; Colorado, Gen. St. 1883, §§ 1039 (Canons), 1041, 1044–1046, 1048; Nevada, Gen. St. §§ 2981–2991; Montana, Comp. St. 1888, p. 395, §§ 532–543; Idaho, Rev. St. 1887, §§ 5700–5716; California, Civ. Code 1886, §§ 1386 (Canons), 1387, etc.; Oregon, Rev. St. 1872, c. 10, §§ 1, 4–7, 14; Washington, Gen. St. and Codes 1891, §§ 1480–1486, 1494; Wyoming, Rev. St. §§ 2221–2226; North Dakota, Territorial Codes of Dakota (1887), Civ. Code, §§ 776–787; South Dakota law is stated hereinafter for "Dakotas," but there is a state Code, which see; Utah, Comp. Laws 1888, §§ 2739–2760; New Mexico, Acts 1887, c. 32; Arizona, Rev. St. 1887, §§ 1459–1472; Oklahoma, St. 1890, pars. 6891–6912. The above references do not include rules of descent in community property, nor generally those as to legitimacy of children or as to rights of aliens.

under age. "Sixth. If the intestate shall leave a husband or wife, and no issue or descendants, and no father, mother, brother, sister, or children of deceased brother or sister, the estate shall descend to the husband or widow. Seventh. If no husband or wife, nor next of kin, the estate shall escheat to the state for the use of the primary school fund."

§ 32. The Wife and Husband as Heirs.

Leaving the homestead laws out of view for the present we can distinguish, among the statutory provisions which give to the surviving wife or husband some or all of the decedent's lands, those which do so in the presence of issue, and those which do so upon the failure of issue. The reason for casting the descent on husband and wife is twofold: Either, as in South Carolina and Georgia, the desire to let lands and goods go in the same channel, or the idea that the law of intestacy should carry out the supposed wishes of the intestate; and this was the avowed motive with Robert Dale Owen, the chief author of the Revised Statutes of Indiana. The share in fee takes the place of curtesy and dower, which are abolished; but the wife's share is often, in whole or in part, secured against the husband's debts, against his alienation without her consent, and against his disposition by last will. But only in two states the widow's rights in the inherited lands are restrained, with a view of preventing her from carrying them away from the transmitting husband's blood.

I. Where the decedent leaves two or more children, or issue by two or more children, or one child and issue by one or more other children, the widow or surviving husband takes one-third of the lands, subject to debts and charges like other heirs, in the following states: New Hampshire, Connecticut, South Carolina; also in Florida, California, Nevada, Idaho, Montana, Washington, the Dakotas, Utah, and Oklahoma. In Florida and the states and territories named after it, he or she takes one-half when competing with only one child, or the issue of one child; in the states named before Florida, only one-third, in all cases; in Colorado and Wyoming one-half, whether sharing with one or with several children.[62] In Iowa

[62] The rules of these states which have given little or no room for litigation will be found among the canons of descent, or in close connection with them.

one-third of all the real property owned by the husband at any time during the marriage, which has not been sold on execution or judicial sale, and to which the wife has not relinquished her right, is set aside to her in fee simple, the husband having the like share in the wife's land. Curtesy and dower are abolished.[63] In Pennsylvania, by the act of April, 1833, which, in the main, still governs descents, the widow is given one-third for life, when there is issue; and this is no longer dower, but an estate in common with the other heirs, held, not under, but with, them, even before allotment. But the husband's life estate is still called "curtesy." On failure of issue the widow has one-half for life.[64] In Texas, also, the act of March 18, 1848, has made a life estate in one-third to the widow, and in the whole to the surviving husband, a part of the canons of descent.[65] In Kansas, when there is issue, the wife takes one-half of all the real estate, on the same terms as in Iowa.[66] In Connecticut a new régime dates from April 20, 1877. Where parties have married since that day, or, having married before it, declare, in writing on record, their choice of the new plan, the surviv-

[63] Iowa first established the present rule by the Revised Statutes of 1851, and repealed it by an act taking effect July, 1853, which re-established dower as at common law. The present rule was re-enacted in 1862, and is now section 2440 of the Code of 1873. The supreme court has held that the wife has no vested rights in her husband's land till his death; hence the legislature may in his lifetime lessen her expectancy, though it cannot increase them as against purchasers. Lucas v. Sawyer, 17 Iowa, 517, where land was sold under execution in 1845. Husband died after revision of 1851, but before act of 1853. The wife got nothing. See, also, Moore v. Kent, 37 Iowa, 20, and cases there cited. Sale of mortgaged land under statutory notice is a judicial sale. Sturdevant v. Norris, 30 Iowa, 64.

[64] This life estate differs from dower, in not being free from the decedent's debts. Nor is it, like dower, before allotment, a mere jus in rem. It is an immediate estate, and may be taken in execution. Shaupe v. Shaupe, 12 Serg. & R. 12; Gourley v. Kinley, 66 Pa. St. 270. But, like dower, it attaches to an estate tail. As to the life estate in Massachusetts, see Sears v. Sears, 121 Mass. 267.

[65] The widow is, as to her share, an heir. She takes such a share in whatever is undisposed of by will, without being put to an election. Carroll v. Carroll, 20 Tex. 744. How far husband and wife are deemed heirs in Massachusetts, see Proctor v. Clark, 154 Mass. 45, 27 N. E. 673.

[66] Comp. Laws Kan. c. 33, § 8, par. 2246. The husband is on precisely the same footing. Id. par. 2266, § 28.

ing husband or wife has, in case of intestacy, one-third absolutely when there is issue, one-half when there is none.[67] In Vermont on failure of issue, the surviving husband or wife has the choice either to take the fee in land to the value of $2,000, and one-half of the remainder, or to have curtesy or dower at common law.[68] Mississippi and Arkansas have, by recent statutes, conferred new rights of inheritance upon the surviving husband or wife.* In the former state, dower and curtesy having been abolished, such survivor takes a child's share, when there are children or their descendants. In the latter state the wife may, within 60 days after grant of administration, disclaim dower, and take a child's share in the husband's estate.[69] In Florida the estate of a married woman is cast on her children, or their descendants, and her husband, giving to the latter a child's share by the canons of descent. But the corresponding provision for the widow is found under the head of "Dower," in place of which she may elect a child's share, or the whole real estate when the husband leaves no issue.[70] In Georgia the wife has a "child's share," but in no case less than one-fifth, while the husband takes the whole of the wife's estate, even in the presence of issue, except that since 1871, when the wife leaves a separate estate (without any remainder or limitation over), within the meaning of equity jurisprudence, he also has only the share of one child, or issue of one child, just like the wife in other cases.[71] In Missouri the wife has her dower as at common law, but she may, within 15 months after the death of her husband, indicate her choice to take a child's share, as heiress,—that is, subject to the decedent's debts,—her share being the same as in Georgia. The choice is to be made of record in the probate court.[72] In Michigan, under the act of 1889, upon the failure of issue, the husband or wife takes one-half, as against father and mother, or either of them, brothers and sisters, or their children, but the whole as

67 Gen. St. §§ 623, 624, 630, 632, 634.

68 Rev. L. § 2230, cl. 2.

69 Code Miss. § 2291; Ark. Dig. § 2599.

70 Rev. St. 1892, §§ 1832, 1833.

71 Code Ga. § 2484.

72 Rev. St. Mo. § 4465, as to wife taking by descent. Election by widow Id. §§ 4520, 4521.

against more distant kindred; and in Minnesota, by a late amendment of the probate act, the wife of a husband dying without children or parents takes the whole estate.[73]

The Indiana statute must be given very much in detail. If a husband dies, testate or intestate, one-third of his real estate descends to his widow. This is free from his debts. But only one-fourth is free if such estate exceeds $10,000 in value; and only one-fifth when it exceeds $20,000. If there is only one child (which means either one living child, or the issue of one dead child), the widow has one-half. If a wife dies, testate or intestate, leaving issue, the husband takes one-third, subject to debts. The wife is entitled to one-third of all the real estate of which the husband was seised during coverture, and which he disposed of without her joining in the deed. His mortgage, unless for purchase money, does not affect her right. Since 1875, if the husband's estate is sold under judicial sale, she is entitled to have her one-third laid off at once. A freehold jointure bars her right of inheritance, just as it would bar dower; and the husband's right to inherit can also be barred by marriage contract.[74] If a wife leaves her husband, and lives in adultery, continuing to do so at his death, she forfeits her inheritance. He can forfeit his in like manner, by living in adultery, or abandoning his wife, and not providing for her and her children.[75] These latter rules apply as well when there is no issue of the decedent as when there is. The very complicated law of Indiana as to the right of succession of husband and wife to each other's land has been adopted almost literally in the territorial act of New Mexico of 1887. In Indiana the inheritance of the wife is clogged with two provisos made by sections 18 and 24 of the original chapter,—the former, to the effect that if the widow marries again, having children by the husband transmitting the inheritance, she cannot thereafter convey it, unless these children be all of age, and join in the deed,

[73] 3 How. Ann. St. § 5772a, amended. See Prob. Act Minn. § 64.

[74] McClanahan v. Trafford, 46 Ind. 410; Isenhour v. Isenhour, 52 Ind. 328. See, for exceptions, Mathers v. Scott, 37 Ind. 303. But a jointure does not prevent the wife from inheriting as against brothers and sisters. Glass v. Davis, 118 Ind. 593, 21 N. E. 319, based on Sutherland v. Sutherland, 69 Ill. 481.

[75] Goodwin v. Owen, 55 Ind. 243; Owen v. Owen, 57 Ind. 291. Contra, Shaffer v. Richardson, 27 Ind. 122.

the latter to the effect that if a man marry a second or other subsequent wife, and has by her no children, but has children alive by a former wife, the land descending at his death to the wife shall, at her death, descend to the children. These two provisos have given rise to a great deal of litigation. Neither of them is held to apply to land sold by the husband without the wife's consent, such land not coming properly by descent. The conveyance, if made by her after remarriage, is void, even as against the widow herself. Partition before remarriage does not put the land allotted to the widow in a new plight. The proviso as to the childless widow is in force where the husband leaves grandchildren alive. If the inheriting wife has any children by the transmitting husband, and other children, both sets will inherit equally upon her death. The cases quoted below decide these and several other points. The vexed question whether the estate of the widow bearing no children to the intestate, who leaves children by another husband, is a fee or a life estate, has at last been set at rest, in favor of the life estate, by an act of March 1, 1889.[76]

[76] The clauses concerning wife and husband as heirs had best be named, as they stand in the Revised Statutes, edition of 1888: Wife with issue, section 2483; not to alien when remarried, section 2484 (old section 18); from wife to husband, section 2485; wife with one child, section 2486; childless widow of man with children, section 2487 (old section 24); wife or husband and parents, section 2489; land conveyed without wife's consent, section 2499; all to husband or wife, section 2490; widow's right in land contract, sections 2493 and 2494; land mortgaged for purchase money, section 2495; adulterous wife, section 2496; adulterous or deserting husband, sections 2497, 2498; jointure, sections 2502–2504. The following cases are but a few of the reported cases arising under these sections: Where a widow has partition before remarriage, she is still in by old title. Avery v. Akins, 74 Ind. 283. See, as to effect of sale in administration suit, Spencer v. McGonagle, 107 Ind. 410, 8 N. E. 266. Lands which a widow cannot alien cannot be sold on execution against her. Smith v. Beard, 73 Ind. 159. Her conveyance is void even against herself. Knight v. McDonald, 37 Ind. 463. Her share free from debts remains so in the husband's children, taking it after her death. Louden v. James, 31 Ind. 69. The estate of the childless widow was called a life estate in Hendrix v. Sampson, 70 Ind. 350, and other of the older cases; but in Utterback v. Terhune, 75 Ind. 366, and all the later cases reviewed in Habig v. Dodge, 127 Ind. 31, 25 N. E. 182, it is recognized as a fee, less power of alienation, and with forced heirs. The "expectant heirs" had no estate that would pass by grant, but it might be barred by warranty. Id. And an act of

II. On the failure of issue the inheritable shares of the surviving wife or husband become greater, as we have already seen, in Pennsylvania and Connecticut; and their right to inherit is more widely acknowledged. Only in Nevada, the husband dying without issue, but leaving brothers, is a casus omissus, and the wife gets nothing, aside of her share of community property.[77] In Georgia either husband or wife, on the failure of issue, takes the whole of the dead spouse's estate. And so it is in Kansas[78] since 1870; also in Wisconsin, Colorado, Mississippi, and Florida. In Texas and Arizona, on failure of issue, the surviving consort has one-half, "without remainder to any one," i. e. in fee; and if there is no father or mother, brother or sister, or other descendants, then all. In Ohio, on failure of issue, the estate vests in surviving husband or wife, subject to special rules for its later descent. In Massachusetts an act of 1854 gave to the widow, on failure of issue, at her choice, instead of dower, a life estate in one-half, as tenant in common with the heirs. In 1880 the lawmaker went further: The husband is to have, when no issue was born alive, a life estate in half the lands; and, whenever the wife dies without issue, a fee in realty up to $5,000 in value. The wife, on the death of the husband, intestate and without issue, has a fee in lands of like value, and her choice between dower and one-half for life in the residue, as before. An adopted child is deemed

March 1, 1889 (see continuation of Rev. St. 1892, E. B. Myers & Co., p. 167), enables the heirs to sell their expectancy and deal with the widow. When the widow has a child by the transmitting husband, her children by another husband share with it if she dies discovert. McMaken v. Michaels, 23 Ind. 462. When she dies covert, neither the second husband nor his children take any part of her share. Mathers v. Scott, 37 Ind. 303. See, also, Thorp v. Hanes, 107 Ind. 324, 6 N. E. 920. Widow cannot defeat rights of children by consenting to sale of her share for husband's debts. Armstrong v. Cavitt, 78 Ind. 476. Land being conveyed by husband without wife's consent, her third goes to her, free of the expectancy of the children. Slack v. Thacker, 84 Ind. 418; Hendrix v. McBeth, 87 Ind. 287. Adopted children of husband do not affect widow's right of alienation. Barnes v. Allen, 25 Ind. 222. For the act of March, 1889, see Sess. Acts, p. 430.

[77] Clark v. Clark, 17 Nev. 124, 28 Pac. 238.

[78] The wife must not have always resided outside of the state. This distinction is held not to be unconstitutional. Buffington v. Sears, 46 Kan. 730, 27 Pac. 137.

issue, within the act.[79] In Connecticut, aside of the half in fee going to the widow on failure of issue, the estate is liable for her support; and, under the present system, it is not clear how the lands can be allotted to an heir as long as she claims that allowance. Perhaps, if once so allotted, a sale to a bona fide purchaser would destroy the widow's lien, if any, for such support.[80] In Illinois the surviving husband or wife takes, on the failure of issue, half the realty, and this is independent of dower. While the latter is barred by a jointure, the former is not.[81] In Indiana, on failure of issue, if the whole estate, real and personal, does not exceed $1,000 in value (it seems, beyond the allotment to widow), the relict gets it all. If it is more, the parent or parents take one-fourth, as a joint estate. In Wyoming the limit is $10,000; and in both states, on failure of parents, the relict takes all.[82] In California, Nevada, Montana, Idaho, the Dakotas, Washington, and Oklahoma, upon failure of issue, one-half goes to the father or mother, or their descendants; the other half to the wife or husband; if there be none of them, all to the relict. In South Carolina, on the failure of issue, the wife or husband gets one-half; on the failure of issue and of brothers and sisters and their issue, and of parents, the wife or husband takes two-thirds.

The surviving husband or wife succeeds on the entire failure of kindred, except in New Hampshire, where the statute is silent; in Delaware, for life only. It was held in Pennsylvania, where a man left only a mother and wife, the former inheriting first, that the wife should step in afterwards, to prevent an escheat. In Louisiana

[79] The wife is considered an heir as to the fee not exceeding $5,000 in value, but not as to life estate. Proctor v. Clark, 154 Mass. 45, 27 N. E. 673. By the acts of 1885 and 1887 the wife's power of devising her estate has been practically taken away.

[80] Conn. St. §§ 623, 624. The former refers to marriage after April 20, 1877; the latter to couples who have recorded an agreement to abide by the provisions of section 624.

[81] Sutherland v. Sutherland, 69 Ill. 481.

[82] For the act of 1853, soon repealed, which let brothers, etc., in with the wife, see Nebeker v. Rhoads, 30 Ind. 330. For husband's share under act of 1838, see Cunningham v. Doe, 1 Ind. 94. As against brothers and sisters,—i. e. when the wife is sole heir,—she takes notwithstanding the jointure, though this would bar her of the one-third, which she takes in case of issue.

the succession of wife or husband is deemed "irregular," and he or she can take possession only under a decree of court. In many states the relatives of a predeceased husband or wife are also let in, to prevent an escheat. A late case from an Ohio circuit court is reported, where such an extremely rare case came up on a dispute between the wife's kindred.[83] It will be seen, in the section on "Bastards," that the wife of a bastard will be preferred to his mother in some cases where the wife of another person would be postponed.

It is very doubtful whether the statutes of Georgia and Connecticut forfeiting the dower of a wife who leaves a husband and lives in adultery would be applied to her rights of inheritance. But in Minnesota either wife or husband loses the right of inheritance by desertion for the space of one year or over, and continuing to the time of death. Where the statute does not provide a forfeiture, the wife's inheritance will not be forfeited by elopement, as it is against public policy to let a land title depend on matters in pais.[84]

Generally speaking, where the statute gives an estate of inheritance to a wife or widow or relict, or to a husband, etc., it is understood that a divorce from the bonds of matrimony destroys that character, and makes the former spouses strangers to each other. In some states this result does not always follow, unless, indeed, the owner of the property to be inherited has entered into a new union. The exceptional statutes will be noticed along with the results of a judgment of divorce.

[83] Rev. St. Ohio, § 4161; Ellis v. Ellis, 3 Ohio Cir. Ct. R. 186.

[84] Adose v. Fossit, 1 Pears. (Pa.) 304. It was held in Massachusetts in Lakin v. Lakin, 2 Allen, 45, that the statute of Westm. II., which bars dower for adultery and elopement, unless there be a voluntary conciliation, is not in force in Massachusetts as against dower; it being against our policy to let the title to land depend on matters in pais. The South Carolina statute (section 1852) makes the wife's share forfeitable on the same grounds on which dower is forfeited. In Arkansas, by the act of 1891, the widow's right to inherit was enlarged, but the canons of descent in the Digest of 1894 put her exactly on the footing of the old law.

§ 33. Descendants.

Where the intestate leaves no wife or husband, but leaves issue, the whole estates goes everywhere to his issue. If he leaves also a wife, or a woman leaves a surviving husband, then the issue takes the inheritance, subject to dower or curtesy, or after taking out such share as the law gives to the surviving widow or widower.

At common law, when the descent was cast on several persons, for instance, on all the daughters in the absence of sons, or under the custom of gavelkind, the tenancy was said to be in coparcenary, which has the same unity of estate as a joint tenancy, but not the survivorship incident to the latter. The statutes of some states call the joint ownership of several children "coparcenary." Others style them "tenants in common." Others, again, use neither term. The difference is at any rate very slight, though it may sometimes affect the bar of the statute of limitations.[85] Where the intestate leaves children, and the issue of predeceased children, the latter in all the states take by stocks,—that is, the issue from each dead child take the share of one child,—unless it be in Kansas, where the dead child may be in part represented by his widow. The inheritance is direct from the intestate to the grandchild, and is therefore

[85] Chancellor Kent, as early as 1832, intimated that there was no practical difference between holding in coparcenary or in common. However, in his days, there was this distinction: That coparceners in a declaration in ejectment laid a joint demise, but tenants in common separate demises. In real actions (such as a writ of entry) coparceners can join; tenants in common cannot. It was held in Campbell v. Wallace, 12 N. H. 362, that heirs, being coparceners, can join. Contra under the Maryland act of 1786. Still, under the law of the District of Columbia, it was held in Miller v. Fleming, 6 Mackey, 397, that heirs take as tenants in common, the act not using the word "parceners"; quoting Hoffar v. Dement, 5 Gill (Md.) 132. Among tenants in common the disability of each ought to work only for his or her benefit. Coparceners must all stand or fall together. The statutes of Virginia, West Virginia, Kentucky, Delaware, Ohio, Missouri, Arkansas, Colorado, Wyoming, and Florida use the word "parceners" or "coparceners." New York, New Jersey, Pennsylvania, and South Carolina give an estate in common; so does Indiana, except to parents, who take as joint tenants. In Louisiana and under the "Field Code" coparcenary is unknown. Many states name neither tenure.

free from the debts of the intermediate parent, unless here again Kansas forms an exception. But if all the children be dead, and there be only grandchildren, or only great grandchildren, in short, if all the descendants stand in the same degree of remoteness, the rule differs in the several states. In New Hampshire, Vermont, Rhode Island, Connecticut, New Jersey, Delaware, Maryland, North Carolina, South Carolina, Georgia, Illinois, Kentucky (only since 1852, when the rule was worded "when any or all of a class first entitled to inherit are dead," etc.), Tennessee, Alabama, Mississippi, Iowa, Kansas (with the modification already noted), Colorado, Wyoming, California, and New Mexico, the descendants take by stocks; [86] while in Maine, Massachusetts, New York (very explicit), Pennsylvania,[87] Ohio, Indiana, Michigan, Wisconsin, Virginia, West Virginia, Florida, Missouri, Louisiana, Arkansas (though the statute leaves the matter undetermined), Nebraska, North and South Dakota, Idaho, Montana, Oregon, Washington, Utah, and Arizona descendants standing at an equal distance from the intestate take per capita. In Texas the question remained until lately in doubt; but it is set at rest by the Revision of 1893, which ordains a division per capita among those in "first and equal degree," and per stirpes only among the descendants of those of equal degree who are dead.[88] In fact, there are several other states in which the statute is not very plain, as those of New York and Kentucky are.[89] In these the courts may incline to the "per capita" rule, as the supreme court of Arkansas did, on the authority of Chancellor Kent, who considers this the American rule.

In Iowa an awkwardly drawn statute gives the representation of a predeceased child, relative, or devisee to his "heirs," instead of his issue. It has been, however, so amended that the heirs of a pre-

[86] Hayes v. King, 37 N. J. Eq. 1. For Tennessee, see Alexander v. Wallace, 8 Lea, 569. See, also, Crump v. Faucett, 70 N. C. 345.

[87] Rev. St. N. Y. pt. 2, c. 2, §§ 2–4. And the clauses of Pennsylvania act of 1833, in Brightly's Purdon's Digest, state every possible case separately.

[88] Mr. Stimson, in his American Statutes, classes Arkansas as carrying out representation by stocks in all cases. But Garrett v. Bean, 51 Ark. 52, 9 S. W. 435, has since been decided, holding the contrary doctrine. See, as to Texas, Rev. St. 1893, art. 1695.

[89] For Virginia acts of 1785 and 1790, and Kentucky act of 1796, see Morehead & Brown St. Ky. p. 560, etc.; also Rev. St. 1852, c. 30, § 2.

deceased child shall take as if he had survived both parents. The supreme court, under the former statute, would not allow the mother of a deceased child or grandchild to represent him, so as to pass the estate out of the intestate's blood at a single step, and has held, under the new statute, that the wife is not an heir within its meaning.[90]

The Kansas law says: "If any one of his children are dead, the heirs of such child shall inherit his share." And here this language has been taken literally so as to allow a father, husband, or wife to step into the representation as an heir, with the incidental duty of the heir to pay the debts of his ancestor; not only of the last dying intestate, but also of the child or other relative whom he represents, to the amount of the assets.[91]

In New York and Pennsylvania the statute expressly says that among remote descendants in unequal degree the stocks shall be carried back only to the generation nearest to the decedent. For instance: There are living grandchildren and great-grandchildren. The latter will take per stirpes, each set representing one grand-

[90] Code Iowa, § 2454. The preceding law under which the heirs of such a child were to take as if he had survived the transmitting parent was construed in McMenomy v. McMenomy, 22 Iowa, 148, so as not to justify the substitution of the child's mother in its place. See, also, Journell v. Leighton, 49 Iowa, 601, and In re Overdieck's Will, 50 Iowa, 244, which practically construe "heirs" into issue. Under present statute it is held in Blackman v. Wadsworth, 65 Iowa, 80, 21 N. W. 190, that a wife does not step in as heir to a predeceased devisee, but a brother does; partly overruling the reasoning of the McMenomy Case. Under section 2457, the portion of the parents shall go as if they had survived the intestate. This does not let in their devisees, but only their kindred capable of inheriting. Lash v. Lash, 57 Iowa, 88, 10 N. W. 302. In Indiana such attempts by relicts or devisees of children to claim an inheritance have been denounced as foolish.

[91] Husband and wife, the latter owning land, have six children, three of whom die young. The mother dies next. Held, that the father, as heir of the three children, takes their shares in the mother's estate. Delashmutt v. Parrent, 40 Kan. 641, 20 Pac. 504. The same sort of representation of dead ascendants and collaterals brings out unique results. A stepfather becoming sole heir, Sarver v. Beal, 36 Kan. 555, 13 Pac. 743; or a sister-in-law, as mother of deceased nephew, Couch v. Wright, 20 Kan. 103. A daughter-in-law, subject to her dead husband's debts, inherited in Fletcher v. Wormington, 24 Kan. 259, where the supreme court said that the statute was as plain as could be. Also, Dodge v. Beeler, 12 Kan. 524.

child, but the grandchildren will take per capita, and the number of descendants from each dead child is regarded no more, as if there were only grandchildren, all standing in the same degree. In other states, such as Massachusetts and Indiana, the statute says generally: If in equal degrees, per capita; if in unequal degrees, by representation. It was doubtful whether stocks should be carried back to the oldest generation which they represent, whether children or brothers. In both states it was held that the stocks must be carried back only to the oldest living generation;[92] and it may be boldly asserted that in other states in which the statute is worded as generally as in Massachusetts, or in which a statute silent on the whole subject has been construed, as in Arkansas, the same construction will be applied as in Massachusetts and Indiana. The children or descendants who inherit, unless a statute expressly says otherwise, are only those born in lawful wedlock. But, in the absence of any proof to the contrary, any person who has the reputation of being the child of the intestate, or was known as such child in the community, will be taken to have been his or her legitimate child; bastardy in a civilized country being the exception.[93]

The rights of posthumous children and descendants have been noticed in section 31. The common-law right of the oldest coparcener of having first choice has been expressly abolished in most of the states. It is, however, yet recognized in Maryland.[94] An estate tail can, upon the death of the first taker, go only to his descendants. Upon the death of the heir in tail,—that is, of one who has inherited directly or indirectly from the first taker,—it may go to any of his collaterals who are of the blood of the first taker. This restriction is implied in the very name. But the question has been raised, does an estate tail descend according to the modern American law to all children alike or according to the course of the common law to the eldest son, in preference to all others? The former view would be the most correct, for in England entailed gavelkind lands have always gone to all the sons alike, entailed borough Eng-

[92] Balch v. Stone, 149 Mass. 39, 20 N. E. 322; Cox v. Cox, 44 Ind. 368; Blake v. Blake, 85 Ind. 65.

[93] Orthwein v. Thomas (Ill. Sup.) 13 N. E. 564.

[94] Chaney v. Tipton, 11 Gill & J. (Md.) 253; and see Pub. Gen. Laws, art. 46, § 45 et seq.

lish lands to the youngest son, without any power in the donor of the estate tail to change the course of descent.[95] But in Pennsylvania (where there are still some estates tail created before 1855, and not barred) the opinion of the chief justice in favor of equal division has been overruled; and an estate tail general goes by descent to the eldest son, and a restricted entail (i. e. a tail male), or a special tail (heirs of the body by a named wife or named husband), would be allowed to descend only in the restricted way.[96] In Maine and Massachusetts it seems that a general entail would go to the heirs under the present law; but a tail male would go to the eldest son only, and fail for lack of male issue in the male line; and a special tail would also pass to the common-law heir of the special bed.[97] In Maryland, and, it seems, in Rhode Island, estates tail would in all cases descend to all children alike, like estates in fee.[98] The so-called "estate tail" in Connecticut, and the seven states that have followed its example, is simply an estate for life in the first taker, with remainder in fee to the lineal heirs under the statutes, with no room for any special rules of descent.

§ 34. Advancements.

At common law, when the father or other ancestor had given to one of several daughters or joint heiresses a parcel of land in frank marriage, for advancing her in life, and as a marriage portion, her sisters might, when the property in the other land of the same ancestor came to them by descent, compel her either to forego her share in coparcenary, leaving the descended estate to the others, or to

[95] Co. Litt. 27a, and Thomas' note O; quoting Dyer, 179, Pl. 45, and Roe v. Aistrop, 2 W. Bl. 1228, relied on by Chief Justice Lowrie in Price v. Taylor, 28 Pa. St. 95.

[96] Hileman v. Bouslaugh, 13 Pa. St. 344; Guthrie's Appeal, 37 Pa. St. 9; Reinhart v. Lantz, Id. 488, where the chief justice yields his former opinion.

[97] Riggs v. Sally, 15 Me. 408; Corbin v. Healy, 20 Pick. 514; Osborne v. Shrieve, 3 Mason, 391, Fed. Cas. No. 10,598; Collamore v. Collamore, 158 Mass. 74, 32 N. E. 1034.

[98] The Maryland statute (Pub. Gen. Laws, art. 46, § 1) expressly states that estates tail and lands held in fee simple shall descend in the same way. The Rhode Island law of descent (Pub. St. c. 187, § 1) speaks of "any real estate of inheritance."

bring the land theretofore given to her into hotchpot, and then to divide the whole. This putting into hotchpot had already fallen into disuse in Blackstone's time, along with gifts in frank marriage; but he mentions it because this method of division had been revived and copied by the statute of distribution of personal estate.[99] As to the rights of children under the customs of London and of the province of York, the same author says: "If any of the children are advanced by the father, in his lifetime, with any sum of money (not amounting to their full proportionable part), they shall bring that portion into hotchpot with the rest of the brothers and sisters, but not with the widow, before they are entitled to any dividend under the custom.[100]

On the basis of this hotchpot or collation among coparceners, and among children taking shares under the customs of London and York, and the statute of distribution, American statutes were enacted, after the abolition of primogeniture, which in most cases apply alike to real and personal property given in advancement, on the one hand, and to the shares of the real and personal estate coming by descent or distribution, on the other, whenever the giver and intestate is the father, mother, or ascendant of the heirs and distributees. Thus,

[99] 2 Bl. Comm. 191. In the civil law, the bringing into hotchpot is called "Collatio." The French Code and that of Louisiana (articles 1227–1288) are very full on "collation." The verb "to collate" is found in some of the American statutes.

[100] 2 Bl. Comm. 518. The learned commentator, when he comes to the statute of distribution, does not refer to its clause on advancement, but does so in setting forth the custom of London, on which the statute is founded. In Holt v. Frederick, 2 P. Wms. 356, it was held that, under the statute, advancements made by a mother must be brought into hotchpot, as well as those from the father. The effective words of the statute are: "All the residue equally among his children and their legal representatives (if any be dead), other than such children, not heirs at law, who shall have any estate by intestate's settlement, or who have been advanced by intestate in his lifetime, by portion equal to the share allotted to the other children under such distribution; and children, other than heirs at law, advanced by settlements, or portions not equal to the other children's shares by such distribution, shall have so much of the surplusage as shall make the estate of all to be equal." 22 & 23 Car. II. c. 10, § 5. The word "settlement" means evidently what is settled on a son upon his marriage, as the "portion" is money given to a daughter in like case.

every advancement becomes a charge, perhaps a lien, on the heir's portion by descent.[101]

Before going into the details of the statutes in the several states, we must lay down the broad lines on which they proceed, and along which they are construed:

I. It is only a father, mother, or higher ascendant (such as a grandfather), who by giving a settlement or portion to one of the heirs, creates an advancement, to be brought into hotchpot; not a collateral, such as an uncle or aunt; even in those states in which the statute (as in New York) speaks only of gifts to a child, grandchildren are included by construction; and in those which, like New Hampshire and Kansas, speak of advancements to "an heir" generally, the reported cases refer only to children or grandchildren.[102]

[101] Maine, c. 75, § 6; New Hampshire, c. 196, §§ 9–12; Vermont, § 2247; Massachusetts, c. 128, § 1; Rhode Island, c. 187, § 18; Connecticut, § 630; New York, Rev. St. pt. 2, c. 2, §§ 23–26; Pennsylvania, "Intestates," 35; New Jersey, "Descent," 1; Delaware, c. 85, § 6; Maryland, art. 46, § 31, and article 93, § 125; Virginia, § 2561; West Virginia, c. 78, § 13; North Carolina, § 1281, rule 2; South Carolina, § 1849; Georgia, §§ 2579–2582; Florida, § 1826; Ohio, §§ 4169, 4170; Indiana, §§ 2407, 2479; Illinois, c. 39, § 4; Michigan, § 5772a, and amendments; Wisconsin, §§ 3956–3959; Iowa, § 2459; Minnesota, c. 46, §§ 8, 9; Nebraska, § 1128; Kansas, pars. 2617, 2618; Colorado, §§ 1042, 1043; Kentucky, St. 1894, §§ 1407, 1408; Tennessee, § 3281; Alabama, Civ. Code, §§ 1925–1935; Arkansas, §§ 2536–2539; Mississippi, § 1550; Texas, art. 1651; California, Civ. Code, §§ 1395, 1396; Dakota, Civ. Code, §§ 788, 789; Oregon, §§ 3105–3107; Washington, §§ 1487–1492; Idaho, §§ 5707–5710, and 5746; Montana, Prob. Prac. Act, §§ 544, 545; Arizona, § 1465; Wyoming, §§ 2224, 2225; Nevada, §§ 2985–2989. The old Maryland law in force in the District, of 1798 (chapter 101, subc. 11, § 6), is much like the present. The statute of Wisconsin carefully provides that advancement in real estate shall be considered as part of the realty; of personal estate, of the personalty. But the heir may be cut down in his share in the other kind of property if one is not sufficient. The Arkansas clauses are copied from those of New York.

[102] Beebe v. Estabrook, 79 N. Y. 246 (the word "child" in the statute embraces grandchildren who are distributees, so that they can profit by the gift to a child other than their parent), was decided under a clause in the article on distribution; but the court says that this construction would apply even more strongly to the clause in the law of descent. The Illinois law says plainly "child or lineal descendant." Children of son barred by advancement to him. Simpson v. Simpson, 114 Ill. 605, 4 N. E. 137, and 7 N. E. 287. An instance where children's shares in the lands were cut out is Parker v. Mc-

II. Though the wife be a coheir in the lands, an advancement to her is not charged up against her to the credit of the children; nor is an advancement to a child thrown into the estate which she can share in, but it is brought into hotchpot, only to be divided among the other children and descendants.[103]

III. The money or other things must have been given, not in order to maintain or to educate the child, or to afford him or her, health or amusement or comforts, but with a view to a "portion or settlement in life," of which the marriage portion in entailed land, with which hotchpot took its rise, is a good example. Indeed, these words have come into our statutes from that of distribution. Where the thing given is land, the presumption is naturally that a "portion or settlement" was meant.[104]

IV. A gift to grandchildren, whose parent connecting them with the giver is living, is a mere gratuity; but, when the intermediate parent is dead, it is a good advancement; and so a gift to the son-in-law may be a good advancement to the daughter, his wife.[105]

V. The advancement is valued at the full value of the thing given, though not given in fee, but to the child for life, with remainder to his or her issue, or to the child in fee defeasible upon its death without issue, or in any of the ways in which it is usual to "settle" property upon a child.[106]

Cluer, 36 How. Prac. 301. Quaere as to the North Carolina statute, though it can hardly be said to confine the rule to children more plainly than that of New York.

[103] A few of the statutes say so expressly. The widow is in many states not a coheir, but only a distributee. See Grattan v. Grattan, 18 Ill. 167.

[104] Brannock v. Hamilton, 9 Bush, 446 (money paid for a good education cannot be treated as a "settlement"); In re Morgan, 104 N. Y. 74, 83, 9 N. E. 861 (not where donor's intention to the contrary appears). Bullard v. Bullard, 5 Pick. 527, requires proofs that advancement was made in a deed of land. Paying off a mortgage on the child's own land is presumably an advancement. Johnson v. Eaton, 51 Kan. 708, 33 Pac. 597.

[105] Stevenson v. Martin, 11 Bush, 485, and a gift to the son-in-law after the daughter's death cannot be charged to her children. In re Schedel's Estate, 73 Cal. 594, 15 Pac. 297; Mowatt v. Carow, 7 Paige, 339; Redf. Wills, pt. 2, p. 336.

[106] Bowles v. Winchester, 13 Bush, 1 (where, however, a simple life estate given to a child was charged only at its life-table value); Wagner's Appeal,

VI. It is valued as of the time when the gift is perfected by deed or delivery; no interest is charged to the receiver. On the other hand, a gift of land or of a fund, in which the parent reserves a life estate himself, or which he delivers, stipulating for interest during his life from the children, is charged justly at full value; for the other children only get their shares at the father's death.[107]

VII. Though the sums of money or other things given be of sufficient amount to indicate a "settlement or portion," the father can, at the time of the gift, show his intention that it shall not be charged against the child, and on proof of such intention the advancement cannot be charged.[108]

In the states of Virginia, West Virginia, Kentucky, and Tennessee, things devised or bequeathed by will to children or descendants must be brought into hotchpot whenever, for any reason, there is a partial intestacy, with the property thus remaining undisposed of. And here it seems that all devises and bequests, though insufficient to be considered as a "settlement" in life, would stand on the same

38 Pa. St. 122 (where a will directed advancements to be charged). If the donor in writing charges, or the donee in writing accepts, at a certain value, that governs. St. Wis. § 3959, and some other statutes. And such is probably the rule elsewhere. In about two-thirds of the states the value at the time of advancement is made the measure, with the proviso in all but six of them that no particular value has been then agreed upon, and this exception would probably hold good in all. Mortgaged land is an advancement only as to the surplus over the incumbrance. Polley's Ex'rs v. Polley, 82 Ky. 64.

[107] Bowles v. Winchester, ubi supra, note 106; Stevenson v. Martin, 11 Bush, 485. Contra, Pigg v. Carroll, 89 Ill. 205 (where land given to sons was valued when possession was taken, though deeds were made long afterwards); Ruch v. Biery, 110 Ind. 444, 11 N. E. 312 (interest to father); Hook v. Hook, 13 B. Mon. 526 (life estate reserved). But in Comings v. Wellman, 14 N. H. 287, where life estates for both parents were reserved, they were deducted from the fee simple in the valuation. Even rent may be charged up if set down in writing by the father at the time. Shawhan v. Shawhan, 10 Bush, 600; Dixon v. Marston, 64 N. H. 433, 14 Atl. 728 (the advancements are thrown into hotchpot at the time of the parent's death).

[108] Christy's Appeal, 1 Grant, Cas. 369; Merrell v. Rhodes, 37 Ala. 449; Frey v. Heydt, 116 Pa. St. 601, 11 Atl. 535 (intent must exist at time of gift). But the parent cannot by a declaration turn a gift which is not an advancement into one. Cleaver v. Kirk, 3 Metc. (Ky.) 270.

footing.[109] For other states, having no such statute, it has been held that a will covering a part of the estate not only does not operate as an advancement, but prevents gifts made by testator from thus operating; as he shows, by not mentioning them, that he does not wish them to be brought into hotchpot.[110] In several states the law is so worded, and very properly, that neither land nor money is to be charged against a child, unless "charged" at the time, "and a memorandum made thereof in writing," or delivered in the presence of witnesses who are asked to take notice, or such other language is used that the intent "to advance" cannot be made to depend on inference.[111]

Where an advanced child dies before the parent, leaving children, the latter take by descent, though by representation, yet in their own right. A simple loan to the intermediate parent could not have been charged against grandchildren thus inheriting. But an advancement is charged to them; and this was done in England, under the customs of York and London, and under the statute of distribution. For greater certainty, New York, its copyists, and a number of other states have adopted this rule by words in their statutes; but it probably prevails everywhere. Michigan, Wisconsin, and Minnesota charge each advancement by statute against the child or descendant who receives it.[112] Under the chapter of the statute on "Powers," a gift to a child or descendant by the parent out of lands over which he has a "beneficial" (that is, an unrestricted) power, or a power in trust, with a right of selection, is in the states named deemed an advancement, if, under the same circumstances, a gift out of his own property would have been such. That is, if he should die, without disposing of the rest, and the estate should go to his children or descendants, they will, if possible, be made even in both estates, his own and that under his power, including the

[109] Virginia, Code, § 2561; West Virginia, Code, c. 78, § 13; Kentucky, Gen. St. c. 31, § 15 (Stat. 1894, § 1407); Tennessee, Code, § 3281.

[110] Thompson v. Carmichael, 3 Sandf. Ch. 120.

[111] Petition of Atkinson, 16 R. I. 413, 16 Atl. 712; Appeal of Yeich (Pa. Sup.) 17 Atl. 32, shows the inconvenience of a law not requiring such clear proof.

[112] 2 Rev. St. N. Y. tit. 3, art. 3, § 76.

parts already given.[113] When the thing given by the father to the child is land, the intent to advance is presumed; proof to the contrary must come from the donee who refuses to bring the gift into hotchpot.[114] A deed made in consideration of one dollar and of love and affection implies a gift, and hence an advancement; but the grantee is not estopped from showing that there was a valuable consideration, and that the conveyance, not being a gift, cannot operate as an advancement.[115] In a late case a rather startling decision on valuation of an advancement was rendered. A father had taken a life policy on his own life for the benefit of one of his children, and it was charged to him at its face value; though this included, in its very nature, interest on the premiums paid. In accordance with the general doctrine, no more than these premiums ought to have been charged.[116]

The law of advancements is part of the law of descent. Hence, when a father says in his will that his property shall be divided among his children, or his descendants, according to the law of descent, advancements should be charged up as if he had died intestate.[117]

§ 35. Parents and Their Descendants.

Aside of husband and wife, after the children and other descendants of the decedent, the next heirs belong to the group which is composed of the father and mother of the decedent, of their children, who are the decedent's brothers and sisters, or half brothers or half sisters, and their more remote descendants; that is, nephews and nieces, grandnephews, etc. But among these precedence is dealt out most capriciously. There may be equality between father and mother;

113 See, for instance, Minnesota, c. 44, § 53, to fully understand the operation of the rule. See infra, chapter on "Powers," § 116; Cole v. Palmer, 1 Bush, 371; Renaker v. Lafferty, 5 Bush, 88.

114 Phillips v. Phillips (Iowa) 58 N. W. 879. In Culp v. Wilson, 133 Ind. 294, 32 N. E. 928, it is said that proof of the father's statements is generally unreliable.

115 Hattersley v. Bissett, 50 N. J. Eq. 577, 25 Atl. 332, affirmed 29 Atl. 187.

116 Cazassa v. Cazassa, 92 Tenn. 578, 22 S. W. 560. To charge the premiums, less commissions and share of expenses, would have been still more logical.

117 Cole v. Palmer, 1 Bush, 371; Renaker v. Lafferty's Adm'r, 5 Bush, 88.

the father or the mother may be preferred; the parents may stand first in order, or the brothers and sisters, or both or one of the parents may take, with the latter, either a certain share or a brother's share; or full brothers may be preferred to the parents, and half brothers postponed; and there may be more or less representation of deceased brothers and sisters, and in some cases none.

I. Equality between father and mother obtains in Pennsylvania, where father and mother take a joint estate with survivorship to the longest liver; and in the presence of a wife or husband (who gets three-fourths), also in Indiana and Wyoming as to the remaining one-fourth; while the two parents take equally, but as tenants in common, in Massachusetts, Wisconsin, Iowa, Kansas, California, Washington, and New Mexico; since 1887, also, in Nebraska and Idaho; since October 2, 1889, in Michigan; and since October 1, 1893, in Kentucky. In all these states the parents take, or the one surviving parent takes, to the exclusion of brothers and sisters and their descendants.[118] In Arizona, the two parents also stand on an equal footing, but take only one-half, the other half going to the brothers and sisters and their descendants.

II. Until the changes of 1889 and 1893 in Michigan and Kentucky, father and mother took in equal shares when both were alive; but while the father, if he alone survived, got the whole estate, the mother, in Michigan, got only one brother's or sister's share (counting the issue of a predeceased brother or sister as one), when there were brothers or sisters, but excluded, when there were none, the issue of brothers and sisters; in Kentucky she took one-half, the other half going to brothers and sisters and their descendants.

III. In the following states the father is preferred to the mother, and to the brothers and sisters of the decedent, taking all that does not go to the surviving wife or husband: Maine, New Hampshire, Vermont, Rhode Island, New York, Minnesota, Virginia, West Virginia, Florida, Montana, Oregon, Nevada, Colorado, the two Dakotas, and Oklahoma. In Utah, on the failure of issue, the mother formerly took the whole estate; but now father and mother inherit in equal shares, if both are alive, or either of them, if alone, in preference

[118] Before 1887, Nebraska, Idaho, and Arizona made the father sole heir to the exclusion of the mother.

to brothers and sisters. In Colorado, the father takes the estate in fee; the mother takes it in like manner, if the father is dead. In Arkansas the statute is obscure. The first section of the chapter on descent, on failure of issue, gives the estate "to the father, then to the mother, then to the brothers and sisters and their descendants in equal parts." But a section dealing with ancestral and with acquired estates says, as to the latter: "To the father, or if there be no father, to the mother for life, remainder to the collateral heirs." The two sections being construed together, new acquisitions go, first, to the father for life, remainder to the mother for life, then to collaterals, among whom brothers and sisters are the nearest.[119] In Louisiana, father and mother each take one-fourth, when there are brothers or sisters or their representatives. The latter take three-fourths, if there is but one parent; one-half when there are two. When there are no brothers, etc., each parent gets half, or the only parent all. In Indiana and Wyoming the descent, as between parents and brothers, when there is no relict, is this: In Indiana the two parents, or only surviving parent, takes one-half, leaving the other to the brothers and sisters and their issue; all if there are none. In Wyoming, both father and mother take one brother's share; naturally all, if there are no brothers or sisters or their issue. In Texas, also, father and mother take one-half as joint tenants; brothers, sisters, and their issue the other half; but, if there be only one parent, he or she takes only half as much.

IV. In Georgia, the father, or if he be dead, the mother, gets one share with the brothers and sisters that are of the father's blood, and their issue; if there are none of that blood, then those of the mother's blood and their issue share with him or her. In Missouri, South Carolina, and Wyoming, each surviving parent takes a brother's part; so in Illinois. But here, if a single parent is left, he or she takes two such parts. In all these states there is full representation of brothers and sisters. In New Jersey full brothers and sisters and their issue come first; next the father; next the mother for life, with remainder to half brothers and sisters and their issue, or other collaterals. The descent in remainder is determined as of the

[119] This is incidentally settled in the leading case of Kelly's Heirs v. McGuire, 15 Ark. 555.

time of the intestate's death,[120] here and elsewhere, as in the case of dower. In Connecticut, the order is: the brothers and sisters of the whole blood and their representatives; the parents or parent; the brothers and sisters, etc., of the half blood. In Ohio those of the whole blood first; then those of the half blood; then the father; then the mother. In Tennessee brothers and sisters and their issue come first, then the parents as tenants in common, or the one surviving parent.[121] In Delaware, Maryland, North Carolina, and Alabama: first the brothers and sisters and their issue; next the father; lastly the mother. While in Mississippi, father and mother, when reached, take in equal parts.

In the states in which the father comes in first, there is great divergency when he does not survive. In New York the descent is to the mother for life, remainder in fee to the brothers and sisters and their issue; but in fee, when none of these is alive.[122] In Minnesota, if there are living brothers or sisters, the mother takes one-third; but all if there is only issue of brothers and sisters; the brothers and sisters and the issue of those predeceased the other two-thirds; if there is no mother, these take all. (The slight amendment made by the last revision in favor of issue may be noted.) In Virginia, West Virginia, Rhode Island, Vermont, and Florida the estate goes to "the mother, brothers, sisters, and their descendants"; that is, the mother takes a brother's share. In the Dakotas, Montana, Nevada, and Oklahoma the estate "goes in equal shares to the brothers and sisters and to the children of any deceased brother, etc. If he have a mother, also, she takes an equal share with the brothers," etc. And if only children of brothers and sisters are left, the mother takes to their exclusion. Oregon has the same law, except that it extends representation to all the "issue" of brothers and sisters. In Maine, children and grandchildren of brothers and sisters are excluded by the mother; but when there are living brothers or sisters these children or grandchildren take by representation, and the mother takes only a brother's part.[123]

120 Den v. Smith, 2 N. J. Law, 7. Nephews do not exclude grandnephews.

121 The statute includes "unborn brothers." See Grimes v. Orrand, 2 Heisk. 298. And remark as to shifting inheritance at the end of this section.

122 Wheeler v. Clutterbuck, 52 N. Y. 67.

123 See statutes cited in note 61 to section 31.

In the states in which father and mother stand on an equality, or where the latter has only a life estate, the next step in the devolution of the estate is confined to brothers and sisters and their issue. Here again divergences must be noted. (1) There may be full or unlimited representation. (2) Such representation may be confined to children and grandchildren of deceased brothers and sisters. (3) And may be confined to the children of brothers and sisters only. We have already stated how one or the other kind of representation is allowed in the states in which father and mother are not the equal and foremost heirs, and have shown how in some cases, in the presence of a mother, there is no representation at all. And this happens in some other cases. In Iowa and Kansas there is a sort of irregular representation. The descent to parents is accompanied by the further direction that, if they have died before the intestate, their share of the estate shall go as if they had survived him. And here Iowa takes the same course that we have noticed Kansas take in allowing a deceased child to be represented by heirs of all kinds, by blood or by marriage. Hence, where the intestate left neither wife nor child, but left brothers and sisters and a stepmother, she took one-sixth on this ground: If the true mother had outlived the intestate, she would have gotten half, and would have transmitted it on her death to her children, that is, to the brothers and sisters; the father would have left two-thirds of his half to the children, and one-third of his half, that is, one-sixth, to his wife, the stepmother.[124] In the other states in which father and mother fare equally, and stand first on the failure of both, the estate goes, of course, to living brothers and sisters, if there are any; but with this difference as to representation of those who are predeceased: There is full representation—that is, all issue or descendants are admitted—in Massachusetts (only since 1876,[125] when the word "issue" was substituted for "children"), in Indiana and Wyoming (where, however, in the absence of a relict, the parents have only one-half), in Nebraska and

[124] As the true mother must have died before the father, it seems he ought to have one-half directly and one-third of her one-half, or two-thirds in all, and leave to his widow (the stepmother) two-ninths; but the true time of the parent's death is not considered. Moore v. Weaver, 53 Iowa, 11, 3 N. W. 741. As to Kansas cases, see note 91 to section 33.

[125] Embodied in the law of descent in the Revision of 1882.

in Vermont. Grandchildren, as well as children, of brothers and sisters, are admitted in Pennsylvania (since 1855; they were not by the great statute of descent of 1833);[126] also in Georgia. Only children of brothers and sisters are admitted to represent them in Wisconsin, Michigan, California, Washington, and Idaho. But both in Vermont, where representation is full, and in Michigan and Wisconsin, where it is restricted to children, there must be at least one living brother or sister, in order to let in this class of "brothers and sisters, and their" children or issue. In Vermont,[127] by construction, in Wisconsin, by plain words, the estate, in the absence of brothers and sisters, goes to the next of kin, and the nephews and nieces can in such case only inherit in that capacity, according to their remoteness in degree, and would be postponed to a grandmother, being further by one degree from the decedent. Going back to other states, there is full representation of brothers and sisters in New York, and in New Jersey, by reconciling two conflicting sections, Virginia, West Virginia, Kentucky, North Carolina, Tennessee, Rhode Island, Connecticut, Ohio, Illinois, Florida, Louisiana (always "by roots"), Missouri, Alabama (also per stirpes), Arkansas (by the New York rule, either per stirpes, or per capita) and Arizona; as far as grandchildren in Maine and New Hampshire; only to children in Michigan, Maryland,[128] South Carolina, the Dakotas, Nevada, Montana, Idaho, and Oklahoma. In all the last-named states, grandnephews and grandnieces can inherit only in their capacity of next of kin in the fourth degree, being postponed to uncles and aunts, who are in the third degree; and, if they inherit, it must always be per capita.

It seems that, wherever the descendants of the decedent's brothers

[126] Brenneman's Appeal, 40 Pa. St. 115, though dealing with the children and grandchildren of uncles and aunts, also expounds the clause of the act of 1855 as to children and grandchildren of brothers and sisters. All the preceding cases are there quoted.

[127] Fully discussed in Hatch v. Hatch, 21 Vt. 450, on the authority of the English decisions under the statute of distributions; the leading case being Lloyd v. Tench, 2 Ves. Sr. 213. Contra where a brother is alive. Gaines v. Strong, 40 Vt. 354. As to Michigan, see How. Ann. St. § 5776a; Act 1883, No. 169; Van Cleve v. Van Fassen, 73 Mich. 342, 41 N. W. 258 (nephews and nieces exclude grandnephews).

[128] McComas v. Amos, 29 Md. 132 (nephews and nieces per stirpes, grandnephews being shut out).

and sisters take by representation, they will share per stirpes if in the same state the representatives of the decedent's children, under like circumstances, take per stirpes, and per capita where the descendants of children take per capita, except in New Hampshire, where nephews and nieces take per capita, though grandchildren do not.[129] The inheritance by brothers and sisters leads naturally to the "shifting inheritance." It often happens that a child leaves an estate, and, after his death, brothers or sisters are born to him. On common-law principles, the inheritance would go to these, in the absence of issue; and, if there was a sister born before the child's death, she would have to share with the sisters who might be born thereafter. Only Maryland and North Carolina have kept up this strange law.[130] Ohio had adopted it at one time, but a decision in that line was soon overruled,[131] and in an Illinois case it was held by the supreme court of the United States that the common law of descent was never in force in the Northwestern Territory, and that the rule of the shifting inheritance, unless enacted by statute, could not be in force in any of the states carved out of that territory.[132] In Tennessee the statute conferring an inheritance on brothers and sisters, whether born or unborn, seemed to have been purposely drawn to affirm the law of the shifting inheritance as it had come from North Carolina, and as it was still recognized in that state; but, after some fluctuation, the supreme court decided, at last, that

129 In Maine the older law of nephews excluding grandnephews was enforced in Quinby v. Higgins, 14 Me. 309 (now changed). In New Hampshire nephews take per capita. Nichols v. Shepard, 63 N. H. 391. In Rhode Island full representation always per stirpes. Daboll v. Field, 9 R. I. 266. Nephews and nieces in South Carolina take per stirpes. Stent v. McLeod, 2 McCord, Eq. 354. So all descendants of brothers and sisters in North Carolina. Clement v. Cauble, 2 Jones, Eq. 82. They take per capita in Virginia. Davis v. Rowe, 6 Rand. (Va.) 355. In Tennessee, section 3271 of the Code puts representation of collaterals and lineals on the same footing. See, for New York rule, Pond v. Bergh, 10 Paige, 140. Great-grandchildren of brothers do not take by representation in Maine. Stetson v. Eastman, 84 Me. 366, 24 Atl. 868.

130 Goodwin's Lessee v. Keerl, 3 Har. & McH. 403; Cutlar v. Cutlar, 1 Hawks (N. C.) 324. Both cases are put on the ground that the common law is in force as far as it is not changed by statute.

131 Dunn v. Evans, 7 Ohio, 169. Contra, Drake v. Rogers, 13 Ohio St. 21. In Indiana, Cox v. Matthews, 17 Ind. 367, rejects the old doctrine.

132 Bates v. Brown, 5 Wall. 710, in which all the cases are reviewed.

the unborn brothers or sisters must have been conceived at the time of the decedent's death in order to be admitted to the inheritance.[133] Georgia has, since 1843, limited the inheritance of the mother from her children in a peculiar way, in order to prevent the transfer of property from family to family. If she marries a second time, she cannot take as heir the estate of any of her children by a former bed, except that of the last surviving child, when her husband's blood has become extinct.[134]

§ 36. Ancestral Lands.

The states may be arranged in groups, from those which do not distinguish at all between the descent of ancestral and of purchased lands, passing through those which distinguish only in a few cases, and to a slight extent, till we come to Maryland, which carries the doctrine to the full extent of the common law, and Pennsylvania and North Carolina, that go beyond it.

I. In Louisiana, of course, the distinction, which is wholly foreign to the French and Spanish law, was never known. In Texas it was introduced in 1842, but dropped since 1848.[135] Massachusetts, which had until 1876 given a narrow room to the principle, repealed its law in that year. West Virginia, in her Revision of 1882, omitted the clauses which had been taken over literally from the Virginia Revision of 1860. The statutes of Vermont, Illinois, Mississippi, Iowa, Kansas, and Arizona (except, in the last named, as to a gift from the adopter to the adopted child) are wholly silent, and thus disallow the distinction. In Missouri the use of the words "grandfather, grandmother," in the singular, might have led to the conclusion that the grandparents on the transmitting side alone were meant;

[133] Melton v. Davidson, 86 Tenn. 129, 5 S. W. 530. Comp. note 121.

[134] The statute was expounded in Wilson v. Bell, 45 Ga. 514. Thompson v. Sandford, 13 Ga. 238, was decided under an act of 1845 (no longer in force), having the same object of keeping property in the family. It made a woman married again, who had children by her former husband, share with them any inheritance that might fall to her from any source. Code Ga. § 2484, subd. 6, For the construction of the rights of the mother, when or when not a widow, see, also, Holder v. Harrell, 6 Ga. 125.

[135] Under act of 1842 paternal kindred took paternal lands. Distinctions abolished in 1848. Jones v. Barnett, 30 Tex. 637.

but this view, and with it the doctrine of ancestral lands, was rejected.[136] In Colorado and Wyoming the Missouri statute, in the main, was copied, after being construed as above; and here, too, the doctrine is unknown. So it is in South Carolina and Georgia, where lands are treated like personalty, except that in the last-named state the inheritance given to the wife is, in case of her remarriage, subjected to restrictions, as has been shown heretofore. This disposes of 14 states and 1 territory.

Where a distinction is made between ancestral and purchased estates, it is only applied upon the failure of issue, and only to so much of the descending lands as do not go to the surviving husband and wife. The narrowest scope is given to the ancestral rule by a canon of descent which is common to the states of Maine, New Hampshire, Michigan, Wisconsin, Minnesota, Nebraska, California, seemingly to Oregon, also to Nevada, the Dakotas, Washington, Idaho, Montana, Utah, and Oklahoma, and, in effect, though in very different wording, in Florida,—15 states and 2 territories; a canon which, spread out into two long clauses, was part of the statutes of Massachusetts until 1876. Some of these states have copied this prolix form, some the short canon of the New Hampshire statute, in almost every case with some slight modifications. In the Maine statute the canon, shortly worded, reads thus: "When a minor dies unmarried, leaving property inherited from either of his parents, it descends to the other children of the same parent and the issue of those deceased in equal shares, if all are of the same degree of kindred, otherwise according to the right of representation." In the other states, "never having been married" is put in the place of "unmarried." In New Hampshire, in accordance with its law for other cases, the clause directing a sharing per capita is left out. In this state and in Wisconsin, lands devised by the parent are coupled with those inherited,—a step beyond the common law, under which a devise is always a purchase. The more extended draft of the canon (see the California Code), by its collocation and language, speaks of the lands of the minor children as if they were still a part of their dead parent's estate. It will be seen that the

[136] Peacock v. Smart, 17 Mo. 402.

old rule is here narrowed down: (1) By being applied only to infant decedents, who could not have disposed of the share by deed or will, if they had desired to do so; (2) to those never married, or at least dying unmarried, having thus no new bonds; (3) to one of several children of the same parent, and only when another child, or issue of child, of the same parent survives. The statute is not to be extended by equity to devised lands, where it speaks only of descended lands, nor to a revival of the common-law distinction in favor of other kindred than the brothers and sisters and their issue. The whole effect is to postpone the surviving parent and the half brothers and sisters on the side not of the transmitting parent; in short, to redivide the estate as if the child just dying had never lived. When there are three or more children, and one dies, the question arises, shall the part of a share descending from it to the second pass under the special canon,—that is, only to the survivor or survivors,—or is this part taken out of it, so as to pass by the general law? The former position was taken in Wisconsin and in New Hampshire, and approved by the highest court in Connecticut; the latter, in Massachusetts, where the canon is now repealed.[137] By

[137] Stone v. Damon, 12 Mass. 490, and Nash v. Cutler, 16 Pick. 491, repressed attempts to extend the scope of the canons. So, also, Watts v. Welman, 2 N. H. 460; Albee v. Vose, 76 Me. 448. On the expression in Nash v. Cutler, that the shares of the children remain parts of the dead parent's estate, the cases of Crowell v. Clough, 3 Fost. (N. H.) 207; Perkins v. Simonds, 28 Wis. 90, and Wiesner v. Zaun, 39 Wis. 188, were decided, followed by In re North's Estate, 48 Conn. 583. The canons are enforced in California in De Castro v. Barry, 18 Cal. 96; Donahue's Estate, 36 Cal. 329. In Michigan an attempt to widen the statute was defeated in Rowley v. Stray, 32 Mich. 70. There can be no preference among uncles and aunts. Parker v. Nims, 2 N. H. 460. Two cases from Nebraska—Rice v. Saxon, 28 Neb. 380, 44 N. W. 456, and Shellenberger v. Ransom, 31 Neb. 61, 47 N. W. 700 (see same case for other points in section 28)—quote these canons, but seem to the writer to have been decided right in the teeth of them. Goodrich v. Adams, 138 Mass. 552, deals with Nash v. Cutler as no more than a dictum, and does not notice the cases in New Hampshire and Wisconsin. The Florida statute has come up in Smith v. Croom, 7 Fla. 81, and been confined to direct inheritance from the parent. It speaks only of infants dying without husband or wife, and does not say without children, but that is understood. It excludes the surviving parent or half brothers and sisters by that parent.

an evident oversight, the Oregon statute provides only for the case where there is a child or children, and the issue of a dead child.[138]

III. Virginia, Kentucky, and Florida come next. Here, also, the ancestral rule works only where the intestate is under age. A canon was introduced in the former state in 1790 (in force March 1, 1791, and corrected in December, 1792); the decedent being an infant (he need not be unmarried), and having received land from the father or mother (not from any other relative) by gift or devise (the first act said "by purchase") or descent, preference is given to the heirs of the blood of the transmitting parent. In the older acts this preference was shown only to the decedent's brothers and sisters and their issue, and to those of the transmitting parent; but under the Revision of 1860, and the law as it stands now, it extends to all kindred of the transmitter's blood. Kentucky re-enacted the canon in 1796, using the words "gift, devise or descent" for the derivation of the estate from the father or from the mother, and again in the Revisions of 1852 and 1873. The kindred on the transmitting side must not be more remote than uncles and aunts and their descendants. The act of 1796 named the kindred to be excluded, and not thus naming half brothers on the wrong side, these were let in.[139] The canon is not to be extended so as to reach land derived from a grandparent; and in Kentucky it has been held, that the part of the first dying child's share that goes to the next does not come directly from a parent, and is no longer within the canon.[140] By another section of the Kentucky statute, land "given"

138 Stitt v. Bush, 22 Or. 239, 29 Pac. 737, under section 3098, Hill's Ann. Code.

139 Browne v. Turberville, 2 Call (Va.) 390, where the court assumed to correct a mistake in the act of 1792, which would have extended the canon to adults. Templeman v. Steptoe, 1 Munf. (Va.) 339, and Liggon v. Fuqua, 6 Munf. (Va.) 281, prefer brothers of the transmitting parent to half-brothers by the other parent. Smith's Ex'r v. Smith, 2 Bush (Ky.) 522 (old law); Clay v. Cousins, 1 T. B. Mon. (Ky.) 75.

140 Gill's Heirs v. Logan's Heirs, 11 B. Mon. (Ky.) 231 (where the result is figured out after the death of children); Driskell v. Hanks, 18 B. Mon. 855 (simple case of two infant devisees dying). The same narrow construction is given to the Florida statute. Smith v. Croom, 7 Fla. 81. The devise of land to an illegitimate child does not make his land ancestral or parental. Blankenship v. Ross, 95 Ky. 306, 25 S. W. 268.

by the parent to the child reverts, upon the death of the latter, whether under or over age, to the parent donor, if he be still alive.

IV. In Alabama, whether the intestate be under or over age, one thing, and one only, results from his having derived his lands by "gift, descent or devise" from an ancestor. It is that the collaterals of the half blood, who are not of the transmitter's blood, are postponed to those in the same degree who are; e. g. where the estate came from the decedent's father the whole blood and consanguineous brothers are preferred to the uterine brothers.[141] And such is also the rule in Delaware.

V. We come now to a number of states in which the preference for the ancestor's blood has a wider scope, but which agree in this: that only the last descent or derivation is looked to, and that no attempt is made to trace the lands back to the "first purchaser." In all of them a "devise or gift" from an ancestor has the same effect as a descent, which leads to the perplexing question as to who is an ancestor. Is it any relative from whom the intestate might possibly have taken by descent, or is it only a relative from whom the donee or devisee would actually have inherited at the time of the gift, or at his death, in case of a devise? The latter view is safer, but some decisions sustain the former.[142]

Arkansas copies the Alabama law, postponing those of the half blood who are not of the transmitter's side, but goes much further. It says, generally, that where the estate has come "by the father," by gift, etc., it shall, on the failure of issue, go to the father for life, then in remainder to the collateral heirs of the blood of the father; and, if it has come "by the mother," then to the mother for life, remainder to the collateral heirs of the blood of the mother. Thus the kindred who are not of the transmitting ancestor's side are not postponed, but excluded. As a paternal estate may, under the statute, revert to the father, as heir, it seems that a gift by the father must be included in estates coming by him; and, if a gift, also a devise. An estate that has come from a brother or sister does not come either by

141 Attempts to extend the canon were repressed in Stallworth v. Stallworth, 29 Ala. 76, and other cases.

142 Den v. Sawyer, 6 Ired. 407. Contra, Greenlee v. Davis, 19 Ind. 60. The word "ancestor" is not in the present statute of Indiana.

the father or by the mother, and must, under the alternative of the statute, be regarded as "acquired" estate.[143]

In Indiana the word "ancestor" has been dropped, in the Revised Statutes of 1852; the estate must have come in the "paternal line," or in the "maternal line." But there must be a failure of issue, of husband and wife, of both parents, and of brothers and sisters and their descendants,—no distinction being made between brothers and sisters of the whole and of the half blood,—before the preference for the kindred of the transmitting parent comes in. The law of Indiana also returns to donor (whether parent or stranger), if alive, the land of the donee who dies without issue, reserving only one-third to the surviving husband or wife.[144]

In Ohio the laws favoring those of the ancestral blood are wider in scope, and quite complex. On failure of issue, lands coming by gift, devise, or descent "from an ancestor" go, subject to the life estate of the surviving husband or wife, first, to the brothers and sisters of the whole blood, and those of the half blood on the transmitter's side, or their descendants; next, if they had come by gift from an ancestor still living, back to such donor, or if he be dead, to his issue. For want of such issue, if the transmitter be the intestate's parent, to his or her wife or husband, for life, and, subject to such life estate, to the transmitter's brothers and sisters, or their descendants; only in default of all these, to the intestate's half brothers and sisters, etc., on the "wrong" side, and after them to the more remote next of kin of the transmitter's blood. A brother is an ancestor, within the meaning of the Ohio law.[145] In Ohio land coming from the husband to the wife is not "ancestral." It was, until lately, treated as purchased; by a late amendment, it goes, on failure of issue of the donee, to the issue by the transmitting spouse, and, if there is none,

[143] The doctrine of the state is very fully set out in Kelly's Heirs v. McGuire, 15 Ark. 555; West v. Williams, Id. 682. See, also, Campbell v. Ware, 27 Ark. 65; Oliver v. Vance, 34 Ark. 564. As to "gift," Galloway v. Robinson, 19 Ark. 396.

[144] Rev. St. § 2473; Myers v. Myers, 57 Ind. 307. Deed of gift (Kenney v. Phillipy, 91 Ind. 511), though consideration of one dollar. Gift from husband to wife through conduit. Fontaine v. Houston, 86 Ind. 205. No preference of uncle over half-brother. Pond v. Irwin, 113 Ind. 243, 15 N. E. 279.

[145] Rev. St. § 4158, from Act 1865 (vol. 62, p. 32). A brother is an ancestor. Benedict v. Brewster, 14 Ohio, 368.

then one-half each to the brothers and sisters (with issue) on the side of each spouse.[146] We have seen how the share in lands inherited by the wife from the husband is restricted in Indiana. And when, under an act of 1875, upon a judicial sale of the husband's land, the share to which the wife has an inchoate right is set aside to her, that share goes, upon her death, back to the husband, if he be alive; if not, then to her children by the husband from whom she acquired it.

In Tennessee land is ancestral if it comes by gift, devise, or descent from a "parent or the ancestor of a parent." On failure of issue, it goes, first, to the brothers and sisters, either of the whole blood, or of the half blood on the transmitting side; next, if it was a gift, to the parent who gave it; lastly, to the heirs of the parent from whose side it came. As a brother is not the "ancestor of a parent," the shares of successively dying children must go like purchased estates, as in Kentucky. A paternal uncle is preferred to the maternal grandmother. But the preference of the blood is only within the same class. The wrong parent, or the half brothers on the wrong side, take in preference to uncles and aunts on the right side.[147]

In New York lands are ancestral which have come "by gift, devise or descent from some of the ancestors of the intestate." On failure of issue, in lands coming "on the mother's side," the father takes a life estate only, if there be brothers or sisters of the mother's blood, or their descendants, instead of a fee, as in other cases. If the estate has come on the father's side, the distinction comes in later. On failure of brothers and sisters of the intestate, of the father's blood, or their descendants, and of parents, the estate goes first to the father's brothers and sisters and their descendants, and, if there are none, then to those of the mother, which order is reversed as to land coming from the mother's side. If the land came from the mother by gift, it returns to her, if alive; if she be dead, then, as stated above as to maternal estates.[148] Brothers and sisters of the

[146] Brower v. Hunt, 18 Ohio St. 311. The amendment is in Revision of 1890 among the other canons.

[147] Statute derived from North Carolina Acts of 1784. Baker v. Heiskell, 1 Cold. (Tenn.) 642; Chaney v. Barker, 3 Baxt. (Tenn.) 425; Nesbit v. Bryan, 1 Swan (Tenn.) 468; In re Miller Wills, 2 Lea, 62.

[148] Morris v. Ward, 36 N. Y. 587. It was a deed by the grandfather of a

parent by the half blood are yet of such parent's blood. A deed partly for value and partly for love and affection makes a purchase, but the insertion of "one dollar" in a gift or advancement to a child or grandchild is immaterial.[149]

Connecticut deals with lands that have come "by gift, devise or descent from any ancestor or kinsman" of the intestate as follows: First. Half brothers and sisters, with their descendants, if of the blood of the transmitter, are as good as those of the whole blood, which they are not as to purchased estates. Second. In default of such whole or half blood brothers, etc., the estate goes to the issue of the transmitting kinsman; next to such kinsman's brothers, sisters, etc.; lastly to the intestate's general heirs. And if the intestate should die under age, without issue, without brothers, etc., of the whole blood, or parents, the estate goes to the next of kin that are of the transmitter's blood; and only in default of these to the next of kin of the intestate generally.

Another clause of the chapter on "Succession" deals with the share of an infant child dying before the parent's estate is settled; such share shall be treated as a part of the parent's estate.[150]

The Rhode Island rule is very broad. The estate which has come by descent, gift, or devise from a parent or other kindred shall, on failure of issue, go to the kindred next to the intestate, of the blood of the person from whom it came, if any there be. Those not of the blood of the transmitting ancestor are practically shut out. And the words would bear the construction that the first purchaser should be traced several steps back, as at common law, but, as will be seen, they have not been so construed. In 1829 this question, under the Rhode Island statute of 1822 (still in force), came before the supreme court of the United States. A father leaves land by descent to three

bride, to her for life, remainder to unborn children, by way of advancement. On the death of such a child, its share was deemed ancestral, as coming from the great-grandfather. Wheeler v. Clutterbuck, 52 N. Y. 67. Half-brother may take the interest in land which the intestate had inherited from a parent, if it came from the common parent.

149 Beebee v. Griffing, 14 N. Y. 235. Under the descent act of 1786, perhaps the half-brothers of the transmitting parent would not have taken.

150 See In re North's Estate, ubi supra; Buckingham v. Jaques, 37 Conn. 402, under act of 1835.

children, all of whom die without issue. When the intestate, who is last survivor, dies, his own original one-third is, of course, ancestral. The other two-thirds have passed through one or two hands,—those of "kindred" between the father and the intestate. What is the character of these shares thus accruing to the last surviving child? If only the descent from a full brother or sister is regarded, the descent would go as if the estate was purchased; not so, if we look back of such brother to the father, the "first purchaser." The supreme court of the United States held—and its ruling has been followed in New Jersey, New York, Ohio, Indiana, Connecticut, and Florida—that not more than one descent, gift, or devise can be looked to. The decisions turn mainly on the ground that the reason for the common-law rule was one of feudal policy, and is rather opposed to the policy of a new country; hence the statutes in favor of a former owner's blood should not be extended by construing them into a re-enactment of an abrogated common-law canon.[151] We need not refer here to the Kentucky decisions; for, as the law of that state speaks only of estates derived from a parent, the descent from brother to brother falls clearly outside of it.

In New Jersey an estate which has come by gift, devise, or descent "on the part of the mother" diverges from the line of descent of purchased lands whenever the intestate has no issue, nor brothers or sisters, or the issue of brothers and sisters, of the whole blood. Instead of going to the father, the inheritance goes as if the intestate had outlived his father. If the estate had come on the part of the father, it does not seem, from the statute, that the mother is deprived of the life estate which is given to her upon the failure of brothers and sisters, etc., of the whole blood. If the estate has come on the

[151] Gardner v. Collins, 2 Pet. 58 (opinion by Mr. J. Story); Den v. Jones, 8 N. J. Law, 340; Wheeler v. Clutterbuck, 52 N. Y. 67 (as to half passing from brother to brother); Hyatt v. Pugsley, 33 Barb. 373 (inheritance from one parent to child, from child to brother, goes to brothers of both parents); Curran v. Taylor, 19 Ohio, 36; Prichett v. Parker, 3 Ohio St. 395; Clayton v. Drake, 17 Ohio St. 367; Murphy v. Henry, 35 Ind. 442 (overruling Johnson v. Lybrook, 16 Ind. 473); Morris v. Potter, 10 R. I. 58; Clark v. Shailer, 46 Conn. 119 (relying on Gardner v. Collins, 2 Pet. 58, and the Ohio cases). We class Tennessee with the states that go back only one step, though the point has not come up, as the tendency of its supreme court lately has been averse to the harsher features of the common law of descent.

side of either parent, brothers and sisters of the half blood on the other side are excluded, and, in like manner, if there are any kindred on the transmitting side capable of taking the estate, none that are not of the blood of the transmitting ancestor shall be admitted at all.[152]

In Delaware any land to which the intestate has title by "descent or devise" from a parent or ancestor (which here seems to mean "ascendant") shall first descend to his brothers and sisters of the blood of such ancestor, or their descendants, before going to the brothers and sisters, or their descendants, not of such blood.

VI. We lastly come to the three states in which the law of descent seeks for the "first purchaser,"—Pennsylvania, Maryland, and North Carolina,—and in two of these three the ancestral rule goes, in a way, really further than at the common law. For in Pennsylvania gift or devise is joined with descent, in the derivation of the lands, and in North Carolina, "gift, devise or settlement." There are, however, in North Carolina, some broad exceptions.

In Maryland the canons of descent, as they now stand under the Revision of 1860, are but slightly altered from the act of 1786. In default of issue, the statute gives one set of canons for land that has descended "on the part of the father"; another for such as has descended "on the part of the mother"; a third for such as has been acquired in any other manner, which comprises such as has come from a brother. The words "or in any other manner" were introduced in 1820 to cure a casus omissus, already mentioned, which would let in the common law.

Land devised is not within the ancestral class. Land descended from the mother's brother comes "on the part of the mother," and goes to her kindred, rather than to half-brothers by the father. Though the brother is not an ancestor, yet the father's estate which descends to one child, and from that child to its brother, remains paternal. Here is a table giving the order of descent for paternal and maternal estates:

Paternal: (1) To the father; (2) to brothers, sisters, and their issue, of the father's blood; (3) paternal grandfather; (4) his descend-

[152] Banta v. Demarest, 24 N. J. Law, 431; Haring v. Van Buskirk, 8 N. J. Eq. 545; Speer v. Miller, 37 N. J. Eq. 492.

ants; (5) father of paternal grandfather, his descendants, etc. On failure of all these: (6) To mother; (7) mother's descendants; (8) maternal grandfather; (9) his descendants; (10) his father, and that father's descendants.

Maternal: The order is 6, 7, 8, 9, 10, 1, 2, 3, 4, 5.[153]

In North Carolina the gift, devise, or settlement, to be equivalent to a descent, must be from an ancestor, which is construed as meaning a relative to whom the donee or grantee would have been an heir.[154] Ancestral land goes, in default of issue, to the intestate's next collateral of the blood of the ancestor, the collaterals on the other side being cut out altogether. But the father or mother seem not to be touched. They take the same estate as if the lands were purchased; that is, after brothers and sisters, and their issue, and before more distant collaterals. And the courts have carried the estate back two steps, and would have gone back further; preferring, for instance, nephews of the grandfather from whom the land had come to the mother, to her uterine half-sister.[155]

In Pennsylvania "no person who is not of the blood of the ancestors or other relatives from whom any real estate descended, or by whom it was given or devised, shall take any estate of inheritance therein; but [it], subject to * * * life estate shall pass to * * * such other persons as would be entitled, if such persons

[153] Donnelly v. Turner, 60 Md. 81. Father's land descends to two children, on their death without issue it goes to the mother. Garner v. Wood, 71 Md. 37, 17 Atl. 1031. But lands descended from a brother, who was the purchaser, are not within this relief. Barnitz v. Casey, 7 Cranch, 456. The older cases, especially Stewart's Lessee v. Evans, 3 Har. & J. 287, and Hall v. Jacobs, 4 Har. & J. 245, are fully discussed. Here, where the common-law rule prevails, and only descended land is ancestral, the decision in Smith v. Triggs, 1 Strange, 487, that lands devised to the heir are to be treated as descended, a devise to the heir being void, is still important.

[154] Sawyer v. Sawyer, 6 Ired. 407; Osborne v. Widenhouse, 3 Jones, Eq. 238. And so, in Ohio, land devised to a sister-in-law is not deemed ancestral. Penn v. Cox, 16 Ohio, 30.

[155] Wilkerson v. Bracken, 2 Ired. 315 (estate carried back two steps). The law of 1808 is illustrated by the history of the bill for enacting it. Dozier v. Grandy, 66 N. C. 484, refers to some older cases. But, to prevent an escheat, those not of the ancestor's blood may take when his blood is extinct. University v. Brown, 1 Ired. 387. Only collaterals of the wrong blood are wholly excluded, not the father. Little v. Buie, 5 Jones, Eq. 10.

not of the blood * * * had never existed." Under this law an inheritance was, in two cases, traced through one descent and two previous devises back of the intestate, with the result of finding no heirs to the purchaser thus reached, and thus defeating the very object of the law.[156] A devise by the husband to the wife is not within the rule (except in Indiana), the husband being neither ancestor nor relative.[157]

The territory of New Mexico, in 1887, adopted the preference of the ancestor's blood to ancestral property, in its broadest form, applying it to everything that has come by gift, devise, or descent from the paternal or the maternal line, the kindred on the wrong side inheriting only when the right line is wholly exhausted.

Whether land that has come from one who is clearly an "ancestor" has come in such a manner as to fall within the rule is often a delicate question. The equity may have come from him, but a deed conveying the title from a stranger. In such a case it has been held in New York, in Rhode Island, and in Ohio, that the lands must be judged by the legal title, and are non-ancestral.[158] In Arkansas, lands bought for the son with the father's money were considered a gift; in Kentucky, also, though the father had derived the money from a legacy coming to his wife.[159] In Pennsylvania, if the holder of de-

156 Baker v. Chalfant, 5 Whart. 477, has been quoted for the opposite view. It holds only that half-brothers on the right side may take ancestral lands. There is a dictum in it that a brother is not an ancestor, but this is repudiated in Maffit v. Clark, 6 Watts & S. 262, where the share passing between brothers is held ancestral. Then follow the cases alluded to in the text,—Lewis v. Gorman, 5 Pa. St. 164, and Dowell v. Thomas, 13 Pa. St. 41. The general heirs kept the estate, because none of the first purchaser were known. But very remote heirs of the first purchaser got the estate in Perot's Appeal, 102 Pa. St. 235.

157 Birney v. Wilson, 11 Ohio St. 426 (arguendo); Brower v. Hunt, 18 Ohio St. 311. Contra, Fontaine v. Houston, 86 Ind. 205; Orr v. White, 106 Ind. 341, 6 N. E. 909; Cornett v. Hough, 136 Ind. 387, 35 N. E. 699 (a strong case).

158 Nicholson v. Halsey, 1 Johns. Ch. 417: Champlin v. Baldwin, 1 Paige, 562; Watson v. Thompson. 12 R. I. 466; Shepard v. Taylor, 15 R. I. 204. 3 Atl. 382; Patterson v. Lamson, 45 Ohio St. 77, 12 N. E. 531 (stress was laid on the recital in the deed that the child had paid the price). Bond v. Swearingen, 1 Ohio, 395, must be considered as overruled.

159 Galloway v. Robinson, 19 Ark. 396, already quoted. And cases in which the equity did not clearly appear: Magness v. Arnold, 31 Ark. 103; Hogan

scended land grants a fee-farm lease, the ground rent is a new acquisition. So, also, where he redeems lands which are ordered to be sold for the ancestor's debts, there is a new purchase.[160] When the ancestral lands are exchanged for others, the latter are not ancestral, for at common law the character of the land might have been changed by mere formal conveyances.[161] But partition, whether by process of law, or by deeds in pais, leaves the character of the land unchanged.[162]

§ 37. Half and Whole Blood.

Much on the subject of half and whole blood has necessarily been stated in the two preceding sections. To sum up the positions taken in the several states, it may be said: (1) As to lands not deemed ancestral, the collaterals of the half blood are nowhere excluded altogether from the inheritance. As to ancestral lands, they are in most cases, where the distinction prevails, postponed, either by implication, or in terms. (2) Where the statute directs that ancestral lands shall go to those heirs only who are of the blood of the transmitting ancestor, the half-blood brothers or collaterals of that ancestor are deemed to be within the definition.[163] (3) The states which have framed their law for the disposition of the decedent's lands most nearly upon the pattern of the statute of distributions make, in general, the least discrimination against brothers and other collaterals of the half blood.[164]

v. Finley, 52 Ark. 55, 11 S. W. 1035; Walden v. Phillips, 86 Ky. 302, 5 S. W. 757. The result would have been the same if the estate had been considered as coming from neither father nor mother. Perhaps Pennsylvania should be counted on this side if an inference may be drawn from Clepper v. Livergood, 5 Watts, 113, and other cases, in which the proceeds of an infant's land sold for reinvestment were made to go to the ancestral heirs. But the lands bought for an infant daughter out of the father's personal estate are not paternal, even in Pennsylvania. Simpson v. Hall, 4 Serg. & R. 337.

160 Culbertson v. Duly, 7 Watts & S. 195.

161 Armington v. Armington, 28 Ind. 74. See citation from Coke's Littleton on change of nature of estate by feoffment and redelivery. But a deed from the husband to the wife through conduit is deemed a gift from him to her.

162 Conkling v. Brown, 8 Abb. Prac. (N. S.) 345.

163 Danner v. Shissler, 31 Pa. St. 289; Cliver v. Sanders, 8 Ohio St. 501.

164 See the history of the colonial law on the subject in Clark v. Russell, 2

Coming to details, we shall first give the states in which no distinction at all is made between those of the whole and those of the half blood:

I. The statutes of Massachusetts, Vermont, Illinois, Kansas, Oregon, and Washington, in so many words put the collaterals of the half blood on an equality with those of the whole blood; and the statutes of Iowa do so by implication, by not speaking of the half blood at all, and yet covering the whole ground. Yet in Oregon and Washington there is a canon about the descent from one of several children, dying under age, to the other children of the transmitting parent; and in this case there must be a distinction against the half blood, as the special rule would prevail against the more general.[165] And the clause of the Kansas statute, that "children of the half blood shall inherit equally," etc., is unmeaning, and is defeated by the next clause, by which "children of a deceased parent inherit in equal proportions the portion their father or mother would have inherited." Thus brothers and sisters take by representation only; and it results that those of the half blood get less than half shares.[166] And the like result flows from the Iowa statute, under which, as in Kansas, on the failure of parents, the estate descends as if they had outlived the intestate. Thus only the three states of Massachusetts, Vermont, and Illinois remain in which collaterals of the half blood are treated, in all cases, as if they were of the whole blood. With these three states, however, Indiana must be counted, for all practical purposes. No distinction is made here as to purchased estates; and the rule for ancestral estates comes in only when there is neither issue nor relict, nor parents, brothers, or sisters, nor issue of brothers and sisters. Should the estate have come from the intestate's father or mother, the collaterals of either by the half blood, being of his or her blood, would inherit. Hence, only in the rarer

Day (Conn.) 112, which refers to acts of 1699 and 1727. It will be seen that Connecticut has since adopted another rule.

165 See section 36, II.

166 Russell v. Hallett, 23 Kan. 276. In Schermerhorn v. Mahaffie, 34 Kan. 113, 8 Pac. 199, some meaning was given to the "children of the half blood," by allowing the children of a woman by her second husband to inherit equally with those by the first husband the share of the first husband's estate inherited by her and left at her death.

case of land which has come from a grandfather or uncle, kindred of the half blood could be excluded as not being of the ancestor's blood.

II. Next we must class the two states of Oregon and Washington, already mentioned, and Maine, New Hampshire, Rhode Island, Delaware, which otherwise admit the half blood on an equality, but exclude it, if on the wrong side, in some or all cases of an ancestral estate; and Michigan, Wisconsin, Minnesota, Nebraska, California, Nevada, the Dakotas, Idaho, Montana, Utah, and Oklahoma, in all of which states and territories the statute, in very nearly the same words, says: "Kindred of the half blood inherit equally with those of the whole blood in the same degree, unless the inheritance came to the intestate by descent, devise, or gift of some one of his ancestors, in which case all those who are not of the blood of such ancestor must be excluded from such inheritance." This clause is copied from section 15 of the New York law of descent, which, however, contains the further clause: "And the descendants of the same relatives shall inherit in the same manner as descendants of the whole blood,"—which are proper in New York, which allows full representation, but not in the other states, which do not. It may be safely asserted that in all these states copying from New York, as in New York itself, only the last step in the derivation will be looked to, unless it be in the case of minor children of the same father, in which we have seen that Wisconsin considers the father's succession as still open while an infant child holding a share in it remains alive.[167] We have seen that in Alabama the only distinction of ancestral lands is that they cannot go to the collaterals of the half blood on the wrong side, while collaterals of the blood of the ancestor in the same degree are to be found. It may be added that this is also the only discrimination against the half blood.

III. Half shares are given to collaterals of the half blood in Virginia, West Virginia, Kentucky, Florida, Missouri, Colorado, Wyoming, Arizona; now, also, Texas, and even smaller shares in Louisiana, Iowa, and Kansas, where brothers and sisters take by representation of their parents, as shown above. We have seen how, in some of these states, in some limited cases, the half blood might be excluded from a parental estate which had come from the other side.

167 See section 36, note 137.

Where the mother takes a brother's share in any of these states, it is, of course, the share of a brother of the whole blood, or twice as much as one of the half blood; and in Missouri both parents take such double share, as against half-brothers or half-sisters, or their descendants, by the express words of the statute. In Louisiana, the whole estate, or so much thereof as goes to brothers and sisters, is divided into equal halves, one paternal and one maternal; each half is divided among the brothers and sisters by their respective parents, and their representatives; those of the whole blood taking their shares in both lines; the result being that if there are as many half-brothers, etc., on one side, as there are full brothers, etc., the latter will have three-fourths; but if there are half-brothers and sisters, both on the father's and mother's side, the full brothers may have only double shares.

IV. The half blood is postponed in the inheritance even of the intestate's purchased lands in Connecticut (which has herein abandoned its older policy of following the statute of distributions); in New Jersey, Pennsylvania, Delaware, Maryland,[168] Ohio, South Carolina, and Mississippi.[169] In Connecticut, brothers and sisters of the whole blood, with those who represent them, come before parents; the same kindred, if of the half blood, after the parents; and, among more distant collaterals, kindred of the whole blood, taking as next of kin, are preferred to those of the half blood in the same degree. In New Jersey the same law prevails, only substituting "father" in place of "parents."[170] In both states, all collaterals are excluded who are not of the blood of the "ancestor" or "kinsman" from whom the estate was derived. In Connecticut, in Maryland, and in Ohio, brothers of the half blood, if on the proper side, will fare better in ancestral than in purchased estate, being in the inheritance to the former of equal rank with those of whole blood. In Pennsylvania, the half blood is postponed only among the brothers and sisters of the intestate, with their children and grandchildren; not among those

168 Keller v. Harper, 64 Md. 74–84, 1 Atl. 65.

169 Scott v. Terry, 37 Miss. 65. Descendants of brothers and sisters of the whole blood take by representation, and are therefore, under the Mississippi statute, preferred to brothers and sisters of the half blood.

170 Paternal land will go to paternal half-brothers in New Jersey where purchased lands would not. Den v. McKnight, 11 N. J. Law, 385.

of his father and mother, as the latter take, under the act of 1833, as "next of kin," and their character is not taken from them by the partial allowance of representation to uncles and aunts under the act of 1855. In Delaware, the half blood is postponed among the brothers and sisters of the deceased himself and their issue, but not among remote collaterals; that is, when the estate is purchased; when ancestral, the half blood on the transmitting side is on an equality with the whole blood. In Maryland and in Ohio, among brothers and sisters and their descendants, those of the whole blood are, in the case of nonancestral lands, preferred to those of the half blood, who come in only on the failure of the former. There seems to be no difference among more remote collaterals.

In South Carolina, the canons of descent refer to half blood only within the parental group, not in the determination of the next of kin beyond that group. The provisions are, however, so obscure, and apparently so contradictory, that in the absence of judicial decisions we cannot undertake to state the effect. In Georgia, no distinction is made among more distant kindred, but, among brothers and sisters and their issue, those from the mother's side only are postponed to those on the father's side, whether the latter be of the whole or of the half blood. In New York, should there be no kindred as near as a grandfather or his descendants (uncles, aunts, cousins, etc.), the descent goes by the common law, that is, to the eldest brother, or to all the sisters, if there be no brother, of the paternal grandfather, which eldest brother or which sisters must be of the whole blood.[171]

A very curious construction has been recently placed on the Indiana statute, which discriminates among kindred of the half blood only in the heirship to ancestral property, by preferring among the collaterals of the wife, as to lands received by her under her husband's will, one who happened to be a kinsman of the husband.[172]

§ 38. Remote Kindred.

When there are no descendants, and none of the parental group, and no surviving husband or wife (or when the law gives to these

[171] Brown v. Burlingham, 3 Sandf. (N. Y.) 418 (arguendo).

[172] Cornett v. Hough, 136 Ind. 387, 35 N. E. 699.

only curtesy or dower, or at all events, less than all of the landed estate), what becomes, then, of this estate, or of the residue? How do the more remote kindred take rank, and how do they share? There are two opposing views: The first is that of the common law and of the Hebrew law, modified only so far as to abolish the distinction of age and sex. You go up from the propositus to his nearest ascendant who is either living, or who has descendants living. But, as the distinction of sex is done away with, you have to divide the estate between the kindred on the mother's side and those on the father's side, though in two or three states the former are excluded or postponed. In applying the principle, there is almost as much variety in parceling out the estate, or the moieties thereof, between grandfathers and grandmothers, uncles and aunts, as we have found in section 35 between father and mother, brothers and sisters, nephews and nieces; and the grandparents themselves may be passed by altogether. The other view is that of the latest Roman law, in which, after the two preferred groups named above (which, by the discrimination between half blood and whole blood, become three groups), the estate goes to the next of kin; that is, to those who are nearest to the propositus in the number of degrees. Instead of only counting up from the propositus to his nearest ascendant (called generally "nearest common ancestor"), you count also downward from him to the proposed living heir, as has been explained in section 29. Representation is wholly inadmissible. In the states which have adopted this principle, the representation of brothers and sisters is not carried out fully; and thus grandnephews and grandnieces, or, at least, great-grandnephews, etc., are taken out of the parental group, and are thrown in with the next of kin. Next of kin always take per capita, and where this principle is fully acknowledged the estate cannot be divided into two halves, for the maternal and paternal side; but of course, the kindred on both sides are of equal rank. One cousin on the mother's side being of the fourth degree, will, for instance, take an equal share with three granduncles on the father's side, each taking one-fourth. Grandparents, being in the second degree, always rank highest. But the descent and division of land among the next of kin by the civil-law degrees seems to have been repulsive to the English-American mind; and the statutes which start out on the civil-law principle have generally been modified to

conform in part to the other, or common-law, principle. This has been done either by extending "representation" to deceased uncles and aunts, which is really an overthrow of the principle itself, or by a proviso that, among several kindred of the same degree, those having the "nearest common ancestor"—that is, those descended from the nearest ascendant of the intestate—should be preferred.

I. The first-named system was set forth by Thomas Jefferson in the Virginia act of 1785. On the failure of issue, and of the parental group, the act proceeds to divide the whole estate into two moieties, one for the father's, one for the mother's, kin, and says, as to the disposition of each: "Sec. 6. First to the grandfather. Sec. 7. If there be no grandfather, then to the grandmother, uncles and aunts on the same side and their descendants or such of them as there may be," etc.,—with similar, but rather unimportant, directions for even more remote kindred on the failure of these. This is still the law of Virginia and West Virginia, of Rhode Island and Florida, while in Kentucky (since 1874) the grandfather and grandmother take equally, and uncles and aunts, or their descendants, come in only in the absence of both grandparents. The rule in Indiana is the same as in Kentucky, and in both states, on the failure of either line (father's or mother's), the whole estate goes to the other. The Texas rule seems to be the same.[173] Under this system a single first cousin, or child of a deceased first cousin, on the mother's side, would get a full half of the estate, though there be 10 living uncles and aunts on the father's side; for the former represents one grandfather, or "one line," and the others jointly only represent the other grandfather, or the other line. By the language of the Tennessee act the estate is also divided into halves, but only if the kindred on the two sides are of "equal degree or represent those in equal degree," which comes exactly to the Virginia plan. Each half goes to the heirs of the father or of the mother, respectively. Who those heirs are has been shown in section 35. The statutes of Missouri, Colorado, and Wyoming also seek for the blood of the intestate's nearest ascendant, thus, "then to the grandfather, grand-

[173] When the estate goes to kindred beyond parents, it goes in two moieties, without regard to nearness of those on the two sides. McKinney v. Abbott, 49 Tex. 371. This point seems not to have been expressly passed upon in the other states.

mother, uncles and aunts and their descendants," and so on, passing to the nearest lineal ancestor and his descendants. This law has been construed in Missouri, notwithstanding the use of the singular, "grandfather, grandmother," to let in the maternal grandparents, as well as those on the father's side; and Colorado and Wyoming re-enacted the statute after it had been thus construed. In Maryland (which includes, for our purpose, the District of Columbia),[174] in North Carolina, and in Arkansas, the kindred on the father's side take the whole estate, in preference to those on the mother's side unless it has come ex parte materna; the latter take if there be no kindred on the father's side. In North Carolina, after the parental group, the inheritance must go to the nearest collaterals; hence the grandfather and grandmother are shut out in all cases. In Maryland the relatives of both grandmothers are excluded in all cases. In Arkansas the postponement of the maternal kindred is based on the use of the singular, "grandfather," etc., as in Missouri, and a section calling in the common law in all cases not provided for by the statute. New York, when directing the descent of lands, knows nothing of next of kin. After exhausting the descendants and the parental group, an inheritance coming from the father's side goes first to the brothers, sisters, or issue of brothers and sisters, of the father; a maternal estate, first to those of the mother; a purchased estate, to those of both parents. But the estate is not divided into two halves. On the contrary, the brothers and sisters of both parents, living or represented by issue, are added together, and take equally among themselves. No provision at all is made for the grandfather or grandmother. And if there are no brothers or sisters of the father or mother, nor issue of any of these, the common law steps in, with primogeniture and the exclusion of the half blood. It is almost impossible to construct a scheme in which the successions of an estate would go in Iowa and Kansas, in which states the children, the wife or husband, and the parents are the only heirs named in the statute, and in which all the more remote kindred, even broth-

174 It seems that the Maryland statute of 1736 still governs descents in the District, while the legislation of Maryland was greatly changed in 1820. The exclusion of the maternal kindred in favor of the paternal, the former to come in only when the latter are extinct, is enforced in Savary v. Da Camara, 60 Md. 139.

ers and sisters, take only as representatives or "heirs" of the parents. As far as the inheritance is not altogether deflected from the intestate's blood, it would have to go rather to the descendants of his nearest ascendant, as at common law, than according to the civil-law degrees. Ohio, though the statute speaks of "next of kin," belongs in this category; for since March 4, 1865, the words "and their legal representatives," have been added to "next of kin," which has no other possible meaning than to restore the common-law rule of looking for the issue of the intestate's nearest ascendant. There is no division into the paternal and maternal lines. The distribution among the takers seems very difficult, under the words of the statute.

II. The following states give lands, like personalty, to the next of kin by the civil-law degrees, after issue and the parental group are exhausted: Vermont, where, as shown in section 35, the descendants of deceased brothers and sisters are taken out of the parental group when there is no living brother or sister, and where the statute expressly declares that there is no representation among next of kin; New Hampshire, where great-grandchildren of brothers and sisters, at all events take only as next of kin; in Illinois; in New Jersey, where, however, the use of the word "consanguinity," instead of "next of kin," has been construed to exclude grandparents entirely; in Connecticut, where the next of kin who are collaterals by the whole blood are preferred to half-blood collaterals in the same degree; and in Louisiana, which provides a division by lines for ascendants,—that is, the one or two parents of the father or mother get one half, the one or two parents of the other get the other half. This separate dealing with the ascendants is taken from the civil law; but the grandparents, as they stand in the second degree, would, at any rate, be preferred to all other "next of kin."

III. The two states of Pennsylvania and Mississippi, which nominally recognize the rights of the next of kin, leave but little of them in effect. Until 1855 Pennsylvania allowed no representation beyond children of brothers and sisters. Grandnephews would take as next of kin only, after grandparents, after uncles and aunts, and on a level with cousins. Since 1855 brothers and sisters may be represented by grandchildren; uncles and aunts, by children. Hence grandnephews come in before all mere next of kin,—grandparents, as the foremost among these. First cousins take with uncles, per stirpes,

and to the exclusion of the children of cousins, who are only kindred in the fifth degree.[175] In Mississippi representation is given "not beyond descendants of brothers and sisters, uncles and aunts,"—that is, in at least 99 out of 100 cases,—and the reference to civil law degrees comes to nothing. In Georgia, after brothers and sisters, and their children and grandchildren, who take under the seventh canon, the eighth canon names first cousins, uncles, and aunts, without distinction between the father's and the mother's side. There is no representation for these. The ninth canon gives the estate, on the failure of all these, to the next of kin under the canon law, as understood in England in 1776, which probably means the statute of distributions. It has been held, under this clause, in accordance with the views indicated by Blackstone, but without citation of any English precedents, that nearness under the canon law is measured by the longest distance of either the propositus or the distributee from the common ancestor, and that, therefore, the grandchildren of an aunt, as in the third degree, must be preferred to the great-grandchildren of a brother, who are in the fourth degree.[176]

[175] Byers v. McAuley, 149 U. S. 608, 13 Sup. Ct. 906 (under Pennsylvania law of descent; children of cousins postponed to cousins).

[176] Wetter v. Habersham, 60 Ga. 193. The writer made inquiries on the subject of this case, and has been favored with the views of the highest authorities in England. Sir Walter Phillimore says: "Blackstone is right in saying that the canon law counts only the longer time of the two in reckoning degrees. I take this from the table of degrees within which marriage is prohibited, published A. D. 1563, etc. Whether, however, the canon-law rule was applied to succession, I do not know. I only presume it was in England. But, if the legislature of Georgia meant by 'canon law as understood in England' the law of the statute of distribution, then there is no doubt that this law is the civil law which counts the degrees (both ways). The best case is Lloyd v. Tench (1750) 2 Ves. Sr. 212, sustaining the counting of degrees by the civil-law rule in determining the distributees, etc. If, therefore, the legislature of Georgia meant to apply the statute of distribution, the decision of the Georgian court in Wetter v. Habersham is all wrong, etc. But if the legislature meant to apply the canon-law mode of counting degrees, as in the table of prohibited degrees, then the court was right. But, of course, the court would find no English precedents, as this mode of reckoning for succession purposes clearly could not prevail in England after the statute of distributions. If (which probably no one knows) it prevailed before that statute, as there are no regular ecclesiastical reports before that date, a precedent could only be preserved by some accident. I think Blackstone's statements as to degrees are made gen-

IV. In several states the inheritance is, on the failure of the parental group (the extent of which has been defined above, in section 35), given to the next of kin, with this modification: that, between two or more next of kin standing in the same degree of remoteness, those connected "by the nearest common ancestor" (that is, by a common ascendant who is nearest to the intestate) shall be preferred,—that is, grandnephews, who in most of these states are not admitted to represent the brothers or sisters, but who stand in the fourth degree, would be preferred to cousins, who are also in the fourth degree, because the former are connected with the decedent by his father; the latter, by his grandfather. But the grandnephews are postponed to uncles and aunts, who are in the third degree. And so first cousins are preferred to granduncles, both being in the fourth degree. This is the rule in Maine, Massachusetts, Delaware, Wisconsin, Minnesota, Nebraska, California, Oregon, Nevada, Washington, the Dakotas, Idaho, Montana, Alabama, and in Utah, Arizona, and Oklahoma; also in Pennsylvania, in which, at best, but little of the civil-law degrees is left. Many of the states say expressly, in their statutes, that the degrees shall be determined by the rules of the civil law; and some statutes show, at large, how the degrees are computed.[177] Lastly, we must again refer to the peculiar clause in the

erally, and not with specific reference to inheritance." Sir Frederick Pollock says: "The state of Georgia has made itself a queer puzzle, certainly. I do not believe there was any such thing as canon law understood in England (for the purposes of intestate succession) on the 4th of July, 1776. Therefore, I think the legislature of Georgia must be taken to have meant the law of the statute of distributions, etc. As to the historical question whether Courts Christian in England ever applied any distinct canonist rule of succession to intestates' effects, I should guess that they did not; and the statute of distributions mainly confirmed existing practice." Mr. Bryce, who kindly forwarded the letters of Phillimore & Pollock, adds: "My own impression after studying the passage in Blackstone [about canon-law degrees] is that the legislature of Georgia misunderstood both Blackstone and the provisions of the English law. Though his language is not very clear, Blackstone cannot have meant to say that either for succession to real estate or for succession to personal estate the rules of the canon law were followed in England in his time. The latter had been regulated for near a century by the statute of distributions, which is based upon the civil law, in fact on Novel 118."

[177] The reported cases as to the rights of remote kindred are few, and not very difficult. Under the pure civil-law system may be mentioned Smith v.

New York statute, by which, after the enumerated groups of kindred, the common law steps in, and the eldest paternal great-uncle is preferred to the great-aunts.[178]

§ 39. Bastards.

We shall first consider how far children not born in lawful wedlock may take or transmit an inheritance without being legitimated by marriage, leaving for another section the legitimation by marriage, and the status of children born in marriages null in law.

The treatment of bastards is very different, ranging from South Carolina, in which the doctrine of filius nullius is still undisturbed, to Utah, where illegitimates inherit like lawful children, from both father and mother,—a law sustained by the supreme court of the United States.[179]

We have already seen that Connecticut allows the transmission between bastard and mother without any provision for that purpose in the statutes, on the plain ground that the common-law rule is not applicable to its plan of succession, which cuts loose entirely from common-law principles.

A number of states—California, Minnesota, Nebraska, Nevada, the Dakotas, Washington, Montana, and Idaho—and the territory of Oklahoma, have enacted, in exactly the same words, a section which says, among other things: "Every illegitimate child is an heir of the person who in writing, signed in the presence of a competent witness, acknowledges himself to be the father of such child, and in all cases is an heir to his mother." The instrument of acknowledgment must,

Gaines, 35 N. J. Eq. 65 (grand uncle takes with first cousin, both being in the fourth degree); Bailey v. Ross, 32 N. J. Eq. 544 (uncles exclude cousins); Smallman v. Powell, 18 Or. 367, 23 Pac. 249 (grandfather preferred to uncle). Cousins in Pennsylvania exclude children of cousins. Shields v. McAuley, 37 Fed. 302. Uncles exclude cousins in New Hampshire. Watts v. Wellman, 2 N. H. 458. Grandparents in the District of Columbia exclude aunt. In re Afflick, 3 MacArthur, 95.

178 Hunt v. Kingston, 3 Misc. Rep. 309, 23 N. Y. Supp. 352.

179 Cope v. Cope, 137 U. S. 682, 11 Sup. Ct. 222. It had been objected that the territorial law was repealed by the act of congress, which abrogates all laws made to encourage polygamy. An act of 1884 requires some sort of acknowledgment by the father, though not in writing.

according to the weight of authority, excepting an important decision made in California in 1893, be one written apparently for the purpose; not one in which the child is incidentally acknowledged by the father.[180] Maine has enacted the same rule in almost the same words.[181] Kansas allows a "general and notorious" acknowledgment as the alternative for one that is in writing, while in Iowa "proof of paternity" during the father's life is deemed of the same force as a written acknowledgment.[182] The statute in these states (other than Kansas and Iowa) proceeds thus: "But he shall not be allowed to claim as representing his father or mother by inheriting any part of the estate of his or her kindred, lineal or collateral, unless" there be legitimation by marriage.

Now, this same difficulty arises in all the states in which the harsh common-law rule, as between the bastard and his mother, has been relaxed: Can the bastard inherit from his mother only, or also through her from her kindred? Can his lawful issue inherit from her and them? Can he transmit his own inheritance to her only, or also to her kindred, as if he was legitimate? On all these points

[180] Pina v. Peck, 31 Cal. 359. A recital in a will, "my natural daughter A. B.," is insufficient. See, for the clause quoted: California, Civ. Code, § 1387; Minnesota, Gen. St. c. 46, § 5; Nebraska, § 1125; Nevada, § 2982; Dakota Territory, Civ. Code, § 780; Washington, § 1484; Montana, Prob. Prac. Act, § 536; Idaho, § 5703; Oklahoma, St. § 6895. In re Jessup, 81 Cal. 408, 21 Pac. 976, and 22 Pac. 742, 1028, upholds another method of legitimation under section 230 of the California Civil Code, by which a father can "adopt" his illegitimate child into his family (if he has a wife, only with her consent) without any writing, by treating him or her as his child. In Blythe v. Ayres, 96 Cal. 532, 31 Pac. 915 (see infra for another point), it was held that an informal letter addressed to the child, and written in presence of a witness, but unattested, is sufficient.

[181] Rev. St. Me. c. 75, § 3.

[182] Gen. St. Kan. pars. 2613, 2614 (illegitimate children inherit from the mother, and the mother from the children). They shall also inherit from the father whenever they have been acknowledged, etc. The leading Kansas case on illegitimates—Brown v. Belmarde, 3 Kan. 41—throws but little light on the subject. Under a mutual acknowledgment, the father may inherit from the child (paragraphs 2615 and 2616), but the mother and her heirs are preferred to him and his heirs. The very broad provision, both in Kansas (paragraphs 2610 and 2612) and in Iowa, for letting children and parents be represented by their heirs, would make transmission either way perfect, modified as above.

the progress of legislation has been steadily towards treating the bastard as if he was the lawful child of his mother. In the following states the father can legitimate, to some extent at least, his natural child otherwise than by marriage, that is, by a proceeding in court: In North Carolina, Georgia, Alabama, Mississippi, and New Mexico,—in which proceeding the judge is allowed some discretion. The effect of the judgment of legitimation is to make the bastard a lawful child for all purposes, so as to carry a descent from the parent, or his or her kindred, to the bastard or his issue. Tennessee, an offshoot of North Carolina, also provides a mode of acknowledgment by order of the county court, which is a sort of adoption, and renders the child legitimate for all purposes.[183]

In Indiana, a child may be acknowledged by the father. The fact of acknowledgment must be proved by other testimony than that of the mother; but there remains only a "natural child," who will inherit only if the father leaves no lawful issue anywhere, and no heirs of any kind (including a widow) in the United States.[184]

In Louisiana the father can by an "authentic act"—that is, an act drawn up by a notary and attested by two witnesses—acknowledge a natural child, provided it be neither the result of adultery (a married man's intercourse with any woman other than his wife is deemed adultery), nor of incest. But the inheritance of natural children takes precedence of the state only, and is "irregular"; i. e. such heirs can take possession only under the decree of a court.[185]

South Carolina does not legislate at all on the subject of bastards, and here, unlike Connecticut, the harsh rule of the common law is deemed in force.[186] Delaware enables the mother to take from the

[183] The Tennessee law dates back to 1805. A child legitimated under it inherits from the grandfather. McKamie v. Baskerville, 86 Tenn. 459, 7 S. W. 194.

[184] Rev. St. § 2475 (amendment of 1853); Borroughs v. Adams, 78 Ind. 161; Cox v. Rash, 82 Ind. 520. Under act of 1831, a bastard's wife excluded the mother. Doe v. Bates, 6 Blackf. 533.

[185] Voorhies' Dig. § 2474, on the basis of an act of 1831. See, also, Rev. Civ. Code, art. 924 et seq. As to "adulterines," see Succession of Fletcher, 11 La. Ann. 59.

[186] Barwick v. Miller, 4 Desaus. Eq. 434 (under St. 1791, but this has not been changed since).

child but not the child from the mother. New Jersey has regulated the transmission of personal estate to and from bastards, but leaves the common-law rule in force as to lands.[187]

In New York, by the Revised Statutes in force January 1, 1830, the mother inherited from the bastard on failure of issue; but no provision was made for the bastard till April 24, 1855. He is now heir to the mother on failure of lawful issue. This is also the rule in North Carolina. In Louisiana the natural child of the mother is indeed postponed to her kindred, but not to her husband.

In the other states and territories the mother and the bastard child themselves inherit from each other as if the child was lawful; but there is great divergency, as indicated above, as to collateral descent, and as to descent through the mother, both in statutes and in the construction of statutes worded alike. However, in the District of Columbia, with the Maryland laws petrified as they stood in 1801, upon the death of an illegitimate without children or other issue, his widow is his only heir.[188]

New York transmits the estate of a bastard dying without issue, not only to his mother, but, if she be dead, to her kindred, as if he were her lawful child; and this is also the rule in California and the states named with it, whenever the bastard leaves neither consort nor issue. Massachusetts (since March, 1882), Illinois (since 1872), Ohio (since 1865, and in part since 1853), Pennsylvania (since 1883, except that the mother and her kindred cannot inherit the bastard's own acquisitions),[189] Indiana (since 1853), Rhode Island, Virginia (by construction of a statute which says simply "transmit and inherit on the part of the mother"), West Virginia (by following Vir-

[187] New Jersey, "Orphans' Court," § 147, refers to personal estate only. The law of descent does not mention bastards.

[188] Briggs v. Greene, 10 R. I. 495; Grundy v. Hadfield, 16 R. I. 579, 18 Atl. 186 (bastard and children of bastard inherit from his brothers, legitimate issue of his mother). Contra, in District of Columbia. Brooks v. Francis, 3 MacArthur, 109.

[189] Opdyke's Appeal, 49 Pa. St. 373; Grubb's Appeal, 58 Pa. St. 55 (under act of 1855). The Virginia court of appeals construed a devise to a woman and her issue in Bennett v. Toler, 15 Grat. 588, as including her illegitimate children. And in Hepburn v. Dundas, 13 Grat. 219, such children, according to their putative father, are classed as full and half brothers.

ginia), Texas, Arkansas, Missouri,[190] Tennessee, Mississippi, and Florida [191] allow the bastard and his lawful issue to transmit and take to, from, or through the mother as if he were legitimate, and so does Connecticut, without having any statute as to the inheritable quality of bastards. And this is probably the law in Iowa and in Kansas. While in Virginia the words "inherit and transmit on the part of the mother" were held to embrace all her kindred, the Kentucky courts construed the same words as meaning no more than "from the mother," or "to the mother;" and a bastard child was not allowed to take the estate of his mother's father or brother.[192] In Missouri the same words in an act of 1845 were held to mean that the bastard can take from his mother, and that, when he dies before her, his issue could take her estate; and this decision probably led to the present more liberal statute, as another adverse decision based upon the Kentucky precedent did in Illinois; in fact, in most of the states which are classed above with Missouri and Illinois. In Massachusetts even the issue of a predeceased bastard child was excluded from the benefit of the first statute, recognizing bastards as children of their mothers. Such representation of the predeceased bastard is, however, allowed in Kentucky, and this is in Georgia the statutory rule, and will probably be maintained in most or all other states on general principles of representation. In the states named with California, and in the states (other than Virginia, West Virginia, and Connecticut) in which no special provision is made for transmission "through" the mother, it may be assumed that it is not allowed.[193]

190 In Bent v. St. Vrain, 30 Mo. 268, both mother and illegitimate sister were excluded, on the authority of Judge Washington's opinion in Stevenson's Heirs v. Sullivant, 5 Wheat. 207, on the meaning of the words "inherit and transmit," etc., in the Virginia act. Virginia has herself rejected this construction. For Indiana, see Ellis v. Hatfield, 20 Ind. 101 (legitimate child of mother inherits from her bastard).

191 Tennessee (Act March 6, 1885) speaks only of descent from the illegitimate himself. Keech v. Enriquez, 28 Fla. 597, 612, 10 South. 91.

192 Allen v. Ramsey, 1 Metc. (Ky.) 635; Scroggin v. Allan, 2 Dana (Ky.) 364 (following Stevenson's Heirs v. Sullivant, 5 Wheat. 207); also Remmington v. Lewis, 8 B. Mon. 606; Jackson v. Jackson, 78 Ky. 390; Sutton v. Sutton, 87 Ky. 216, 8 S. W. 337 (bastard's lawful issue represents him).

193 Bales v. Elder, 118 Ill. 436, 11 N. E. 421 (under act of 1845, in short terms giving transmission between mother and child), in which the Kentucky and other like authorities are fully quoted and relied on. The new Illinois law,

In some of the states named above, along with Massachusetts, as treating the bastard the same as the legitimate child of the mother, there is, however, a special set of rules for the descent of property on the death of an illegitimate intestate. Thus, in Illinois, while the widow or widower of any other person dying without issue takes only half his real estate, the relict of a bastard takes it all, to the exclusion of a mother and brothers, etc. And so it is in Vermont, one of the states in which the bastard inherits only from the mother, but not from her kindred.[194] In Tennessee, while in other cases brothers and sisters come in as heirs before the mother, the mother of a bastard precedes his brothers and sisters; and so does the surviving husband or wife. Such statutory rules are faithfully carried out;[195] but the statute of Michigan, which gives a bastard's estate to his mother on the failure of issue, has been construed, as if it read: "Without husband or wife or issue;" and a similar clause in the Indiana statute will be interpreted as securing to the wife her ordinary share.[196]

In Colorado, the estate of a bastard who dies without consort or issue goes one-half to his mother, the other half to his brothers and sisters, etc. In Alabama, where a bastard may inherit as well from the mother's kindred as from the mother, the rights of the latter are not enlarged above those of a legitimate mother, but even a half-brother by a different father inherits from the bastard in preference to the mother. What is said above as to Kentucky was the law only till October 1, 1893; for, by the new statute which then came in force, a bastard inherits from the mother and her kindred, and transmits to her and them, as if he were her legitimate child.[197]

more liberal, is applied in Jenkins v. Drane, 121 Ill. 217, 12 N. E. 684. See, for older Tennessee laws, Brown v. Kerby, 9 Humph. 460.

[194] Bacon v. McBride, 32 Vt. 585; Grundy v. Hadfield, 16 R. I. 579, 18 Atl. 186.

[195] The rules are found among the canons of descent. See, as to Tennessee, Evans v. Shields, 3 Head. (Tenn.) 70; Scoggins v. Barnes, 8 Baxt. (Tenn.) 560.

[196] Keeler v. Dawson, 73 Mich. 600. 41 N. W. 700. See Rev. St. Ind. § 2476, and consider the favor shown in Indiana to the widow.

[197] Under the older Kentucky law, the late case of Blankenship v. Ross, 25 S. W. 268, gives the estate of a bastard dying without issue, one-half to his mother, the other half to his only brother by the same womb.

While Virgina has, without special words in her statute, allowed the bastard to inherit from his brothers, legitimate or illegitimate, born from the same mother, and even discriminated between full brothers and half-brothers, according to the fathers, lawful or putative, the statutes in some other states have treated the descent among brothers and sisters specially. Georgia allows bastard children from the same mother to inherit from each other, but not from her legitimate children; hence, by way of reciprocity, the latter do not share in the "wild pasture" of the bastard's estate.[198] In North Carolina, on the other hand, the legitimate brothers are allowed to come in on the bastard, while the latter inherits only from his brother in shame.[199] In Tennessee the illegitimate brother cannot inherit from the legitimate.[200] In Kentucky, as in Georgia, the bastard children of one mother could until very recently take and transmit only among themselves.[201] In California the inheritance of one bastard child from the other (or the other's lawful issue) was worked out from the general power of the bastard to transmit to the mother or her kindred; and the precedent will probably be followed in the states which have drawn their statute in the same words.[202]

Where persons have been legitimated by special acts of the legislature, the words of the act must, of course, be closely scanned, to find how far the legitimation goes; and the courts will presume in favor of the wider scope. So, where A. and B. are declared the lawful sons of C., they become by statute lawful brothers, and inherit from each other.[203]

There have been very few cases in which the legitimating father sought an inheritance from his natural child. Where the statute

198 Allen v. Donaldson, 12 Ga. 332; Houston v. Davidson, 45 Ga. 574.

199 Flintham v. Holder, 1 Dev. Eq. 349; Ehringhaus v. Cartwright, 8 Ired. 39; Powers v. Kite, 83 N. C. 156. The law is made more liberal in the successive revisions of 1836, 1857, and 1873.

200 Woodward v. Duncan, 1 Cold. (Tenn.) 562. See Code, §§ 3270, 3273.

201 Act 1840 (see Loughborough's St. p. 211); now Gen. St. c. 31, § 5. See, contra, Remmington v. Lewis, supra. But, by an act of 1893 (St. 1894, § 1397), the bastard inherits from his mother's kindred.

202 Estate of Magee, 63 Cal. 414.

203 Berry v. Owens, 5 Bush (Ky.) 453; Killam v. Killam, 39 Pa. St. 120; Pace v. Klink, 51 Ga. 220.

speaks of the child as "legitimate for all purposes," of course the father should inherit, like any other father. But most of the statutes which we have here considered fall short of these words; and in most of the states which allow a legitimation without marriage the father will not inherit from the natural, though legitimated, child.[204]

Though it would seem that legitimacy is a matter of "personal law" and should depend upon the domicile of the child, it has been lately held in an important and well-contested case that a father living in California could by mere correspondence so far recognize a daughter born in England, and living there until after the father's death, as to make her his legitimate child and sole heir.[205]

The bastard to whom the lands of the father descend, when he is recognized in the form pointed out by the statutes of many of the Western states, is an "heir," within the meaning of the national land laws of the United States, and may claim the benefit due to the heirs of a pre-emptor.[206]

§ 40. Effect of Marriage.

In most of the American states, a child born out of wedlock may be fully legitimated by the subsequent marriage of the father and mother, which in most of them must be coupled with recognition by the father. The states, which in the next preceding section are named with California as having the same enactment as to illegitimate children, say therein: "But he shall not be allowed to claim as representative of his father or mother," etc., "unless, before his death, his parents intermarry, and his father after such marriage acknowledges him as aforesaid, or adopts him into his family." This

[204] McCormick v. Cantrell, 7 Yerg. 615. The Kansas statute (sections 2615 and 2616) provides that the child may recognize the father; and he can inherit from the child.

[205] Blythe v. Ayres, 96 Cal. 532, 31 Pac. 915, arising under sections 230 and 1387 of the California Civil Code, and pretty well supported by the decision of the house of lords in the Scotch appeal of Munro v. Munro, 1 Rob. App. 492. It was thought not necessary for the father in this case to receive the child into his family, as he lived with a mistress.

[206] Hutchinson Invest. Co. v. Caldwell, 152 U. S. 65, 14 Sup. Ct. 504 (under section 2269, Rev. St. U. S.).

makes him brother to the legitimate children, with a "saving to the father and mother * * * their rights in the estates of all said children," etc. In Maine, the birth of other children to the marriage is made equivalent to acknowledging the antenatus, or adopting him into the family. In Minnesota and Nebraska, the words "and have other children" are inserted after "intermarry." So there are three requisites: intermarriage, other children, and acknowledgment. Some of the states referred to have elsewhere in their statutes a clause to the effect that "a child born before wedlock becomes legitimate by the subsequent marriage," etc.; but this, it seems, does not dispense with acknowledgment.[207] Pennsylvania requires only that the parents should "intermarry and cohabit" (which cohabitation need not be permanent); and in Oregon intermarriage alone makes the child legitimate to all purposes. But who are the parents? Who is the father? Under the law of both Pennsylvania and Oregon an acknowledgment by the father seems immaterial, and paternity has to be proved.[208]

The acknowledgment must in Louisiana be by an authentic act, or must be contained in the marriage contract; and a child of adultery or incest cannot be legitimated. In other states no writing is required to constitute an acknowledgment. Some states require, by implication or expressly, that the child be acknowledged after marriage with the mother, while a few, for instance Kentucky, allow this recognition to take place either before or after marriage; but the child must not be begotten in adultery. In Virginia, the parents may, by marriage after the child's death, legitimate its issue.[209] Gen-

[207] See section 39, note 180, for place of the clause in the several statutes.

[208] The Pennsylvania acts of 1857 and 1858 are embodied in Brightly's Purdon's Digest with the act of 1833 among the canons of descent. See, for construction, McDonald's Appeal, 147 Pa. St. 527, 23 Atl. 892 (no presumption that antenatus is the husband's child). But even in Maine, where the statute contemplates an acknowledgment, this is not always a sufficient proof of paternity. Grant v. Mitchell, 83 Me. 23, 21 Atl. 178.

[209] See, for statutes: Maine, c. 75, § 3; Massachusetts, c. 125, § 5; New Hampshire, c. 180, § 15; Vermont, § 2233; Connecticut, § 630; Pennsylvania, "Marriage," pl. 9; Ohio, § 4175; Indiana, § 2476; Illinois, c. 39, § 3; Michigan, § 5775a; Wisconsin, § 2274; Maryland, art. 46, § 29; Virginia, c. 123, § 6; West Virginia, c. 78, § 6; Kentucky, c. 31, § 6; Georgia, § 1786; Florida, c. 11, § 5; Alabama, §§ 2364, 2365; Mississippi, § 1549 (1275); Minnesota, c.

erally speaking, the child legitimated by marriage is "legitimate for all purposes," though the Arizona statute reads as if the issue were only enabled to inherit from his father, but not to represent him.[210] But in Rhode Island, New York, New Jersey, Delaware, and South Carolina the old rule, of which England is so proud, is still unbroken. In North Carolina and Tennessee, legitimation by the order of a court, as explained in a former section, is the equivalent of intermarriage and recognition; and the laws of North Carolina and Tennessee do not provide for the latter. In Louisiana, recognition gives only the greatly inferior position of a "natural" child, while marriage and recognition give all the rights of inheritance and transmission which belong to lawful issue.[211]

At common law, though there be a marriage in form, yet if it be null by reason of another husband or wife living [212] at its inception, or by reason of consanguinity or other causes, the children born of the union are deemed bastards. But the states which legitimate the children born before marriage have generally relaxed the other rule also, by giving legitimacy to the children of a "marriage null in law," if they are born or begotten before its judicial annulment, either in all cases, or with exceptions. Thus, those states which disallow marriages between whites and blacks bastardize the children of such connections. In California, Nevada, the Dakotas, Montana, Washington, Idaho, and Oklahoma, the section already quoted in part winds up: "The issue of all marriages, null in law, or dissolved by divorce are legitimate." Minnesota says the same in its chapter on marriage, leaving out "or dissolved by divorce," the meaning of which words is not clear. Nebraska, which otherwise goes along with these states in

61, § 17; Iowa, § 2200; Missouri, § 2170; Arkansas, § 2525; Texas, § 1656; Colorado, § 1045; Wyoming, c. 42, § 7. Several states have two clauses in their laws,—one which requires acknowledgment; the other does not. But it seems that the former prevails. Contra, Sams v. Sams' Adm'r, 85 Ky. 396, 3 S. W. 593. See Ash v. Way, 2 Grat. 203.

210 Jackson v. Moore, 8 Dana (Ky.) 170; Rev. St. Ariz. § 1470.

211 Rev. Civ. Code, art. 198.

212 Cartwright v. McGown, 121 Ill. 328, 12 N. E. 737. Husband lived with second wife for many years, and had children by her after dissolution of first marriage, she being ignorant of it. The cohabitation and reputation, being based on the original ceremony, did not prove a common-law marriage per verba de praesenti.

the treatment of illegitimates, declares the issue illegitimate, but only when the marriage is annulled by decree for consanguinity, or when it is between a white person and a negro.[213] The number of marriages null in law, except where one of the parties is ignorant of the other party having another husband or wife living, is so small that it seems sufficient to refer the reader in a note to the statutes of the several states that have legislated on the subject.[214] Where the law forbids intermarriage between whites and blacks, it is natural that the issue should be illegitimate, as there could have been no mistake of fact to excuse the forbidden union, and it is so declared in Maine, Nebraska, Delaware, North Carolina, Kentucky, Arizona, by way of exception to the curative statute. In South Carolina there is no statute on the subject, nor in Connecticut; hence, issue of a marriage void for any cause is deemed illegitimate as at common law; and so it is in Rhode Island, where the statute only enforces the old rule as to certain cases.

In a number of the old slave states, and in the District of Columbia, also in Illinois, the legislature has found it necessary to set up retrospectively a lawful relationship between colored parents and their children born in the days of slavery, giving to the customary marriage among slaves the effect of wedlock. In Missouri some sort of registration was demanded. The child, to be legitimate, must be

[213] See section 39, note 180, for the other states and territory; for Minnesota, c. 61, § 17; for Nebraska, § 1449. It is so also in Kentucky and many of the former slave states.

[214] Illinois, c. 40 (Divorce), § 3, and case of Clarke v. Lott, 11 Ill. 105, decided under it, fall short of legitimating the issue of void marriages. As to other states, Virginia and West Virginia have the broadest declaration of legitimacy among the rules of descent. See Maine, c. 60, § 19; New Hampshire, c. 160, § 3; Vermont, § 2355; Massachusetts, c. 145, § 13; Minnesota, c. 61, § 17; Indiana, §§ 1026, 1027. And there are similar acts in Pennsylvania, Ohio, Michigan, Wisconsin, Missouri, Iowa, Colorado, Wyoming, Arkansas, Texas, and Arizona. Under the Virginia statute, in Heckert v. Hile's Adm'r, 18 S. E. 841, the child of a second wife, whom the husband married before a divorce from the first, who had deserted him, was held legitimate, and allowed to inherit. A law legitimizing children of void marriages, as the Texas act of 1848, aids the children as to all inheritances opened by death after such law is enacted. Carroll v. Carroll, 20 Tex. 731.

born before a day named, ranging from 1865 to 1870.[215] Where the statute, as in North Carolina, in terms only enables the children to inherit from a parent, they cannot take the estate of an aunt or of a brother or sister;[216] but the Missouri statute expressly confers on the children of a slave marriage the quality of brothers and sisters.

Where a child is legitimated by marriage under the law of the domicile in which he is born, perhaps, also, if he is recognized as legitimate by the laws of the state in which his parents are domiciled and marry, he acquires the status of a lawful child, and ought, upon principle, to inherit even lands lying in those states which adhere to the common-law rule. It is different in England, where legitimation, under the Scotch law, of children born and domiciled in Scotland, has been held insufficient;[217] and not all of the American decisions are in harmony on the subject. But the two principal states which have held out against the innovation on the old English rule, New York and New Jersey, have admitted the effect of the status of legitimacy acquired elsewhere.[218] At all events, he who is

[215] Maryland, Pub. Gen. Laws, art. 62, § 13; Rev. St. U. S. pt. 2, § 794; the Missouri act is found in Revision of 1869.

[216] Tucker v. Bellamy, 98 N. C. 31, 4 S. E. 34 (under act of 1879; not from aunt). In Brown v. McGee, 12 Bush, 429, the remedial statute of Kentucky was deemed to apply, though one of the parents was free. Hepburn v. Dundas, 13 Grat. 219. Emancipated slave children of same parents inherit from each other. They might do so under the general law as to bastards. The reported decisions under these statutes are few in number, as the estates in dispute were not often large enough to justify appeals to the highest courts. In Tennessee, the original law on the subject being found too narrow, it was enlarged by act of March 21, 1887, to include children of "customary marriages" born outside of as well as within the state.

[217] Doe v. Vardill, 6 Bing. N. C. 385 ("that a child must be legitimate, and, moreover, born in wedlock"). But the so-called "statute" is nothing but an entry on the rolls of parliament that the barons had rejected a proposed change in the law in favor of the antenati. See Story, Confl. Law, §§ 87–93.

[218] Smith v. Derr, 34 Pa. St. 126, was decided in Pennsylvania before its law permitted legitimation on the strength of a clause in the descent act of 1833, similar to the statute of Merton. In Miller v. Miller, 91 N. Y. 315, a child born in the kingdom of Wurtemberg (whose laws allow legitimation), and whose parents married in Pennsylvania, which afterwards enacted a retrospective law to the same end, was allowed to inherit land in New York,

a bastard, as being born before wedlock, by the law of his own domicile, cannot inherit as a lawful child in a state which allows children born outside of wedlock to be legitimated by a subsequent marriage.[219]

A child born before wedlock is not legitimated by a marriage that is itself void by reason of being bigamous.[220]

§ 41. Adoption.

The "adrogation" or "adoption" of a person by another, not his father, by which the former would become, in the eyes of the law, the child and heir of the latter, was a feature of the Roman law, from a very early period. It passed through France and Spain, into the jurisprudence of Louisiana and Texas. It was introduced by statute in Massachusetts in 1851, and has since become the law of all states and territories, with the exception of Maryland, the District of Columbia, and Virginia.[221]

where the father and child resided at the time of the former's death. This was followed up in Stack v. Stack, 6 Dem. Sur. 280 (at best a very close case). In New Jersey the chancellor recognized a Pennsylvania legitimation in Dayton v. Adkisson, 45 N. J. Eq. 603, 17 Atl. 964. One of two twins was allowed to inherit from the other.

219 In McDeed v. McDeed, 67 Ill. 546, the state with the more liberal law withheld the inheritance from a child bastardized by the laws of its home. So in Mississippi, as to a child born in South Carolina, where his parents intermarried. Smith v. Kelly, 23 Miss. 167.

220 Adams v. Adams, 154 Mass. 290, 28 N. E. 260.

221 The Louisiana act of 1831 as to legitimation has a clause for adopting a strange child by notarial act. For the present statutes on adoption, see in the Revisions or Codes quoted in last note to section 31, and in other laws, specially named: Maine, c. 67, § 38; New Hampshire, c. 188, § 1; Vermont, §§ 2536–2542; Massachusetts, c. 148, §§ 1–10; Connecticut, §§ 471–474; Rhode Island, c. 164, § 1; New York, Rev. St. pt. 2, c. 8, tit. 3, § 18; New Jersey, Revision, p. 1345; Pennsylvania, "Adoption"; Ohio, § 3137; Indiana, §§ 823–828; Illinois, c. 4, § 1; Michigan, § 6379, etc.; Wisconsin, §§ 2273, 4021–4024; Delaware, 17 Biennial Laws, p. 612, § 1; West Virginia, c. 122, §§ 2–5; North Carolina, c. 1; Georgia, §§ 1788–1790; Acts 1889, p. 69; Florida, Laws 1885, c. 3594; Kentucky, c. 31, § 18, amended 1890, c. 573; Tennessee, § 4388, etc.; Alabama, § 2475, etc.; Mississippi, § 1496, etc.; Iowa, § 2307, etc.; Minnesota, c. 124, § 26; Nebraska, §§ 5263–5267, or chapter 2, §§ 796–800; Kansas, pars. 3873, 3874; Texas, arts. 1 and 2; Wyoming, c. 2, §§ 1, 2; Col-

As a supplement to the two preceding sections, we should mention a clause in the statutes of California, the Dakotas, Idaho, Montana, and Washington which is appended to those which regulate adoption, and which uses the same word, but only gives an additional method for legitimating natural children: "The father of an illegitimate child, by publicly acknowledging it as his own, receiving it as such with the consent of his wife, if he is married, into his family, and otherwise treating it as if it were a legitimate child, thereby adopts it as such, and such child is thereupon deemed legitimate for all purposes from the time of its birth." In true adoption the paternity of the adopted person is immaterial, and he becomes, in the eyes of the law, only the adopter's child, as to the relations between the two, but not the relative of all the adopter's kindred. The clause quoted has been sustained, as being cumulative, and not limited by another clause in the same body of laws, which requires a written legitimation.[222] In a few states, adoption is effected by a deed or written declaration signed by the adopting parent or parents and the person to be adopted, or his parents or guardian. It is so in Vermont, Iowa, Missouri, Alabama, and Texas. The deed has to be acknowledged and recorded. In Pennsylvania, Colorado, and Wyoming, adoption can be made either by deed, or by proceedings in court, while all other states which allow adoption at all demand proceedings in either the probate court, or a court of full common-law or equity jurisdiction, resulting in a judgment or decree. The requirements of the law differ greatly. In some states the person adopted must be under age; in others, he need only be younger than the adopter. In

orado, §§ 1, 2; Idaho, §§ 2545–2554; Montana, Gen. Laws, §§ 1–10; Nevada, Acts 1885, c. 24, § 1; Washington, § 1418; Oregon, § 2938, etc.; California, Civ. Code, §§ 221, 230; Arizona, c. 15, §§ 1383–1392; Arkansas, Dig. 1894, §§ 2492, 2493 (heir made by written declaration); Louisiana, Rev. Civ. Code, art. 214 (see Voorh. Dig. § 2474); Florida, §§ 1536–1541. The adopted child is a "child capable of inheriting." Moran v. Stewart, 122 Mo. 295, 26 S. W. 962. The South Carolina act was only passed December 24, 1892. Georgia, see amendment of September 26, 1883, to section 1788 of the Code. See amendment in Maine, Acts Feb. 28, 1889; in California, March 9, 1893.

[222] See In re Jessup, 81 Cal. 408, 21 Pac. 976, and 22 Pac. 742, 1028 (already quoted in section 39), for facts to establish adoption in pais under section 231; In re Pico's Estate, 52 Cal. 84, 56 Cal. 413. This section, with its counterparts in other states, applies only to minor children.

some states a married man can only adopt with the consent of his wife; in others, he can, without her consent, choose an heir for himself, though not for her. In a few states a nonresident may become the adopting parent of a child having its domicile there. The age above which the child must give its own consent is generally 14. In some states it is 12.[223]

The leading features of the Massachusetts law, from which many of the others are copied, are these: Any one who is 21 years, or over, may petition the probate court for leave to adopt one younger than himself, other than the petitioner's husband or wife, brother or sister. If the petitioner is married, husband or wife joins. The adopted person becomes the child of both. One not an inhabitant may adopt a child residing in the state. The person to be adopted, if over 14, also the husband, on behalf of a married woman, the parents or surviving parent, or person having custody, or illegitimate mother, on behalf of an infant, must give consent in writing. Parent need not consent (1) if hopelessly insane; (2) if imprisoned under sentence having still three years to run; (3) if he has for two years allowed the child to be supported by corporate or public charity. When all the parties do not consent, notice is issued, or order of publication, if the notice cannot be served. The court, if there is no answer, gives judgment, or appoints guardian ad litem. If satisfied of petitioner's ability to do good to the child, a decree of adoption is entered. "As to the succession to property, a person adopted in accordance with the provisions of this chapter shall take the same share of property which the adopting parent could have devised by will that he would have taken if born to such parent in lawful wedlock, and he shall stand to the legal descendants but to no other of the kindred of such parent in the same position, as if so born to him." But what he receives by gift or inheritance from his natural father shall descend as if he had not been adopted. He shall not lose the inheritance from his

[223] Louisiana statute of 1865 required a judicial act. Since 1872 notarial act is again sufficient. Succession of Vollmer, 40 La. Ann. 593, 4 South. 254. For exposition of Texas statute, see Eckford v. Knox, 67 Tex. 200, 2 S. W. 372. Pennsylvania act of 1872 for adoption by deed is retrospective as to deeds made before that time, but not if descent is already cast on others. Ballard v. Ward, 89 Pa. St. 358. New York act of 1873 (chapter 830) is not to defeat previous adoptions, but cannot aid them. Hill v. Nye, 17 Hun, 457.

natural kindred. Inhabitants of another state, adopted in accordance with its laws, are entitled to inherit in this state accordingly. There may be a second adoption, with the first adopter's consent. From the decree of the probate court an appeal lies to the supreme court, and it may be vacated for fraud in the probate court itself. Most other states have either left out the clause which raises a relationship between the adopted and the real children of the same father, or have expressly directed that the adopted child is not to represent the father in the inheritance from his lineal or collateral descendants; and, though the descent between brothers is deemed direct, it is believed that with such a clause the two classes of children will not inherit from each other.[224] In Texas, one who is adopted as an heir is not given the same rights as a real child, for when the adopter leaves any issue the adopted heir's share must not exceed one-fourth. In most of the states there is no reciprocity; the adopter does not become the heir of the adopted.[225] Some statutes and decisions bear on the question whether an adopted child fills the description of "children," of "issue," or of "heirs of the body," in a deed or will. This is no part of the law of descent, but rather of the construction of grants and devises. The adopted child is deemed "issue," within the meaning of a statute of descent, such as the Massachusetts act, giving a certain share to the widow on failure of issue.[226] But it is generally held that where the adopter's wife has

[224] This clause in the Wisconsin statute was thought by the supreme court of Illinois not to allow the real child to inherit from the adopted. Keegan v. Geraghty, 101 Ill. 26. As to descent between brothers being direct, see below, sections on "Aliens." No succession between real and adopted child. Moore v. Moore, 35 Vt. 98; Barnhizel v. Ferrell, 47 Ind. 335. Helms v. Elliott, 89 Tenn. 446, 14 S. W. 930, distinguishing McKamie v. Baskerville (see note 183 to section 39, case of legitimated natural child). In Massachusetts a grandchild adopted by her grandfather becomes a sister to her dead parent, and can take only her own share, not the parent's share by representation. Delano v. Bruerton, 148 Mass. 619, 20 N. E. 308. But in Iowa grandchildren adopted inherit their own shares and that of the parent. Wagner v. Varner, 50 Iowa, 532.

[225] Hole v. Robbins, 53 Wis. 514, 10 N. W. 617. But by section 2272a property derived from the adopter is to go to him or his kindred. There is a similar provision in Arizona ("Descent"); and the counterpart, as shown in the text, in Massachusetts. Barnhizel v. Ferrell, 47 Ind. 335.

[226] Buckley v. Frazier, 153 Mass. 525, 27 N. E. 768.

not assented to the adoption, though the act might not be void altogether, yet it will not diminish the widow's descendible share.[227] A state which provides by its own laws for adoption considers the condition of a child adopted anywhere as a status known to its laws, and will allow such child to inherit land situate within it to the same extent as if such child had gone through the process of adoption under its own laws.[228]

The land lawyer is interested in knowing how far a defect in the judicial proceedings, or in the execution of the deed, will render the adoption void, so that it may fail to give inheritable capacity. Where proceedings in court are required, the person or persons wishing to become adopters are the petitioners; and other persons, generally the parents of the child, if not at hand and willing to consent, must be notified. The failure to notify them in the manner pointed out by law would, on general principles, render the judgment or decree void.[229] But a defect rendering it only voidable could not be invoked by the heirs of the adopter to the injury of the adopted child.[230] The jurisdiction to declare one person the child of another, not his parent, is so foreign to the course of the common law that it has been narrowly watched. The proceedings should show that the domicile of the parties is such as the law demands, and, unless the statute indicates another intention, it will hardly be interpreted as allowing nonresidents of the state to apply under it for leave to adopt.[231]

227 Stanley v. Chandler, 53 Vt. 619. See In re Rowen's Estate, 132 Pa. St 299, 19 Atl. 82. In Indiana, wife's consent is not required. See Barnhizel v. Ferrell, supra. But the adoption of children by the husband does not reduce the wife's right over her inheritance, as real issue does. Barnes v. Allen, 25 Ind. 222.

228 Ross v. Ross, 129 Mass. 243 (a case arising before present statute); Keegan v. Geraghty, 101 Ill. 26. In Florida the statute recognizes the adoption laws of other states. Rev. St. 1892, § 1825.

229 Furgeson v. Jones, 17 Or. 204, 20 Pac. 842. In California, under act of 1878 for adopting children from orphan asylum with consent of managers, no consent, adoption void. In re Chambers, 80 Cal. 216, 22 Pac. 138 (not a case of succession). It seems that in Kentucky the order of adoption cannot be collaterally attacked. Tinker v. Ringo's Ex'r (Ky.) 11 S. W. 605.

230 Sewall v. Roberts, 115 Mass. 262.

231 Ex parte Clark, 87 Cal. 638, 25 Pac. 967, but an order made by an acting judge is good. In re Newman's Estate (Cal.) 16 Pac. 887. New Hampshire statute passed on, Foster v. Waterman, 124 Mass. 592. But in Pennsylvania

In some states the court decreeing the adoption has no further power over the matter, while in other states it may, upon application, set it aside for good cause.[232] Where the adoption is made by deed, slight informalities, such as failing to fill out the age of the child, when enough appears to show its minority, are not fatal, and it is no objection that the same person who signs the deed as consenting guardian signs also as adopter.[233] But, where the statute requires the deed to be recorded, it must be done within the adopter's lifetime, or the adoption will fail.[234] Where a "person" is authorized to adopt, husband and wife may join in one act, and the adopted will sustain the position of child to both of them.[235]

A line of decisions took rise in New Jersey, establishing a sort of equitable adoption; that is, where, by some oversight, the forms of adoption had been neglected, in whole or in part, or where the law for adoption turned out ineffectual, but the adopting parents, as well as the child, had for many years lived in the belief that the relation of parent and child existed between them, the latter was given the inheritance by way of an equitable right arising by contract. The supreme courts of Ohio, Missouri, and Michigan followed these precedents.[236] They have, however, been disapproved in Indiana, Illi-

it was held that a temporary residence is sufficient to give jurisdiction, though petitioner was a nonresident of the commonwealth. Appeal of Wolf (Pa. Sup.) 13 Atl. 760. Formality not insisted on in New York. People v. Bloedel (Super. Buff.) 4 N. Y. Supp. 110.

232 Thus, Pub. St. Mass. c. 148, §§ 2, 11, only provide for a decree of adoption, and an appeal from its grant or refusal. Secus in New York, Laws 1884, c. 438, § 12. See People v. Paschal, 68 Hun, 344, 22 N. Y. Supp. 881 (power to revoke). So in Pennsylvania. In re Gatjkowski, 12 Pa. Co. Ct. R. 191.

233 Bancroft v. Bancroft's Heirs, 53 Vt. 9; Abney v. De Loach, 84 Ala. 393, 4 South. 757 (where also the unauthorized signature of the wife claiming to adopt as mother was deemed surplusage).

234 Tyler v. Reynolds, 53 Iowa, 146, 4 N. W. 902; Shearer v. Weaver, 56 Iowa, 578, 9 N. W. 907. The defective execution of the deed is not aided by the child's living in the adopter's family. Long v. Hewitt, 44 Iowa, 363. But in Abney v. De Loach (supra, from Alabama) it was held not fatal that the deed was recorded in the wrong book.

235 Krug v. Davis, 87 Ind. 590.

236 Van Tine v. Van Tine (N. J. Ch.) 15 Atl. 249, following Van Dyne v. Vreeland, 11 N. J. Eq. 370; Sharkey v. McDermott, 91 Mo. 647, 4 S. W. 107; Shahan v. Swan, 48 Ohio, 25, 26 N. E. 222.

nois, and Iowa.[237] The supreme court of South Dakota has gone so far as to treat the expectancy of an adopted child (whose mother had given her needful consent on condition that it would inherit from the new parent) as so much of a vested right that a voluntary conveyance or a devise by the latter of the bulk of his estate might be set aside by the adopted child as a fraud upon his rights.[238]

§ 42. Legitimate Birth.

In sections 39 and 40 the rights of natural children have been discussed on the supposition of the facts being known. We have still to consider some presumptions of law and artificial rules of evidence bearing on legitimate birth. Presumption is always in favor of legitimacy, especially where a person has for many years been recognized as the legitimate child of another, and still more after the child's death.[239] Marriage may always be proved by "cohabitation as husband and wife, and reputation," and in a state in which, as at common law, verba de praesenti alone, or verba de futuro and cohabitation, make a valid marriage, such proof is conclusive. In a well-considered case in New York, the jury were allowed to presume, in the case of a child born two weeks before a marriage ceremony, and always thereafter acknowledged by the father, that the parties, living in Connecticut, had before the birth of the child been married privately, so as to sustain the child's legitimacy.[240]

The question of admissibility of declarations by the supposed father or mother, or of reputation, to prove the dates of marriage or of birth, or the paternity of a child, belongs rather in a work on Evidence than on Land Titles; but the question, what facts may be shown to bastardize a child born or begotten during lawful wedlock,

237 Wallace v. Rappleye, 103 Ill. 229; Wallace v. Long, 105 Ind. 522, 5 N. E. 666; Shearer v. Weaver, 56 Iowa, 578, 9 N. W. 907.

238 Quinn v. Quinn (S. D.; 1894) 58 N. W. 808.

239 Stegall v. Stegall, 2 Brock. 269, Fed. Cas. No. 13,351; Johnson v. Johnson, 1 Desaus. (S. C.) 595; Johnson v. Johnson, 30 Mo. 72.

240 Starr v. Peck, 1 Hill (N. Y.) 270. The reasoning is strained. In nearly all the states the law legitimates children on intermarriage and recognition; hence this case has lost some of its importance as a precedent. Marriage "in fact" need not be proved. In re Robb's Estate, 37 S. C. 19, 16 S. E. 241.

is one of policy, rather than of evidence, and its correct answer is a part of the law of descent. The civil law lays down the rule: "Pater est quem (justae) nuptiae demonstrant" ("Father is he whom lawful wedlock points out"). This rule was received into the law of England, and in the time of Lord Coke and long thereafter was carried so far that no exception was allowed, except the husband's absence from the realm during the whole time when conception could have taken place, or his impotency.[241] The rule was shaken by a judgment of Lord Raymond in 1732, and narrowed down so that the utter impossibility of the husband's access from any cause, not only by reason of absence from the realm, may be shown against the presumption; and in the Banbury Peerage Case it was still more weakened, nothing being left but this: if access by the husband appears, no proof against his paternity can be allowed, and under no circumstances can either husband or wife be admitted by their testimony to bastardize the child of the latter.[242] The common law assumes that a living child may be born after a gestation of 180 days at the least, and of 280 days (still improperly called "ten months") at the most; hence, a child born within 280 days after the husband's death or after divorce stands on the same presumption as if born within wedlock.[243] But the presumption is by no means withdrawn from those born less than 180 days after the marriage is solemnized.[244] In a Virginia case decided in 1811, the husband was allowed to inherit from his wife's child born three

241 Co. Litt. 244a.

242 Pendrell v. Pendrell, 2 Strange, 925; Banbury Peerage Case (Opinions of the Judges) 1 Sim. & S. 153. See, also, Goodright v. Moss, Cowp. 591, for the distinction between a case in which the dates of marriage and birth are in dispute and the matter in hand. The rejection of the husband's or wife's testimony or declaration against the legitimacy of a child begotten in wedlock is said here, by Lord Mansfield, to be demanded by "decency, morality, and policy."

243 Rhyne v. Hoffman, 6 Jones, Eq. (N. C.) 335. So declared in many states by statute, for the purpose of letting in posthumous children; e. g. in California and those grouped with it in section 39, issue of marriages dissolved by divorce is legitimate, which must mean begotten in marriage, but born after divorce.

244 A child born immediately after marriage is legitimate. Niles v. Sprague, 13 Iowa, 198; State v. Herman, 13 Ired. 502.

months after the marriage, although he had always repudiated it, and had separated from his wife, evidently by reason of her antenuptial unfaithfulness. It was, of course, not absolutely impossible that he might have been the father, but the court knew plainly that he was not, and rested its judgment on the presumption alone.[245]

While the courts everywhere agree that neither reputation nor the declarations of father and mother, nor even their testimony, can be allowed to bastardize a child avowedly born in wedlock, or within the period of gestation after its dissolution,[246] they differ pretty widely as to the facts which may be admitted to upset the presumption of legitimate birth. The supreme court of North Carolina has in one case gone almost or quite as far as the English courts before Lord Raymond, holding a child legitimate that was born six months after a divorce had been granted for the wife's adultery, while both an older and a later case [247] speak of the staid old rule as exploded. The supreme court of Louisiana went also very far in a case which it decided on the supposed law of South Carolina.[248] In Louisiana the matter is regulated by the Civil Code, which gives to the husband or his heirs an action for disavowing issue, to be instituted within a given time, and does not allow an inquiry to be made otherwise than in such an action.[249]

[245] Bowles v. Bingham, 2 Munf. 442 (decision), 3 Munf. 599 (opinion). Phillips v. Allen, 2 Allen (Mass.) 453, was also a case in which the child was in fact almost certainly a bastard, born eight months after marriage, and eight months and ten days after husband and wife first met. Perhaps the Virginia courts would decide the matter otherwise in our days.

[246] Bowles v. Bingham, supra; Cross v. Cross, 3 Paige (N. Y.) 139; Green v. Green, 14 La. Ann. 39; Haddock v. Boston & M. R. Co., 3 Allen, 298; Dennison v. Page, 29 Pa. St. 420.

[247] Rhyne v Hoffman, 6 Jones, Eq. (N. C.) 335. Contra, State v. Petway, 3 Hawks, 625; Warlick v. White, 76 N. C. 175.

[248] Vernon v. Vernon, 6 La. Ann. 242, a case in which husband and wife lived for years in different counties, if not in different states, and where the child in question was by both of them openly treated as the offspring of adultery. It seems that the courts of South Carolina treated the matter differently.

[249] Dejol v. Johnson, 12 La. Ann. 853; Succession of Saloy, 44 La. 433, 10 South. 872. In this case, A., B., and C. were the daughters of D. and of E., her supposed husband. A. dying without issue, B. and C. claimed the suc-

In Georgia, on the other hand, the strict old English doctrine was denounced as the height of unreason, and all facts are admitted which indicate that the husband could not have been the father, including his actions and declarations on discovering his wife's pregnancy.[250] The only case in Kentucky in which the wife's loose conduct and her acts of adultery were deemed material is really not so strong, yet these facts were only admitted as corroborative, after strong medical evidence had been given of the husband's impotency at the time of conception.[251] South Carolina in two late cases (1880 and 1882) has gone as far as Georgia, the court holding that "a question of paternity is in itself a question of fact, the principle pater est, etc., having its full influence." [252]

In Tennessee, all such circumstances as would bear against the husband's paternity, such as the wife's loose conduct, her intimacy with an adulterer, the claim made by the latter and the wife that the child was their child, its resemblance to the adulterer, and not to the husband, etc., were all deemed admissible against the presumption of the law. The admission of the mother's declaration in this and in the Georgia case goes far beyond the modern English cases.[253] In New York, also (not, however, in a case of inheritance), the old rule, even in its modified form, by which intercourse between the husband and the wife must be impossible, in order to bastardize the issue, has been rejected.[254] In all cases in which a child having

cession, and were opposed by the state, which claimed for want of all heirs, on the ground that the kinship of A., B., and C. sprang from adulterous birth, as D. was in fact the wife of F., who lived in another country. *Held*, that unless F. or his heirs raised the question, D.'s daughter must be deemed legitimate.

250 Wright v. Hicks, 12 Ga. 155; the case coming up on a second writ of error in 15 Ga. 160.

251 Goss v. Froman, 89 Ky. 318, 12 S. W. 387. In this and other cases the monograph of Sir Harris Nicolas on Adulterine Bastards, giving all the English decisions down to about 1840, is frequently quoted.

252 Shuler v. Bull, 15 S. C. 421, followed up in Wilson v. Babb, 18 S. C. 69, where it was held that the presumption is weaker where the child is begotten before marriage.

253 Cannon v. Cannon, 7 Humph. 410.

254 Van Aernam v. Van Aernam, 1 Barb. Ch. 375.

a strain of negro blood is born to the white wife of a white husband, all presumptions must yield to the plain fact.[255]

In Wisconsin and Michigan, in cases not directly affecting the rights of the child, the English doctrine, said by Lord Mansfield to be founded "on decency, morality, and policy," that neither husband nor wife can testify to nonaccess, has been upheld.[256] While neither the child's mother nor her husband are allowed to testify as to nonaccess, either of them may prove the date of their marriage, and the date of the child's birth, so as to show whether or not it was born in wedlock.[257]

It may be stated, as a result of the reported decisions, that the modern English doctrine is on the whole the average doctrine of the United States; in other words, neither husband nor wife can by declaration or testimony bastardize a child born during wedlock; and, when access by the husband cannot be disproved, the child must be held legitimate, unless, indeed, its race or color should differ from that of both its mother and her husband.

The presumption of the husband's paternity has in a late case in Maine been successfully invoked to disinherit a child born to a woman during her first coverture, but who was acknowledged as his own as an antenatus by her second husband, and sought a share in his estate.[258]

Where a statute gives a kind of legitimacy to the children of colored parents who lived in slavery times in the "customary" relation of husband and wife, the same strong presumption in favor of the husband's paternity does not arise as in the case of actual marriage.[259]

255 Watkins v. Carlton, 10 Leigh (Va.) 560. Compare Raby v. Batiste, 27 Miss. 731; Warlick v. White, ubi supra; Bullock v. Knox, 96 Ala. 195, 11 South. 339.

256 Egbert v. Greenwalt, 44 Mich. 245, 6 N. W. 654; Mink v. State, 60 Wis. 583, 19 N. W. 445.

257 Janes' Estate (Appeal of McDonald) 147 Pa. St. 527, 23 Atl. 892; 2 Greenl. Ev. § 151.

258 Grant v. Mitchell, 83 Me. 23, 21 Atl. 178.

259 Woodward v. Blue, 107 N. C. 407, 12 S. E. 453.

§ 43. Aliens.

At common law an alien who should, by purchase (that is, by either deed or will), acquire land, would hold it undisturbed until the crown should institute an inquest of office; and only after "office found" (that is, upon the verdict of a jury given before the escheator) the crown would be vested with the estate, and might then dispossess him. But in the matter of descent it is otherwise. An alien has no "inheritable blood," i. e. no one is his heir. When he dies his kindred have no more right to take possession than any one else. And if a subject dies, and his kinsman nearest in right of inheritance is an alien, he will be passed by, and the one nearest after him who is a subject will step in his place.[260] It follows that if some of the coparceners were aliens the others alone would inherit. And if a subject dies, and leaves no kindred other than aliens, his land escheats, the alien kindred having no more title or right of entry than any stranger. Lastly, one subject cannot inherit from another through an alien; that is, the grandson or nephew cannot inherit through his father,[261] but one brother inherits directly from the other, though their relationship comes through the common father.[262] All this learning has become more and more unimportant, as well through the very liberal legislation of the several states, as through the conclusion of treaties by the United States, with a great number of other

[260] Hardy v. De Leon, 5 Tex. 211; Jackson v. Jackson, 7 Johns. (N. Y.) 214.

[261] Levy v. M'Cartee, 6 Pet. 102, where the English authorities are reviewed. The British statute removing the objection had been repealed in New York along with other British statutes in 1789. It was re-enacted in the Revised Statutes, going into effect in 1830. Probably those states which do not authorize a descent passing through an alien would act upon the British statute 11 & 12 Wm. III. c. 6. Where authority is given to inherit through an alien ancestor, he must be dead. A., a citizen, leaves an alien brother, B., who has a citizen son, C. He also leaves an uncle, D., a citizen. D. will inherit, not C. McLean v. Swanton, 13 N. Y. 535. The contrary, however, was decided in Virginia in Jackson v. Sanders, 2 Leigh (Va.) 109 (now become unimportant in that state, through the sweeping act of 1873). Connecticut does not recognize the common-law rule against deriving descent through an alien. Campbell's Appeal, 64 Conn. 277, 29 Atl. 494.

[262] McGregor v. Comstock, 3 N. Y. 408, and authorities quoted in Levy v. M'Cartee, supra.

nations, in which the citizens or subjects of each are enabled to inherit real estate in the other, and by the statutes which confer citizenship upon the wife and minor children of every American citizen, who has at any time resided in the United States.

I. The following history of the law of Kentucky on descent to and from aliens, reproduced from the writer's Kentucky Jurisprudence, is useful to illustrate the course of state legislation: "As to aliens, the common law, having been modified in 1796 so as to permit the title to pass from citzen to citizen through an alien, was further relaxed in 1800 so as to permit aliens who have lived in the state two years thereafter to pass or take lands by descent. This was re-enacted by the Revised Statutes (1802). An act of March, 1861, removed the disability to inherit or transmit lands entirely. An act of March, 1867, restored the older law, so modified as to make a 'declaration of intention' the test, instead of the two-years residence. This was re-enacted by the General Statutes (1873). But an act of February 23, 1874, removes the disability in favor of those aliens whose home country allows citizens of Kentucky the right to transmit and inherit lands within its own borders. This takes in all subjects of Great Britain." [263] It may be safely stated that the old rule, by which a citizen cannot take by descent from a citizen through an alien, is no longer in force anywhere within the American Union. But this means merely that a grandson or nephew who is a citizen may, if the next heir, inherit, though his father or mother, who died before the intestate, had been an alien; not that such grandson or nephew can inherit, though his father or mother, an alien, nearer to the intestate than he, be alive at the intestate's death.[264]

In the following states it seems that aliens are put on the footing of citizens, as to the transmission and inheritance of land: Maine, Indiana, Michigan, Wisconsin, Iowa, Minnesota, Maryland, Virginia, West Virginia, Georgia, North Carolina, Tennessee, Missouri, Arkansas, Oregon, Nevada (except as to subjects of China), Colorado, Washington, the Dakotas, Idaho, South Carolina, Alabama, Mis-

[263] "Kentucky Jurisprudence," by the author, p. 191.

[264] De Geoffroy v. Riggs, 18 D. C. 331. But in Spratt v. Spratt, 1 Pet. 343, lands acquired by the intestate while still an alien were held to be included.

sissippi, Florida, New Mexico, Arizona, and, for all practical purposes, Montana;[265] and very nearly so in California.[266]

Maryland, by an old act, which is still in force in the District of Columbia, did, and Nebraska, perhaps by a slip of the lawmaker, does yet, allow nonresident aliens to take by descent from aliens, while the same right is not vouchsafed to them over the succession from citizens. It was held in a late case in the District that the statute is not to be extended by a reasoning a fortiori to the latter case. However, resident aliens are not now subjected in either place to any disqualification.[267] In Delaware only resident aliens who have made their "declaration of intention" are relieved from the disability of transmitting or taking.[268]

Connecticut relieves "any alien resident" of the United States, and any citizen of France, as long as France accords the same right to American citizens, so they may transmit and inherit like born citizens, but it seems that only the widow or lineal descendants of an

[265] Maine, c. 73, § 2; Massachusetts, c. 126, § 1; Rhode Island, c. 172, § 6; Pennsylvania, "Aliens," §§ 10, 11, 15; Ohio, § 4173; Indiana, § 2967 (Act 1885); Illinois, c. 6, §§ 1, 2, modified in 1887 (see below); Michigan, § 5775; Wisconsin, § 2200; Iowa, § 1908; Minnesota, c. 75, § 41; North Carolina, § 7; Tennessee, §§ 2804–2807 (taken from an act of 1873); Missouri, §§ 342, 343; Arkansas, § 233; Oregon, §§ 2988, 2989; Nevada, §§ 2655, 2656; Colorado, § 61; Washington, except as to Chinese, §§ 2955, 2956; Dakota, Civ. Code, § 170; South Carolina, §§ 1768, 1847; Alabama, § 2860; Mississippi (only as to resident aliens), § 2439; Florida, c. 92, §§ 7, 14; New Mexico, § 2746; Arizona, § 1472; New Jersey, Revision 1877, p. 6, Act 1846 (excepting, as do some of the other states, alien enemies); Virginia act of 1873, made section 43 in Code 1887, very sweeping (see Hauenstein v. Lynham, 100 U. S. 483); West Virginia, c. 70, §§ 1, 2; Maryland, c. 45, § 8; Georgia, § 1661; In Montana, Prob. Code, § 553; and Idaho, Rev. St. § 5715 (a nonresident alien heir must "appear" and claim within five years).

[266] The constitution of California guaranties to resident aliens the same rights of property as to citizens. The Civil Code (sections 671 and 672) gives to nonresident aliens five years after the decedent's death to "appear and claim," which law is in accord with the constitution. State v. Smith, 70 Cal. 153, 12 Pac. 121.

[267] Nebraska, §§ 4396–4399. See Comp. St. 1881, c. 73, § 54. On the Maryland act of 1791, see Geoffroy v. Riggs, 18 D. C. 331.

[268] Delaware, c. 81, § 1.

alien are capacitated to take as dowress, or as heirs at law.[269]

In Kansas the constitution, as amended in 1888, seems to contemplate that, until laws are enacted on the subject, aliens will have the same property rights as citizens, and no laws disabling them from taking or transmitting lands have been passed.[270]

The Civil Code of Louisiana does not disqualify aliens, and, as it has no background of common law, there is no distinction in property rights between aliens and citizens. It would have been the same in Texas, under the Spanish law, but for a Mexican decree of 1828 which prohibited the ownership of land by aliens in the projected colony in Texas. Until the republic, in 1840, adopted new laws, many owners of large tracts died, leaving kindred in the United States; and cases arise yet, from time to time, in which the incapacity of these "alien" heirs to take by succession arises. At present an alien resident who has "declared his intention," and the subject of any country which allows inheritance to American citizens, has the right to transmit and inherit lands in Texas.[271]

In New York there were a number of retrospective acts, down to 1826, releasing the state's title by escheat, and again an act of 1843 in favor of naturalized citizens to whom land had come by descent or devise before their naturalization, reserving all vested rights, and a similar act for resident aliens in 1845. Among permanent statutes came first one of 1825, putting a resident alien who had made his "deposition" or "declaration," for six years thereafter, on the footing of citizens.[272] Then came the Revised Statutes, allowing descent through an alien. The act of 1845 enables the alien or other heirs of an alien resident to take the descended lands, on certain terms, which law was in 1874 extended to resident alien heirs of citizens. Finally, under a statute of 1889, the children and descendants of a woman born in the United States may take and hold real estate in New York, notwithstanding her marriage and residence in a foreign

269 Connecticut, Gen. St. 1888, §§ 15–17.

270 Kansas, Gen. St. 1889, § 99.

271 Middleton v. McGrew, 23 How. 45 (alien could not inherit in 1835); Hardy v. De Leon, 5 Tex. 211 (nearest citizen takes).

272 Construed in Kennedy v. Wood, 20 Wend. 230; Wright v. Saddler, 20 N. Y. 320. The common law is left in force, except where the act applies.

country. But aliens residing outside of the United States were still incapable of inheriting till they were allowed, by an act of 1893, to inherit from citizens, and to transmit the inheritance.[273]

In New Hampshire the statute, until 1891, only released the rights of the state where the title had vested in an alien, but did not prevent the inheritance from passing "around him" to the next heir after the alien; but now it puts an "alien resident" in this state on the same footing with the citizen, as to taking and transmitting by descent.[274]

Only Vermont has enacted no statute on the subject of aliens,[275] and this for the singular reason that escheat of the land of aliens, and the want of "heritable blood," has appeared to the judicial mind of that state as an incident of feudalism, and out of place in a state in which all titles to land are allodial. Though the decisions of the supreme court do not cover all the points, the universal practice of the state does. It puts citizens and aliens on the same level, as to the descent of lands.[276]

The statutes of the United States regulate the rights of aliens in the District of Columbia, and, to some extent, in the territories. The object of these laws, enacted in 1887, was to prevent the holding of large bodies of land by nonresident foreigners, or by corporations or syndicates made up in foreign countries. They therefore, in terms, exclude from their prohibition the acquisition by aliens of land by descent, by devise, or in the course of justice, when it is bought in good faith in satisfaction of a debt. But this exception does not repeal the old common-law disability, where it still exists, as in the District of Columbia, under the old laws of Maryland there in force.

[273] Goodrich v. Russell, 42 N. Y. 177. Compare remark above on statutes of Nebraska and Maryland. In many other states the progress from the forbidding policy of the common law, to a more or less liberal policy, or to full equality of citizens and aliens, has been thus taken, as here shown for Kentucky and for New York. The act of 1889 is chapter 42 of that year. And see Act March 9, 1893.

[274] New Hampshire, St. 1891, c. 137, § 16.

[275] The statute revision of 1880 is wholly silent on the subject.

[276] Gilman v. Thompson, 11 Vt. 643; State v. Boston, C. & M. R. Co., 25 Vt. 433; Lenehan v. Spaulding, 57 Vt. 115. Mr. H. A. Huse, of Montpelier, Vt., has kindly informed the writer as to the practice of the state and the opinion of its bar on the subject.

These allow one alien to inherit from another alien, but not from a citizen.[277]

The state of Illinois has also, in 1887, deprived nonresident aliens of the capacity to take, hold, transmit, or convey land. Hence, on the death of a citizen, some of whose heirs are nonresident aliens, the land goes to the other, or to the more remote heirs, as if the former had never existed.[278] The statutes of Wisconsin, Texas, and other western states and territories, directed against nonresident aliens, like the act of congress of 1887, make an exception in favor of acquisition by descent or devise, and need not be noticed further in this connection.[279] Similar is the Iowa act of 1888, amended by chapter 82 of the Acts of 1894, which directs that nonresident aliens shall not take lands, by descent or devise, in excess of 320 acres in the country, or of $10,000 in value in a city, unless they were at the date of the former act owned by an alien, or by a naturalized citizen.

II. The naturalization of aliens is regulated by title 3 of the Revised Statutes of the United States. One of the sections of this title (section 2172) directs that the children of persons who have been naturalized under any law of the United States, being under age at the time of the naturalization of their parents, shall, if dwelling within the United States, be considered citizens, "and the children of persons who now are, or have been citizens of the United States, shall though born out of the limits and jurisdiction of the United States be considered as citizens thereof." The latter clause is limited by the proviso in section 1993 containing the same law, with the substitution of "fathers" for "parents," and which says, "but the rights of citizenship shall not descend to children whose fathers never resided in the United States." Section 1994, which, together with section 1992, was first enacted in 1855, also naturalizes every "woman who

277 Acts Cong. 1887, p. 476, to be found in all Territorial Codes since published. For construction, see De Geoffroy v. Riggs, 18 D. C. 331.

278 Repealing an act of 1851, in favor of nonresident aliens, expressly, and thus replacing as to them the common law. Wunderle v. Wunderle, 144 Ill. 40, 33 N. E. 195. An act of 1891 again allows aliens to take land in Illinois by purchase.

279 Wisconsin, Acts 1887, c. 479; Washington, St. 1891, § 2955; Wyoming, Rev. St. § 2226; Idaho, Rev. St. § 5715; Mont. Comp. St. 1887, p. 400; Arizona, Rev. St. 1887, § 1472; Texas, Rev. St. 1893, arts. 9–15 (applies only to lands outside of cities, towns, or platted villages).

is now or may be married to a citizen of the United States," and who might herself be lawfully naturalized.

In a very late case the supreme court, in passing on the question whether the governor-elect of Nebraska was or was not a citizen of the United States, came very near deciding, if it did not actually decide, that the acts of congress which confer on residents of territories, who are of foreign birth, and have made their "declaration" under the naturalization laws, the right of suffrage, do thereby make such residents citizens for all purposes.[280]

III. The treaties between the United States and many foreign powers giving, by way of reciprocity, to the citizens or subjects of those powers the right to inherit real estate, are enforced in all the states as a fair exercise of the treaty-making power.[281] The oldest of these treaties was concluded with Prussia in 1785. The so-called "Jay Treaty," concluded in 1794 with Great Britain, operated only in favor of the heirs of those who held lands at or before the time of the treaty, and it is almost impossible for cases to arise under it. The treaty concluded with France in 1800 expired by its own terms in eight years from its ratification, and no new treaties have been concluded with either Great Britain or France regarding the succession to lands. The fullest and most effective expression is given in the following words, found in a treaty with Prussia: "And where on the death of any person holding real estate, it would by the laws of the land descend on a citizen or subject of the other were he not disqualified by alienage, such subject shall be allowed a reasonable time to sell the same, and to withdraw the proceeds without molestation, and

[280] Boyd v. Nebraska, 143 U. S. 135, 12 Sup. Ct. 375. Field dissented on the ground of want of jurisdiction. Three other judges would not assent to place Boyd's citizenship on the grounds above stated.

[281] Chirac v. Chirac, 2 Wheat. 269; Hauenstein v. Lynham, 100 U. S. 483 (in which the effect of the Swiss treaty of 1850 is fully explained); Schultze v. Schultze, 144 Ill. 290, 33 N. E. 201; Prevost v. Greneaux, 19 How. 1 (by inference). This case refers to a treaty concluded with France in 1853, which gives the right of succession to Frenchmen on equal terms in all states, the laws of which permit it; that is, it forbids as against them discriminating succession taxes. See, also, Yeaker's Heirs v. Yeaker's Heirs, 4 Metc. (Ky.) 33; Jost v. Jost, 1 Mackey (D. C.) 487 (where it appears that the treaty of 1850 with Switzerland applied only to the states, and not to the District or to the territories).

exempt from all rights of detraction on the part of the government of the respective states." Very few of the treaties are as explicit as this. Some of them allow two years' or three years' time for sale and removal.

The following is believed to be a complete list of the treaties now in force which grant reciprocity as to the right of taking lands by descent, and, a fortiori, by devise, together with the dates of the treaties: Austria, 1848; Bavaria, 1845; Hesse-Cassel (now part of Prussia), 1844; Nassau (now part of Prussia), 1846; Wurttemberg, 1844; Brazil, 1828; Chili, 1832; Ecuador, 1839; Guatemala, 1849; Hanseatic Republics (i. e. Hamburg, Bremen, and Lübeck), 1827; Peru, 1851; Peru-Bolivia, 1847; Bolivia, 1858; New Granada, 1848; Venezuela, 1836; Brunswick, 1854;[282] Prussia, 1785, 1799, 1828; Russia, 1832; San Salvador, 1850; Swiss Confederation, 1850; Sardinia, 1838; Spain, 1795; Hanover, 1840; Two Sicilies (now part of Italy), 1855; Italy, 1871 (by a most favored nation clause).[283] It will be noticed that there is no treaty on this subject between the United States and the German empire, nor with the North German Confederation, which preceded it. Hence the subjects of those German states which made no treaties about the right of succession, such as Baden, are under the disabilities of alienage, while the subjects of those states with whom such treaties subsist have not lost them by the entrance of their states into the German empire.[284]

Where the treaty gives to the alien heir a certain length of time in which he may sell the inherited lands and remove the proceeds, he obtains thereby a fee in the land, which is defeated by a failure to sell within the prescribed time. It would seem that, if the descent is thus once cast on the alien, the more remote home heir could no longer come in, but the land must escheat. While the fee is in

[282] The treaty with Brunswick and some others use the inexact words "on whom the land should descend, and who could not retain it," when under the common law the descent does not take place at all. But, as a strict construction would nullify the treaty, it will be held to mean that the land shall descend on the Brunswicker, notwithstanding his alienage.

[283] The "second volume of the Revised Statutes of the United States" contains all the treaties ratified and proclaimed at the date of publication. The later ones will be found in the Statutes at Large for the year.

[284] Wunderle v. Wunderle, 144 Ill. 40, 33 N. E. 195; Schultze v. Schultze, supra.

the alien, i. e. before the expiration of the limited time, he may claim a partition.[285] The supreme court of the United States has held that these treaties must be liberally construed, so as to carry out their purpose, and has allowed the land of a resident alien to go to his heirs abroad, although, in terms, the treaty took care only of the alien heir, and said nothing as to imparting inheritable blood to the alien ancestor. It treated the time in which the alien must sell as a sort of statute of limitations.[286]

§ 44. Presumption of Death.

Often the fact of the last owner's death, though highly probable, is in doubt, or cannot be proved; a presumption must take the place of proof. In other cases it is known that the former owner of land, and one or more of his heirs, have died, but the order of time in which they have departed is unknown, and a presumption as to this order of time would be helpful; again, where persons have died at a great distance of time, and at some unknown or far-off place, it is not known whether they have left issue.

I. If a person has left his home for a foreign country, and has not been heard of for seven years, a presumption arises, in analogy to the statute of bigamy of James I., that he is dead. Strictly speaking, he must have gone either to parts unknown, or for some temporary purpose; for, if he had emigrated to some known place abroad, he would thereby establish a new home, at which inquiries for him should be made. In the "leading case" of Nepean v. Doe, in the exchequer chamber, 7 Wm. IV., it was held that the absence and lack of news for seven years only proves that a person is dead, but not when he died; certainly not that he died on the last day. Indeed, death on the last day of the period is least to be presumed, for it would offer no reason for the long preceding lack of news.[287] How-

[285] Kull v. Kull, 37 Hun (N. Y.) 476; Schultze v. Schultze, supra.

[286] Hauenstein v. Lynham, 100 U. S. 483. It was incidentally held in this case that a born foreigner is presumed to remain an alien till the contrary is proved.

[287] 2 Smith's Lead. Cas. 306; 2 Mees. & W. 910. The older English cases on the general doctrine are Doe v. Jesson, 6 East, 85; Hopewell v. De Pinna, 2 Camp. 113; Rex v. Inhabitants of Twyning, 2 Barn. & Ald. 386.

ever, the supreme courts of Illinois and Pennsylvania, and Mr. Justice McLean, on the circuit, have held that the presumption is in favor of death at the end of the seven years.[288] On the other hand, the principle of the English case has been adopted in North Carolina and in Mississippi (where the period is reduced to five years). Partly on the ground that innocence is to be presumed, it was held, after the lapse of many years, that where a woman had married five or six years after the disappearance of her former husband, his previous death might be presumed, so as to validate the second marriage, and give her her dower.[289] The distinction that the departure should be for a temporary purpose seems to have been ignored in the decisions and statutes of several states. And in some states the authorities are not definite as to whether or not any particular time of death is to be presumed; indeed, in most cases it is immaterial at what time within the seven years death took place. In this general way, Maine, Massachusetts, New Hampshire, and New Jersey also recognize the seven-years rule.[290] To leave the boundaries of the state would, under the American view, be equivalent to "leaving the realm" in England; it has never been deemed necessary that the absent man should have gone outside of the United States. It will in many cases be difficult to prove that the disappearing party has actually left the state of his abode, and still more difficult to prove that he stayed away for seven years; and an insistence of the court on such proof might defeat the presumption altogether. This was done in an early Kentucky case,[291] even under a statute. And a much later case in the same state raises other difficulties, still more destructive: Firstly, if a man has

[288] Whiting v. Nicholl, 46 Ill. 230; Burr v. Sim, 4 Whart. 150 (Ashbury v. Sanders, 8 Cal. 62, being rather equivocal); Gilleland v. Martin, 3 McLean, 490, Fed. Cas. No. 5,433.

[289] Spencer v. Roper, 13 Ired. (N. C.) 333; Spears v. Burton, 31 Miss. 547; Chapman v. Cooper, 5 Rich. Law, 459.

[290] Smith v. Knowlton, 11 N. H. 191; Brown v. Jewett, 18 N. H. 230 (requires proof that friend and kindred have not heard of the absentee); Winship v. Conner, 42 N. H. 341; Primm v. Stewart, 7 Tex. 178 (presumption aided by rumors of death); Cofer v. Thurmond, 1 Ga. 538; Stinchfield v. Emerson, 52 Me. 465; Newman v. Jenkins, 10 Pick. 515; Winship v. Conner, 42 N. H. 341; Osborn v. Allen, 26 N. J. Law, 388.

[291] Spurr v. Trimble, 1 A. K. Marsh. 278 (notwithstanding act of 1798, which is similar to new statute quoted below).

moved from his former abode in Kentucky to Missouri or to Utah, with his family, and made his home in the latter state or territory, why should news from him come to Kentucky? News should be inquired after at his new home. Secondly. You want to take an inheritance or devise limited to A. B. by reason of his presumed death. How do you know but that he left children, or if he had children when he moved from his first home, is it not highly improbable that all of these should have died also? [292] Thus qualified, the seven-years rule can no longer serve to hasten the distribution of estates.

A few of the states have adopted statutes on the subject, which are placed generally under the head of "Evidence," subhead "Presumption." So in New York: "If any person upon whose life any estate in lands shall depend, shall remain beyond sea, or shall absent himself in this state or elsewhere for seven years together, such person shall be accounted dead in any actions concerning such lands, unless sufficient proof be made of the life of such party." The New Jersey statute is in nearly the same words.[293] The statutes of Virginia, West Virginia, and Kentucky speak of "any person who has resided in this state," and goes from it, and does not return in seven years (Arkansas has it "five years"), unless proof is made. Under all these laws, it would seem that hearing from the absent man is not enough; his being alive, when it comes into question, must be proved as

[292] Gray v. McDowell, 6 Bush, 475. This is, however, in agreement with the older cases in England and Massachusetts (Newman v. Jenkins, 10 Pick. 515), which raise the presumption of death only when the party has left home for a temporary purpose. As to second point, see, also, Faulkner's Adm'r v. Williman (Ky.) 16 S. W. 352 (not otherwise reported). In Henderson v. Bonar (Ky.) 11 S. W. 809, it was said that, after seven years' absence of the father, his son may bring ejectment. It might be objected, non constat, but that he begot other children.

[293] New York, Rev. St. pt. 2, c. 1, tit. 5, § 6; also, Code Civ. Proc. § 841; New Jersey, Revision 1877, p. 294, § 4; Virginia, c. 172, § 47; West Virginia, c. 130, § 44; Kentucky, c. 37, § 16; Arkansas, § 2850. Under the New Jersey statutes, it seems that the party seeking to prove death has only to prove the seven years' absence, and the burden is then thrown on the other side to show that the absent man has been heard from. Osborn v. Allen, 26 N. J. Law, 388; Wambaugh v. Schenck, 2 N. J. Law, 229; Smith v. Smith's Ex'rs, 5 N. J. Eq. 484.

a fact.[294] The laws of Indiana and Louisiana which provide for seizing and administering the absentee's estate after five or seven years hardly belong here.[295] The California statute presumes "that a person not heard from in seven years is dead," saying nothing of absence; while the Dakota Code says expressly, "Absents himself, in the territory or elsewhere." The statute of Vermont requires him to be absent and not heard from for fifteen years.[296]

A subordinate court of New York has refused to presume death after a seven-years disappearance, where the missed party had strong motives for concealment.[297]

Where property has been adjudged to any one by reason of the presumption arising from the seven-years disappearance, it must, of course, be restored, if the absentee turns out to be alive; and many of the statutes have a clause to that effect.

In those states in which lands go, along with the personal effects, to the executor or administrator, the grant of letters would of itself establish the death of the ancestor, until set aside; for it does so at common law as to the personalty.[298] A shorter time of absence than seven years may be taken as proof of death, when coupled with circumstances of great impending danger; but going to sea alone is not such a case of danger.[299] The presumption that a person once known to be living is still alive, is not overcome by that of unreasonably high old age till he would have attained the age of 100 years.[300]

II. Where several persons die in the same calamity, such as battle, fire, or shipwreck, the transmission of a landed estate will often depend on the order in which their deaths take place. In the absence of all proof, rules, depending on age and sex, for determining this

294 Foulks v. Rhea, 7 Bush (Ky.) 568. Under the English rule, receiving letters from him is a sufficient rebuttal. See Hopewell v. De Pinna, supra.

295 Indiana, § 2232; Louisiana, arts. 58, 59. But see Indiana, act 1883, c. 137.

296 California, Code Civ. Proc. § 1963, subsec. 26; Dakota, Code Proc. § 498; Vermont, Rev. L. §§ 2077, 2245.

297 In re Miller's Estate (Surr.) 9 N. Y. Supp. 639.

298 Newman v. Jenkins, 10 Pick. 515.

299 Burr v. Sim, ubi supra.

300 Emerson v. White, 29 N. H. 482 (arguendo). But a much shorter time may be persuasive under circumstances. Ross v. Clore, 3 Dana (Ky.) 189, where a widow, not having claimed dower for 36 years, was presumed to be dead.

order, have been laid down by the civil law, which are copied into the Code Napoleon.[301] These rules are not recognized by the English courts; they treat the question as one of fact only, to be determined upon all the circumstances, and, if no inference can be drawn from these circumstances to show who died first, the party who seeks to recover on the ground that some one among the sufferers in the disaster survived some other one must fail for want of proof. In other words, in the absence of both proof and presumption, it is to be assumed that all have died at the same moment. Thus, if A. and his only son, B., perish together, the former owning land, in the absence of proof, B.'s mother will not take by inheritance from her son, but the land will go to A.'s brothers, while B.'s land might pass to his mother; for A. had no son surviving him, and B. no father.[302]

American courts follow the English decisions in ignoring the presumptions set up in the Roman and French law; each case must stand on its own facts.[303] But some states have enacted the French rules, or rules nearly like them, by statute,—Louisiana, of course, also California and Oregon: (1) Of two persons under 15 years of age, the older is deemed to have survived; (2) if both are over 60 the younger; (3) if one is under 15, the other over 60, the former; (4) both between 15 and 60, the male; and, if both of the same sex, the older; (5) one between those ages, the other below or above, the former is presumed to be the survivor. So it is in California and Oregon, while in Louisiana, more in accordance with the French model, the first three rules are the same as above; the fifth is not stated, but only implied; and, among those between 15 and 60 years of age, the male is deemed the survivor only if the difference of age is less than a year; otherwise, survivorship is "in the order of nature.

[301] Civ. Code, arts. 721, 722.

[302] Wing v. Angrave, 8 H. L. 183. The Roman and French rules are repudiated. As long as the possessio fratris governed descents of lands in England, the question could arise only as to personalty. The rule is repudiated in this country as foreign to the common law in Smith v. Croom, 7 Fla. 81; Coye v. Leach, 7 Metc. (Mass.) 371.

[303] Newell v. Nichols, 75 N. Y. 78; Estate of Ehle, 73 Wis. 445, 41 N. W. 627; Williams v. Williams, 63 Wis. 58, 23 N. W. 110. A distribution is figured out in Russell v. Hallett, 23 Kan. 276, under the intricate descent law of that state.

Thus the younger must be presumed to have survived the elder." [304]

III. When a person has so long been unheard of that he may be set down as dead, can we, in the absence of all evidence, assume that he died without issue? Lord Tenterden thought we might, as two affirmatives, marriage and the birth of a child, must be shown by the opposite side.[305] But many of the American cases, supported by good English authority, take the ground that he who seeks to establish his heirship takes upon himself the burden of showing the absence of all nearer heirs and all coheirs; though very slight proof may often suffice.[306]

§ 45. Escheat.

Though Blackstone ranges Title by Escheat under the head of Purchase, not of Descent, it is more convenient to treat the law of escheat in connection with that of descent. For the state takes the land of the intestate, when he leaves no heirs, and, under most of the statutes, the state actually takes as heir,[307] either because he

[304] California, Code Civ. Proc. § 1963, subsec. 40; Oregon, § 776, subsec. 41; Louisiana, Civ. Code, arts. 932, 933.

[305] Doe v. Wolley, 8 Barn. & C. 22, criticised in the next following case as being in its reasoning unsupported, though allowed to be correct on the facts.

[306] Emerson v. White, 29 N. H. 482. There is no presumption either way. The party interested in showing failure of issue must show it as a link in his claim of title. Gray v. McDowell, supra, note 292, agrees herewith. But King v. Fowler, 11 Pick. 302, followed in 1892 by Butrick v. Tilton, 155 Mass. 461, 29 N. E. 1088, tends the other way; i. e. the lack of proof or presumption results in concluding lack of issue, as in Doe v. Wolley. But in these cases the decedents had not been heard from for a long time,—40 to 70 years. The leading case for throwing the burden on the claimant for want of issue is Richards v. Richards, 15 East, 294, note, quoted in Adams Ej., 1 Greenl. Ev., 2 Phil. Ev., and 2 Steph. N. P. But this proof may be mere hearsay or reputation. Doe v. Griffin, 15 East, 293. See, also, Crouch v. Eveleth, 15 Mass. 305; Clark v. Trinity Church, 5 Watts & S. 266; and McComb v. Wright, 5 Johns. Ch. 263.

[307] Very many of the states have set the escheat to the commonwealth down as the last among the canons of descent; e. g. in Minnesota, the tenth canon of chapter 46, § 3, reads thus: "If the intestate leaves no husband or wife or kindred, his or her estate shall escheat to the state." Similar is canon 12 of section 1124 of the Nebraska Consolidated Statutes; the eighth canon in Michigan; Montana Prob. Prac. Act, § 535, which follows immediately on the canons of descent, etc. In other Codes escheat is put on the ground that

has none in any sense, as a bastard dying without issue in those states which have left the harsh rule of the common law unchanged; or because he has no known heirs; or because, being an alien, he is incapable of transmitting an inheritance; or because all the kindred on whom the law would cast the inheritance are aliens, and thus incapable of taking by descent. The liberal laws which in many states give heritable blood to bastards, and the still greater liberality with which most of our states have abolished all or nearly all the disabilities of alienage, aided as these are by public treaties, and, lastly, the inclusion of the surviving wife or husband among those capable of taking by descent, have made escheats very rare, and this whole branch of learning rather unimportant.

Treating escheat as a branch of the law of succession is in accordance with the civil law, under which the fiscus (i. e. the imperial treasury) became the heir in default of all others; and so in Louisiana, as, under the French "Code Civil," the succession by the state is placed among "irregular successions," along with those accruing for the want of blood kindred to the surviving husband or wife, or to natural children.[308]

Under the common law, the escheat of lands flows from the lapse of the fief which the tenant or vassal has received from his immediate lord, "to him, his heirs and assigns." When he dies without heir or devisee, the tenancy is at an end, just as a tenancy for life comes to an end with the death of the tenant, with or without heirs. The fief returns to the immediate lord; and, if the land be holden of the king, it reverts to him. Thus the escheat to the crown is seigniorial, not a part of the prerogative. Hence, an escheat of land for want of transmissible blood, or for want of heirs, makes an exception to the general rule that the crown can only take by matter of record; but the escheated land vests in the crown, or, in America, in the state, "without office found," or without inquest of office; that is, no jury need be impaneled to find the facts on which the title of the crown or of the state rests.[309]

Since the abrogation of the proprietary governments, the feudal

a thing which has no owner escheats. Thus, in Connecticut, Gen. St. §§ 647, 648.

[308] Corp. Jur. Cod. Const. 10, § 10; French Civ. Code, art. 723.

[309] 4 Kent, Comm. p. 424, quoting 4 Co. Inst. 58; 2 Com. Dig. tit. "Pre-

relation no longer exists in the United States between persons; hence, ownerless land can only escheat to the commonwealth. The laws passed by many states at the time of the Revolution abolish in express words all feudal tenures; but the ultimate rights of the commonwealth, escheat and eminent domain, are always reserved, though land is to be holden allodially in all cases.[310] And where the commonwealth is not in modern statutes named as an heir in the canons of descent, there is generally a provision that the lands (or the estates) of those who die without making a will and without heirs, shall "vest in the commonwealth without office found." [311] Some of the states do, however, empower some court to make an inquiry (not necessarily with the aid of jury) when no heir comes forward to claim the estate; and the estate is adjudged to the state after such inquiry. In Louisiana, too, the succession by the state, being "irregular," must be authorized by the decree of a court.[312]

The escheating of land which an alien has lawfully acquired on the ground that, as an alien, he cannot hold it, must be effected by an inquest of office. But in the very few states, and in the very few cases, in which land might be escheated on the ground of alienage, hardly any state in the Union in our days enforces such an odious right, except perhaps under laws lately passed by some of the far western states and by congress for the territories, with the view of preventing accumulation of large tracts in the hands of foreign capitalists and corporations.[313]

In a few states the legislature has by general law conferred all estates escheated or to be escheated on some one of the political

rogative," D, 70. And the Revised Statutes of New York, accordingly, authorize the attorney general to sue any occupant of the land at once for possession.

[310] Rev. St. N. Y. pt. 2, c. 1, tit. 1, §§ 1–3.

[311] E. g. in Kentucky, an act of April 30, 1884, made section 1 of chapter 36 of the General Statutes.

[312] Vermont, Rev. L. 1880, §§ 2235, 2238, dating back to 1797. The proceeding is before the probate court, and is called an "inquisition," but a jury is not provided for in plain words. So, in Connecticut, under section 647, the "probate judges shall make inquiry." Nothing is said of a jury. See, also, Civil Code of Louisiana. This will be referred to again in a section on "Office Found."

[313] See section 43, supra, notes 277 and 279, for these laws. No reported cases can be found in which these statutes have been enforced.

subdivisions,—in Vermont and Rhode Island, on the town in which the land lies; in Illinois and Washington, on the county in which it lies; in Kansas, on the county in which administration on the estate of the decedent is granted; in Kentucky, as to all estates in Louisville, to the school board of that city.[314]

When the commonwealth, or a purchaser from the commonwealth, seeks to recover land as escheated for failure of heirs, she or he has the burden of satisfying the jury that the decedent died without heirs; and proof that a man's intimate acquaintances for several years never heard him speak of his family, parents, wife, or children is prima facie evidence that he had no heirs, if his place of birth is unknown, and there is no clue to better evidence. It has even been held that when, after advertisement and inquiry, nobody claims the premises as heirs of the person last seised, this is enough to put the other side on their defense.[315]

At common law the lord took by escheat, for want of heirs, the land of the owner, his "tenant," dying without heirs, free from any trust or equity that might have been impressed upon it. On the other hand, he was not entitled to succeed to any equitable fee, the owner of which left no heirs, for the simple reason that an equity was not held "of a lord," and, consequently, in such a case the holder of the legal title would own the land thereafter beneficially, and free from all trusts or equities. In America, however, escheats are not seigniorial, but a flower of sovereignty, and neither of the feudal rules is applicable.[316] The escheated title remains always, either by statute or by the more liberal construction of the courts, subject, in the hands of the commonwealth, to all trusts, equities, and incumbrances which rested on it while in the hands of the last owner, while, on the other hand, equities of all kinds will now, for lack of heirs, go to the commonwealth in her capacity as ultima haeres.[317]

[314] Vermont, Rev. L., ubi supra; Rhode Island, c. 188.

[315] People v. Etz, 5 Cow. 314; People v. Fulton Fire Ins. Co., 25 Wend. 205.

[316] Burgess v. Wheate, 1 Eden, 177; 4 Kent, Comm. 425. And see case quoted in next note.

[317] Johnston v. Spicer, 107 N. Y. 185, 197, 13 N. E. 753; Rev. St. N. Y. pt. 2, c. 1, tit. 1, art. 1, § 1 ("subject to the same trusts, incumbrances, charges, rents, services," etc., with power in the chancery court to order the attorney general to make conveyances for carrying out the equities). The Kentucky case of Com. v. Blanton's Ex'rs, 2 B. Mon. 393, enforcing the escheat of personalty, is somewhat in point.

CHAPTER V.

TITLE BY GRANT.

§ 46. The Deed.

The common-law method of transferring a freehold in land by livery of seisin was never in vogue in any of the American colonies. The statute of uses was part of the law which the English settlers brought to this country; and deeds which take effect under it, by annexing the possession to the use: "bargain and sale," "lease and release" (that is, a lease for a year and a release of the reversion), and a covenant to stand seised, where blood, or marriage, and not money or money's worth, is the consideration, were from the first recognized modes of transfer. In fact, simple grants were used in the New England states, where the nice distinctions of the common law between things lying in grant and things lying in livery were at first not much understood. As the "lease and release" was invented in England only in order to escape the enrollment of plain deeds of bargain and sale, required by the statute of uses, and as the American colonists at a very early day introduced the regis-

tering or recording of all deeds for the conveyance of land, this cumbrous fiction was but little used, and the deed of bargain and sale became the common instrument for the sale of land, whether in fee or for life; and, by the insertion of a small and only nominal consideration, also for gifts and family settlement. Early statutes in Virginia and elsewhere declared a "release" to be good though not preceded by a lease.[1]

While the statute of uses (27 Hen. VIII.) saved the time and trouble of giving and receiving livery of seisin to those who would rather deliver or take a deed, it left the ancient way of transferring the fee or other freehold in land, without any writing, in full effect till "the statute for the prevention of frauds and perjuries" was enacted in 29 Car. II. One section of this great law directs that a conveyance of land, or of a greater interest therein than a lease for three years, made merely by livery of seisin or by parol, shall confer no greater interest than a lease at will. Hence, the conveyance of land by one of the forms of deed growing out of the statute of uses became compulsory. In the American colonies, the statute of frauds was either considered as binding, or it was re-enacted, either in whole or in part; and thus at an early day a civilized system of land titles, based upon written and publicly recorded deeds, was fully established. Fines and recoveries, though not frequent, were known in the colonies, being used to bar entails or to extinguish the title of married women. Indeed, the privy examination of married women, as it is now used in many of the states, grew out of the examination which a married woman had to undergo before a judge under the very old English statute of fines. These examinations, in fact all the acknowledgments of deeds, were in colonial times, and for some time after the Revolution, taken in open court; the examination before a clerk, recorder, or other magistrate is a later relaxation, which has indeed made the ceremony quite unmeaning, and has in many places led to its abolition.[2]

As, under the great principle enounced in Roe v. Tranmarr, every deed will take effect, irrespective of its wording, in the way in which under the law it may have effect ("ut res magis valeat quam pereat"),

[1] See 4 Kent, Comm. p. 494, for history of "Lease & Release." It is seen there how in New York the enrollment came to be dispensed with, and the simple bargain and sale, unrecorded, became binding between the parties.

[2] As in Indiana, where since 1853 the "privy examination" is unknown.

it can hardly have ever happened that a deed showing clearly the intention to pass the maker's estate in land should not have produced that result.[3] As to an estate in reversion or remainder, a deed of grant, operating as a surrender, if to the reversioner, or as a release, if from him to the party in possession, would have been good even at common law. But, to avoid all doubt, a number of statutes have been passed from time to time, by many of the state legislatures, under which words of "grant" or of "conveyance," or any words indicating an intention to pass the title, are made effective. The Revised Statutes of New York going into effect in 1830, give force to the word "grant"; Virginia has borrowed the same word in the Code of 1873, professedly from an act of 8 & 9 Vict.; in Kentucky, since the statutes of 1852, "to convey" is made effective, which, not being a technical common-law term, may be supplied by any word of like meaning, and at the same time the forms used under the statute of uses are declared to be still good; in Georgia the act of 1785 and subsequent laws require "a deed," and this has been construed to comprise any deed indicating the intention to convey; and so it is in Iowa under the Revision of 1857.[4] Many of the states, e. g. Virginia and Tennessee, give short forms of deeds which shall be sufficient to pass all the grantor's title in the premises; the Tennessee form begins with the words "I convey," while in others the effective words are "I grant," or "I bargain and sell."[5] The statutes of many

[3] Willes, 632. Best known from its insertion in Smith's Leading Cases.

[4] New York, Rev. St. pt. 2, c. 1, tit. 5, § 1; Virginia, Code, § 2439; Kentucky, Gen. St. c. 24, § 3; Georgia, Code 1882, § 2692. The statutes of New York and Kentucky recognize deeds of bargain and sale or lease and release as valid kinds of grants or conveyances.

[5] So, also, in Indiana, Illinois, Michigan, Wisconsin, Iowa, Maryland, West Virginia, Arkansas, Texas, California, the Dakotas, South Carolina, Mississippi. Some of these statutes declare that the form given is not exclusive of the older forms, but this must be understood as to all of them. The author avails himself of the collection of these forms found in Stim. Am. St. Law, art. 148; leaving out, however, those for Texas, Arkansas, and Missouri, and that for South Carolina, as being too long, and hardly any saving on modern so-called "common-law forms":

(1) In consideration of ——, I convey [and warrant] to —— the land described as ——. Witness my signature, the —— day of ——, 18—.
(Mississippi, § 1231.)

(2) This deed, made the —— day of ——, in the year ——, between [J.

other states are silent as to the form of the conveyance, but simply say that a "deed" or a "conveyance" is to be executed, or how it is to be executed. This is so in Kansas, Minnesota, Delaware, Connecticut, and other states; and it may be boldly asserted that the meaning of such a clause is: "Whatever would in popular language pass for a 'deed' or a 'conveyance' of the land therein described, as distinguish-

S. and W. V.], witnesseth: That, in consideration of [one dollar], the said [J. S.] doth grant unto the said [W. V.] all [description of property]. Witness the following signature and seal.

(Maryland, art. 21, § 51; Virginia, § 2437; West Virginia, c. 72, § 1; Dakota, Civil Code, § 624.)

The Maryland form has the word "Test" at its end.

(3) For the consideration of —— dollars, I hereby convey to A. B. the following tract of land [description]; [and I warrant the title against all persons whomsoever].

(Iowa, § 1970.)

(4) J. S., of D., for and in consideration of $—— in hand paid, conveys [and warrants] to J. W., of V., the following described real estate (description), situated in the county of ——, in the state of Illinois.

Dated this —— day of ——. A. D. 18—.

J. S. (L. S.)

(Illinois, c. 30, § 9.)

(5) J. S. conveys (and warrants) to J. V. (description), for the sum of (consideration).

(Indiana, § 2927; Michigan, § 5728.)

(6) A. B., grantor, of —— county, Wisconsin, hereby quitclaims (conveys and warrants) to C. D., grantee, of —— county, Wisconsin, for the sum of —— dollars, the following tract of land in —— county (description). Witness the hand and seal of said grantor, the —— day of ——, 18—.

In the presence of

———— [Seal.]

———— [Seal.]

(Wisconsin, § 2208.)

(7) I hereby convey to A. B. the following tract of land (description) [and I warrant the title against all persons whomsoever].

(Tennessee, § 2820.)

(8) I, A. B., grant to C. D., all that real property situated in —— county, state of ——, bounded [or described] as follows (description). Witness my hand and seal, this —— day of ——, 18—. A. B. (L. S.)

(California, § 1092.)

Form where a married woman is a party:

This deed, made this —— day of ——, in the year ——, by us, —— and

ed from a contract to convey, will pass the title without livery of seisin or delivery of possession." [6]

But, in the absence of express words in the statute, one strict rule of the common law must be enforced; unless a deed conveying land has words of inheritance; i. e. unless the words, "and his heirs" are added after the name or designation of the grantee, or after the pronoun referring to him, he can take only an estate for life, even if the deed should indicate the intent of the maker to part with whatever estate he has.[7] This rule, having often worked mischief, has been abolished in most of the states. Virginia took the lead, in 1792; Kentucky came next, by act of December, 1796; New York followed in the Revised Statutes (1830); and thereafter many other states in quick succession, the statute in each case directing that a conveyance shall be always construed to convey the whole estate of the grantor, unless the contrary intention appears.[8] Yet no such statute has

———, his wife, witnesseth that, in consideration of ———. we, the said ——— and his wife, do grant unto ———.

Witness our hands and seals.

Test: A. B.

(Maryland, c. 21, § 52.)

It is useless to give here the statutory forms of states like South Carolina and Florida, which would be good as deeds of bargain and sale without the aid of any statute.

[6] The great majority of deeds in the states which have not adopted statutory forms contain the words "grant, bargain, and sell," or "bargain, sell, and convey," and state a money consideration, even when the deed is made from "love and affection" to a wife or child.

[7] 4 Kent, Comm. p. 6, quoting 1 Co. Litt. 87b, 100b; Tapner v. Merlott, Willes, 177; Vanhorn v. Harrison, 1 Dall. (Pa.) 137. Later cases are Sisson v. Donnelly, 36 N. J. Law, 432; Edwardsville R. Co. v. Sawyer, 92 Ill. 377. And in Sedgwick v. Laflin, 10 Allen, 430, even a mortgage made to the creditor, his successors and assigns, was held to expire with his death. In Cole v. Lake Co., 54 N. H. 242, the court, after a fierce onslaught on the feudal system, from which the rule came, holds that any other words indicating a fee simple may supply words of inheritance.

[8] New York, Rev. St. pt. 2, c. 1, tit. 5, § 1; Maryland, art. 21, § 51; Virginia, Code, c. 112, § 8; West Virginia, c. 72, § 8; North Carolina, § 1280; Georgia, Code, § 2248; Indiana, Rev. St. (as passed in 1852, in force 1853), § 2929; Illinois, c. 30, § 13; Michigan, § 5730; Wisconsin, § 2206; Kentucky, Gen. St. c. 63, art. 1, § 17; Tennessee, Code, § 2812; Iowa, Ann. St. § 1929 (word "heirs" unnecessary), and section 1930 (every deed conveys whole estate of

yet been enacted in any of the New England states nor in New Jersey, Delaware, South Carolina, Ohio, or Florida, though in most, perhaps in all, of these states, words of inheritance would not be required in a devise. A deed to a corporation aggregate needs no "words of inheritance," and even under the common-law rule they are effective, if placed anywhere in the deed where they clearly express the intent of the parties to convey a fee.[9]

The date inserted in a deed is no part thereof, unless it is referred to in the body; e. g. where a deed of mortgage provides that the debt secured by it shall be paid in a given time "from the date hereof." The date does not, but delivery, fixes the time at which the deed takes effect; and the date is only important as indicating the time when the delivery most probably took place.[10]

In many of the states the statute dispenses in express words with the attornment of tenants where the land is farmed out, which at common law was in such case closely akin to livery of seisin, so that the seisin and possession of the new owner was not complete until the tenants had in some way attorned to him.[11] But, even without such a statute, the failure of tenants to attorn would not in our days prevent the full vesting of an estate conveyed by proper deed, though it might tend to establish a possession adverse to it.

A deed of conveyance, in the forms in use in the United States, though purporting to confer on the grantee a greater estate than the

grantor, unless contrary intent appears); Minnesota, c. 40, § 4; Missouri, § 3939; Arkansas, § 641; Texas, art. 551; California, §§ 1072, 1105, 1329; Oregon, § 614; Nevada, § 2611; Colorado, § 204; Dakota, Civ. Code, § 618; Idaho, § 2905; Montana, Gen. Laws, § 278; Georgia, § 2248; Alabama, § 2128; Mississippi, § 1189.

[9] See 4 Kent, Comm. pp. 6, 7, for the exceptions to the requirement of words of inheritance, with quotations from Co. Litt. 9b, 273b, 280a; Holdfast v. Marten, 1 Term R. 411; Fletcher v. Smiton, 2 Term R. 656; Newkerk v. Newkerk, 2 Caines (N. Y.) 345. In a late Ohio case (Brown v. National Bank, 44 Ohio St. 269, 6 N. E. 648), though the old rule was still recognized as to absolute conveyances, it was reasoned away in its application to a mortgage. The whole instrument, it was said, showed the intention that the fee in the land should be in security for the debt.

[10] Hardenberg v. Schoonmaker, 2 Johns. 230. See infra, section on "Delivery."

[11] E. g. New York, Rev. St. pt. 2, c. 1, tit. 2, § 146; New Jersey, "Conveyances," 74; Indiana, Rev. St. 5215; Kentucky, Gen. St. c. 63, art. 1, § 16.

grantor has himself, never has the consequences which a common-law conveyance (by livery of seisin or by fine) had under similar circumstances; that is, the rightful owner of the remainder or reversion is not thereby deprived of any right or remedy. On the other hand, the grantor's estate is not forfeited by his attempt to create a wrongful fee.[12]

There is this great distinction between a deed of conveyance, which is an executed contract, and an executory agreement, whether sealed or unsealed: that while the latter is indissolubly tied up with the obligation of which it is the evidence, so that its destruction or alteration by the obligee, or its surrender to the obligor, releases him from his obligation, the former, the conveyance, has all its effect at the moment of delivery, and its destruction, or its return to the grantor, cannot divest the grantee's title.[13] The latter has a freehold, with which he can only part by sealing and delivering a new deed, not by giving up a piece of paper or parchment which has achieved its object, and is nothing but evidence. In the words of an English judge, "God forbid that a man should lose his estates by losing his title deeds."[14] The American cases do not, however, all come up fully to this doctrine. The surrendered deed was in most cases unrecorded, and was returned because the grantee feared the levy of an execution; and the dispute generally arose between the execution creditor of the grantee and the resuming grantor, or a second purchaser from the grantor. The decisions in Connecticut, in New York, and in Wisconsin, where the question has come up most frequently, are consistent; the cancellation or redelivery amounts to nothing.[15] The opinions of the supreme courts of Massachusetts

12 The real-estate law of almost every state provides for this in express words needlessly, for it follows naturally from the abolition of feoffments and fines.

13 Chessman v. Whittemore, 23 Pick. 231.

14 Chief Justice Eyre, in Bolton v. Bishop of Carlisle, 2 H. Bl. 260; Roe v. Archbishop of York, 6 East, 86 (a very strong case); going back to Co. Litt. 225b, Butler's note 136.

15 Jackson v. Chase, 2 Johns. 84; Raynor v. Wilson, 6 Hill, 469; Botsford v. Morehouse, 4 Conn. 550 (where an unrecorded deed was returned, and the notes for the price given up by the seller); Marshall v. Fisk, 6 Mass. 24 (attachment against first purchaser after cancellation preferred to claim of second purchaser with notice); Parker v. Kane, 4 Wis. 1; Albright v. Albright,

and Maine are divided or wavering, those favoring the effectiveness of cancellation or surrender being based either on a strained construction of the recording laws, where there was a second recorded grant after the unrecorded first, or on the ever-ready plea of estoppel; while New Hampshire has gone pretty far in sustaining this irregular mode of conveyance.[16] In Ohio it was thought by the supreme court that a grantee consenting to the destruction of his deed might be estopped from proving its contents; but it was held that such an estoppel should not be enforced against a married woman who gives a reluctant consent to the demands of her husband.[17] In North Carolina the cancelment of an unrecorded deed is sustained on the ground that the conveyance is still in fieri, the "probate and record" being the modern substitute for the old livery of seisin; and this ground was also taken in New Hampshire.[18]

And, just as the estate cannot be returned to the grantor by returning the deed, it cannot be destroyed by an alteration in the deed which in a bond or note would be deemed fatal. Where an erasure or interlineation appears in a deed of conveyance, it can

70 Wis. 532, 36 N. W. 254 (where it is, however, intimated that a grantee might in some cases be estopped from proving the contents of a deed voluntarily destroyed by him); Hinchliff v. Hinman, 18 Wis. 130 (though the parties thought that an unrecorded deed might be effectually canceled); Rogers v. Rogers, 53 Wis. 36, 10 N. W. 2; Partee v. Mathews, 53 Miss. 140. In California and the Dakotas, where much of the common law is codified, the statute directs (California, Civ. Code, § 1058; Dakota, Civ. Code, § 610) that the title shall not be returned to the grantor by returning or canceling the deed. A fortiori, a married woman cannot divest her estate by giving back an unrecorded deed where she is under disability. Ray v. Wilcoxon, 107 N. C. 514, 12 S. E. 443.

[18] Com. v. Dudley, 10 Mass. 403 (a case perhaps maintainable on the ground of fraud in the grantee. It is bitterly assailed in the notes to the second edition); Holbrook v. Tirrell, 9 Pick. 105 (mainly rested on recording laws); Barrett v. Thorndike, 1 Greenl. (Me.) 73 (decided against effect of a willful alteration, but intimates that a surrender of the deed might have been effectual); Tomson v. Ward, 1 N. H. 9 (the intent to reconvey by surrendering deed is sustained). Farrar v. Farrar, 4 N. H. 191, approves Com. v. Dudley, supra (arguendo).

[17] Dukes v. Spangler, 35 Ohio St. 119.

[18] Edwards v. Dickinson, 102 N. C. 519, 522, 9 S. E. 456 (relying on Southerland v. Hunter, 93 N. C. 310, and Hare v. Jernigan, 76 N. C. 471); Dodge v. Dodge, 33 N. H. 487.

lessen its force only by throwing a doubt upon the shape in which it was worded at the moment of its execution. The modern doctrine starts here from the presumption of honesty, and in the absence of special grounds for suspecting a forgery, or fraudulent change, the jury will be instructed that they may, from its appearance, find whether the changes were made before or after execution. And the party relying on the deed will, under most of the American authorities, not be called upon to account for the alteration, unless it has a suspicious look about it; the supreme court of the United States, however, still inclining to the harsh old rule.[19] To avoid all difficulty, it is best to note erasures on interlineations above the signatures. Nearly all the decisions on this subject are found with regard to executory instruments, where a material alteration after delivery destroys, not only the instrument, but the obligation. The English authorities, even those of rather modern date, take the opposite ground to those of American courts. Under them any visible alteration in a written instrument throws the burden of proof on those claiming under it to show that the alteration was made before execution.[20] Where the change is made after execution and delivery, by the consent of both parties, there is, in consideration of law, a new delivery, and the deed as changed is valid.[21]

At common law, partition could be made between tenants in common by the simple yielding of exclusive possession to the parcels

19 Wing v. Stewart, 68 Iowa, 13, 25 N. W. 905 (court must decide on inspection whether the instrument looks suspicious, and shift the burden of proof accordingly); Hagan v. Merchants' & Bankers' Ins. Co., 81 Iowa, 321, 46 N. W. 1114 (to same effect); Smith v. U. S., 2 Wall. 219, 232 ("where any suspicion is raised as to the genuineness of an altered instrument, whether it be apparent on inspection, or is made so by extraneous circumstances, the party producing the instrument and claiming under it is bound to remove the suspicion by accounting for the alteration"); Gooch v. Bryant, 13 Me. 386 (in absence of all proof, the jury were not to assume that the alteration of a figure in a note was made after execution); Cumberland Bank v. Hall, 6 N. J. Law, 215 (law does not presume that an alteration apparent on the face was made after execution); Bailey v. Taylor, 11 Conn. 531 (whether alteration was made before or after execution is for the jury to determine from all the circumstances).

20 Knight v. Clements, 8 Adol. & E. 215; Henman v. Dickinson, 5 Bing. 183; Clifford v. Parker, 2 Man. & G. 910.

21 Hargrave v. Melbourne, 86 Ala. 270, 5 South. 285.

which they were to hold in severalty. Releases by deed were not deemed proper, as each of them was deemed to be separately possessed. Neither was a formal livery of seisin needed. In New York, where, under the statute of descents, coheirs are tenants in common, it was held at an early day that, notwithstanding the statute of frauds, and aside from the statute regulating judicial partitions, tenants in common such as coheirs can divide their land by parol, provided they actually mark the boundaries and take possession accordingly. Nor is it necessary that there should be any long acquiescence, or any acts following the taking of possession which would amount to an estoppel.[22] The same doctrine has been laid down in Illinois, but in a case in which each of the parties afterwards gave a deed to a purchaser for his share in severalty, which deed would perhaps everywhere operate as an estoppel, e. g. in Wisconsin.[23] But in Massachusetts, Maine, New Hampshire, Pennsylvania, and Ohio a parol partition does not, though the parties take possession in accordance therewith, pass the legal title; though it would raise a strong equity, and the parties might by long acquiescence, for a time shorter than the bar of limitations, and by the erection of valuable improvements, be held estopped from reopening the partition, especially if it appeared to be fair when made.[24] In Virginia the statute, though such partitions had been sustained by the courts, declares them invalid.[25]

It is not likely that a title may still be defeated under the statute of uses because the deed on which it rests is neither a good bargain and sale, based on a pecuniary consideration, nor a covenant to

[22] Wolf v. Wolf, 158 Pa. St. 621, 28 Atl. 164. Older cases are Jackson v. Bradt, 2 Caines, 174; Jackson v. Harder, 4 Johns. 202; Jackson v. Vosburgh, 9 Johns. 276; Jackson v. Christman, 4 Wend. 277. Incidentally, also, Corbin v. Jackson (Ct. Err.) 14 Wend. 619; affirming Jackson v. Livingston, 7 Wend. 136; Ryerss v. Wheeler, 25 Wend. 434; Baker v. Lorillard, 4 N. Y. 257,—all reviewed and followed in Wood v. Fleet, 36 N. Y. 499.

[23] Shepard v. Rinks, 78 Ill. 188; Eaton v. Tallmadge, 24 Wis. 217.

[24] Porter v. Perkins, 5 Mass. 233; Porter v. Hill, 9 Mass. 34; Snively v. Luce, 1 Watts, 69 (where possession had not been taken); Gratz v. Gratz, 4 Rawle, 411; Dow v. Jewell, 18 N. H. 354; Piatt v. Hubbell, 5 Ohio, 243 (sustained as an equity); Gardiner Manuf'g Co. v. Heald, 5 Me. 384.

[25] Virginia, Code 1887, § 2913, changing the law as laid down in Bolling v. Teel, 76 Va. 487, 493.

stand seised, made in consideration of a proposed marriage, or in favor of a son, brother, or nephew; especially as the payment of the nominal consideration (one dollar) which is usually inserted in a deed of gift, cannot be gainsaid, and as laws passing the title to land by any words of grant have been in force now for from 60 to 100 years in all the older states.[26]

§ 47. Parts and Parties.

A conveyance of any kind must contain the names of a grantor and a grantee. The former is necessarily in being when the deed is executed, but the grantee named may happen to be dead, though there was an understanding to make and deliver the deed to him while he was alive. This will happen oftenest where an official, who has to follow a prescribed routine, conveys land on behalf of the sovereign, i. e. the United States or a state, or conveys the land of the citizen under powers conferred by law. He has not the opportunity to learn the death of the applicant for public land, or of the bidder at an execution or tax sale; nor is it part of his duty to find out on whom the right to the land to be conveyed is thrown by descent or devise. By the common law, a deed made to the dead man is void, as lacking one of the two necessary parties; but some of the states have enacted statutes to remedy the mischief. Where the conveyance is a "grant" or "patent" of the public land, the deed inures to the heirs or devisees, according as the grantee died intestate or testate (or to the heirs generally, with an equity in favor of the heirs when the estate has been devised), by the land laws of the United States,[27] and by those of Kentucky,[28] while in Virginia, un-

[26] See Hare's notes to Roe v. Tranmar in volume 2 of Smith's Leading Cases (page 461), referring to a very few American cases in which this difficulty arose. Statutes putting all estates "in grant" were passed in Massachusetts and in Pennsylvania in very early colonial times.

[27] Rev. St. U. S. § 2448. It is retrospective. Title inures to "heirs, devisees, or assignees" as if it had been issued during the patentee's life.

[28] Such an act was passed in Kentucky in 1792, embracing heirs and devisees, and was re-enacted in the revisions of 1852 and 1873 with the latter word left out. See Gen. St. c. 50, art. 1. The heirship is determined by the law in force at the time of the patent. Skeene v. Fishback, 1 A. K. Marsh. 356; Hansford v. Minor's Heirs, 4 Bibb (Ky.) 385. The modern statute is con-

der the common law, the patent in the name of the dead man is void.[29]

A deed of conveyance is either a deed poll, in which the grantor speaks in the first person, and which he alone executes, or an indenture or deed inter partes. A deed of the latter kind, in its origin, was always made out in counterparts. It derived its name from the zigzag or indented line along which the parchment for the counterparts was cut. But it is now fully agreed that where two or more parties have to execute a deed, each of them parting with some right, or binding themselves in a covenant, their signatures and seals affixed to one and the same writing will bind all.[30] Indeed, in most cases the so-called indenture is a unilateral deed, in which only one party parts with an estate, or binds himself to anything. The opening words of an indenture are: "This indenture, made and entered into this [here insert day and year], by and between A. B. and C. D. [giving names and residence], parties of the first part, and E. F. and G. H. [names and residence], parties of the second part [and there may be parties of a third and fourth part, or even more], witnesseth;" and the parties so named are thereafter referred to as the parties of the first, parties of the second part, etc. The old rule was that, where a deed opens in this wise, an estate in possession can be granted only to such persons as are named among the parties; but an estate in remainder may be limited to other persons not so named. It is doubtful whether this distinction would be kept up at the

strued as giving the title to the heirs in trust for the devisees. Russell's Heirs v. Marks' Heirs, 3 Metc. (Ky.) 37. The Kentucky, like the United States act, is retrospective, as it well may be; the state having clearly the right to validate its own patent, unless rights of third parties have intervened.

[29] Blankenpickler v. Anderson's Heirs, 16 Grat. 59. The Virginia statute provides for a grant to the heirs or devisees. Code, § 2351.

[30] The only deeds that are in modern practice made out in two or more parts are leases, of which the landlord and the tenant each receives a counterpart, and deeds of partition, of which one is retained by each part owner. Where a deed of the latter kind is made by a master in chancery or court commissioner, it is becoming the custom to make out but one part, which, being put on record, is accessible to all persons in interest. Assignments for the benefit of creditors are always made out in one draft only, and the trustee writes his acceptance of the trust at the bottom. Dyer v. Sanford, 9 Metc. (Mass.) 395; Giles v. Pratt, 2 Hill (S. C.) 439.

present time, even for the purpose of construing a deed of doubtful import.[31]

Next comes the granting clause. In a deed poll, after its opening words, "Know all men by these presents that," this clause reads: "I, A. B. [or we, A. B. and C. B., his wife], for and in consideration of $———, paid by E. F., the receipt whereof is hereby acknowledged, have granted, bargained, and sold [or "quitclaimed and released"] unto E. F., his heirs and assigns forever,"—while, in an indenture, "party of the first part," etc., is substituted for the names. It has been said that the granting clause, being the most essential part of the deed, prevails, in case of conflict, over the other parts; though, as we have seen, words of inheritance inserted in other parts of the deed would turn a life estate into a fee.[32] The consideration is important where a deed of "bargain and sale" carries the legal title, while a mere grant does not. A nominal sum, such as "one dollar," is sufficient, and the recital is conclusive. If the dollar has not been paid, the grantor may demand it, if he chooses; but he cannot deny the operation of the deed as a bargain and sale.[33] In Kentucky it is the unvarying custom (and it is very common in Texas), when the consideration is not fully paid in cash or property,

[31] Foster v. Shreve, 6 Bush, 523; Davis v. Hardin, 80 Ky. 672 (gifts to a woman and her children, referred to in a former chapter). These go back to Webb v. Holmes, 3 B. Mon. 404, which relies on Co. Litt. 231, a case in 8 Mod. 115, and 4 Com. Dig. tit. "Fait," D, 2. The writer has found no American cases outside of Kentucky to support the position. The authors of the American & English Encyclopedia of Law (volume 5, p. 453) say bluntly that there is no practical difference between a deed poll and an indenture. But see, note 38, infra, as to new name in habendum.

[32] The introductory words of the deed, containing the names of the parties and the granting clause, including the description, are often comprised under the name of "the premises"; e. g. 4 Kent, Comm. p. 466. Everything that precedes the habendum. Berry v. Billings, supra. The names of the grantors may appear only as "we" or "we, the undersigned," which are explained by the signatures, as in a note. Withers v. Pugh, 91 Ky. 522, 16 S. W. 277.

[33] Delaware, perhaps, is now the only state in which a deed must take effect as a bargain and sale or as a covenant to stand seised, and where a "grant" or "conveyance" is not authorized by statute. As to North Carolina before the present Code, see Blair v. Osborne, 84 N. C. 417. The English practice of indorsing the payment of the purchase money on the deed is now unknown in this country, and was not practiced in the days of Kent.

to state the fact truly; e. g. "For and in consideration of three thousand dollars, paid and to be paid as follows, to wit, one thousand dollars in cash, and two promissory notes, each of one thousand dollars, payable, respectively, in one and two years from this date, each bearing interest from this date, the receipt of which money and notes is hereby acknowledged." And the deed proceeds, either at this point or later on, "For the securing of which notes a lien is hereby reserved." [34] Then follows the description, which is generally introduced thus: "A certain parcel of land, lying in the county of ———, and state of ———," and winds up with a reference to the deed or other instrument under which the grantor deraigns title thus: "Being the same parcel which was conveyed to the party of the first part by deed of X. Y. and Z. Y., his wife, of date ———, recorded in the office of the register for ——— county, in Deed Book ———, page ———." We have discussed in a former chapter how contradictions in the description, or between it and this reference to the source of title, are to be reconciled or solved.[35] Next usually come the words, "And with the privileges and appurtenances thereto belonging," which is hardly ever, perhaps never, of any effect whatever, or adds anything to the force of the deed.[36]

Next comes the habendum clause, to which we have already referred when speaking of estates in fee. Originally, the habendum itself defined the duration of the estate. Then the tenendum stated of whom and by what tenure the land was to be holden, and the reddendo named the amount of services or yearly rent. Except in indentures of lease, all this is now useless and obsolete. But when uses grew up they were set forth in this part of the deed, and when "uses were turned into possession" it became the custom, in the deed of release of the reversion ("lease and release"), which operates as a common-law conveyance when the releasee was the bene-

[34] This institution of the express vendor's lien has in Kentucky, at least, wholly superseded mortgages for the purchase money, and has shown itself in every way more convenient, and has for that state put an end to many perplexing questions arising on such mortgages.

[35] Supra, c. 2, § 5.

[36] See chapter 2, § 12, "Incidents and Appurtenances"; also, Berry v. Billings, 44 Me. 416, quoting 2 Greenl. Cruise, 334, note; Kent v. Waite, 10 Pick. 141; Blake v. Clark, 6 Greenl. 436; Brown v. Thissell, 6 Cush. 257 (where water rights passed with a mill without the words "privileges and appurtenances").

ficial taker, to add, after the clause, "To have and to hold to said C. D., his heirs and assigns forever," the declaration of use: "To his and their only use, benefit, and behoof forever;" and, this use being reduced into possession, a trust for others might then follow: "In trust, nevertheless, for the use and benefit of," etc. And it is still the custom to put declarations of trust in this part of a deed.[37] Aside of such declarations, the land is, in the vast majority of cases, limited in the habendum to the same persons and for the same estate or estates as in the premises; and in all these cases the habendum is a dead formality, which (as seen above) is dropped in all the statutory forms for deeds. But sometimes the habendum disagrees with the premises, and then the rule is that it may enlarge the estate granted, but cannot lessen it.[38]

After the habendum, the covenants of title, if any, are inserted, of which we shall speak hereafter, only as far as they may operate by way of rebuttal or estoppel on future or after-acquired estates. After these any conditions are inserted, the happening of which

[37] A use may be declared in the habendum. Sammes' Case, 13 Coke, 54; Spyve v. Topham, 3 East, 115.

[38] The theory of a grant is that the earlier part prevails over the latter, as a man cannot resume what he has given. The contrary rule would apply to a devise which the testator can revoke. See 2 Bl. Comm. 241, 293; Goodtitle v. Gibbs, 5 Barn. & C. 709; 4 Kent, Comm. 468. In McLeod v. Tarrant, 39 S. C. 271, 17 S. E. 773, the granting clause was in favor of the husband alone, without words of inheritance, the habendum to him and his wife and their heirs. The majority of the court held that, the husband's estate by the premises not being a fee, the habendum did not cut it down, but possibly enlarged it, and held the deed to convey an estate by entireties to husband and wife; quoting Berry v. Billings, 44 Me. 416 (no grantee named in premises, person named in habendum will take). From Blackstone, supra: "The office of the habendum is properly to determine what estate or interest is granted by the deed." Chief Justice McIver, in his dissent, quotes Windsmore v. Hobart, Hob. 313 (where the habendum is not allowed to give an immediate estate to one not a party to the deed); Brooks v. Brooks, Cro. Jac. 434 (which is really in point for the decision of the majority); Greenwood v. Tyler, Id. 564, (where the additional grantees in the habendum were ruled out, it being a lease, a deed inter partes). In Hafner v. Irwin, 4 Dev. & B. (N. C.) 433, the deed (of slaves and personalty) was a grant to Hafner, his heirs, etc., habendum to Curry, his heirs, etc., in trust, etc. It was held that the habendum, being in conflict with the premises, was void, and the title in Hafner. Blair v. Osborne, 84 N. C. 417, approves the old authorities,—that one who is first

shall render the deed void, of which by far the most frequent is the defeasance, which renders the deed void in the event that the grantor should pay certain sums at some given day; in short, the clause which turns an absolute deed into a mortgage.[39] Last of all comes the testimonium clause, which, in a deed poll, embraces the date, while in an indenture the "day and year" are stated at the opening, in the inter partes. The mention of a party as grantor in the testimonium clause may sometimes suffice to connect his signature with the deed.[40]

The parties to a deed are generally named by their Christian and family names; and those who grant anything or bind themselves to anything necessarily so, as their signatures must appear under or in the deed. But the grantees, especially of future estates, are often described by the office or position they hold, and oftener by their kinship to the grantor or to others, e. g. when a gift is made "to my eldest son," or "to my three daughters." Such grants are valid on the principle of id est certum quod certum reddi potest. Indeed, we have seen that grants may be made to persons unborn, designated only as the children that may be born of a named parent.[41]

Where any uncertainty arises as to the persons to whom an estate is given, the same principles apply, which we have set forth in a previous chapter as to uncertainty in the description; that is, in the thing granted. And when there is an ambiguity, latent or patent, the same principles govern, as to the admission of extrinsic evidence, as have there been referred to. This will be treated more fully in a note in the chapter on Title by Devise, drawn mainly from

introduced in the habendum cannot take a present estate. Where the grantor is by mistake named as grantee in the premises, the habendum will set it right. Irwin v. Longworth, 20 Ohio, 581.

[39] Words occurring in the warranty may modify the estate, and perhaps amount to a condition. Kibler v. Luther, 18 S. C. 606.

[40] Newton v. McKay, 29 Mich. 1, goes even further, for it holds that where one of the grantors is named as a party, but not as a grantor in the body of the deed, and he and another person sign the deed, the words, "we have set our hands," in the testimonium clause, will make both of them grantors.

[41] There must, however, be at least one known grantee, to whom the deed is delivered, either as trustee for the unknown or unborn, or as the taker of a particular estate, the latter taking remainders or other future estates; for, as will be shown in another section, there is no private grant without delivery.

Wigram's essay on the Admission of Extrinsic Evidence in the Interpretation of Wills.[42]

Sometimes an absolute deed and oftener a mortgage, is made to a firm by its firm name, indeed the latter conveyances are habitually drawn in that way. The grantee takes such a form as "John Brown & Co.," or "Brown Brothers," or "Brown, Smith & Co."; that is, the full names of some partners, or of all the partners, are not given; some partners are not named at all. By changes in the firm it may happen that none of them is named even by his surname. In equity, the land conveyed belongs to the firm for partnership purposes;[43] but how does the legal title stand? The weight of authority sustains the position that if the firm name contains the full name of a partner, or even the surnames of one or more partners who can be identified, the title would vest in such fully-named member, or in the members partially named and otherwise identified, but not in those only indicated by the words "& Co." If members of the firms are identified by such words as "& Son," the name of the son meant may be proved, and he will take under the deed.[44]

[42] Though the omission of the given name makes a patent ambiguity, it has been supplied, showing who took possession under the deed. Fletcher v. Mansur, 5 Ind. 267, 269, where the title in the party thus ascertained was sustained against the later insertion of another Christian name in the blank. In David v. Williamsburg Fire Ins. Co., 83 N. Y. 265, a deed from the owner to a fictitious person and one executed by him in the fictitious name to a third person were held to pass the title. Where the beneficiaries of a deed are named in general words,—e. g. the grantor's creditors, evidence must always be taken to ascertain them and their respective interests. In Drummond v. Attorney General (1850) 2 H. L. Cas. 837, the question arose upon a deed of trust made in 1870 for the benefit of "Protestant Dissenters in Ireland,"—whether Unitarians could take a share of the fund; and evidence was admitted that, at the date of the deed, the word "Protestant Dissenters" was not understood as comprising Unitarians. A deed to the heirs of A. B., who was still alive, was in Hall v. Leonard, 1 Pick. 27, held void for uncertainty. In such a case, if the deed was made for a money consideration, equity must give some relief.

[43] As to the equities in partnership lands, and what are partnership lands, see Lake v. Gibson, 1 White & T. Lead. Cas. Eq. 264, and Lake v. Craddock, Id., and notes. It is a subject not falling within the scope of this work.

[44] In Beaman v. Whitney, 20 Me. 413, it was held that a deed to "Whitney, Watson & Co.," where one man named Whitney and one named Watson were members, vested these two, at least, with the legal title, and was valid. To same effect are Arthur v. Weston, 22 Mo. 378; Morse v. Carpenter, 19 Vt. 613

Where a partnership does business in a name sounding like that of a corporation or joint-stock company, there is no good reason in law why the same rule should not apply. A deed to the "Real Estate Company" is in effect a conveyance to the persons who make up that company. But here the decisions are in conflict; the feeling against unauthorized corporations having inclined some courts to declare such deeds invalid.[45]

On the much more important question, when and how far lands belonging to a firm can be affected by deed of conveyance or by an incumbrance made by one partner on behalf of the firm, the supreme court of the United States has, in 1895, announced it as the settled rule that the other partners will be bound, and the title of the firm will pass (whether legally or equitably is of little import), if there be either a previous parol authority, or a subsequent parol adoption of the act; and "ratification may be inferred from the presence of the other partner at the execution and delivery, or from his acting under it, and taking the benefits of it with knowledge."[46]

(ejectment on deed to "Morse & Houghton" by two partners with those surnames); Winter v. Stock, 29 Cal. 411 (deed to L. B. & Co., L. B. alone has the legal title). But in McCauley v. Fulton, 44 Cal. 355, under a deed made to a partnership of four, two names only appearing in the firm, with "& Co.," each was held to have title to one-fourth, though the articles of partnership were not in writing. Moreau v. Saffarans, 3 Sneed, 595 (deed to J. L. Saffarans & Co., title at law in the named partuer alone); Murray v. Blackledge, 71 N. C. 492 (deed to firm not void. The ambiguity as to "Co." may be explained by parol. Title in all); Hoffman v. Porter, 2 Brock. 156, Fed. Cas. No. 6,577 (deed to P. H. & Son); Bernstein v. Hobelman, 70 Md. 29, 16 Atl. 374 (mortgage to firm good deed at law). See, also, Carruthers v. Sheddon, 6 Taunt. 14; Maugham v. Sharpe, 17 Co. B. (N. S.) 443; Lindl. Partn. (4th Ed.) p. 208; Elphinston, Interp. Deeds, p. 126.

[45] Kelley v. Bourne, 15 Or. 476 (deed to "Grant's Pass Real Estate Association," a partnership of five members, held to give to each a share in the fee). Contra, German Land Ass'n v. Scholler, 10 Minn. 331 (Gil. 260). The other cases which were quoted in the former against validity of the deed arose on grounds of public policy; as Harriman v. Southam, 16 Ind. 190 (deed to a railroad company unconstitutionally chartered); or of devises to corporations not yet formed, or incapable of taking, in states having no statutes of charitable uses. See Baptist Ass'n v. Hart's Ex'rs, 4 Wheat. 1; Wheeler v. Smith, 9 How. 55; also, Sloane v. McConaliy, 4 Ohio, 157 (where a title bond to the commissioners of Wayne county was held void).

[46] McGahan v. Bank of Rondout, 156 U. S. 218, 232, 15 Sup. Ct. 347 (a case

A conveyance, generally by sheriff or master, after a judicial sale, is often made to the administrator, who has bought the land of a debtor to the decedent's estate. Such a conveyance, to "A. B., administrator of C. D., deceased," vests the legal title in the grantee A. B., who may sue, for possession in his own name, without joining the heirs; though he will, of course, hold the land subject to the same trusts as the money that he might have collected.[47] Generally speaking, a deed is not the less valid because the grantee's name is incorrectly, or even incompletely, given, as long as he can be identified from the designation.[48] While a deed made to an officer of a corporation cannot at law inure to the corporate body, and in equity only by way of resulting trust, such body having furnished the consideration, yet, when a note secured by mortgage is made payable "to A. B., cashier," or is assigned to him in like terms, the latter

involving priority between a mortgage made by one partner and a subsequent execution against the firm, the land being in South Carolina, the parties mainly in New York). The court relies on the following authorities: Smith v. Kerr, 3 N. Y. 144; Graser v. Stellwagen, 25 N. Y. 315; Van Brunt v. Applegate, 44 N. Y. 544 (from New York); Stroman v. Varn, 19 S. C. 307; Salinas v. Bennett, 33 S. C. 285, 11 S. E. 968 (from South Carolina); also, 3 Kent, Comm. 48; Cady v. Shepherd, 11 Pick. 400; Peine v. Weber, 47 Ill. 41; Frost v. Wolf, 77 Tex. 455, 14 S. W. 440; Schmertz v. Shreeve, 62 Pa. St. 457; Wilson v. Hunter, 14 Wis. 683; Rumery v. McCulloch, 54 Wis. 565, 12 N. W. 65; Pike v. Bacon, 21 Me. 280; Russell v. Annable, 109 Mass. 72; Gunter v. Williams, 40 Ala. 561; Sullivan v. Smith, 15 Neb. 476, 19 N. W. 620. See, to the contrary, Carter v. Flexner, 92 Ky. 400, 17 S. W. 851.

[47] Jackson v. Roberts, 95 Ky. 410, 25 S. W. 879.

[48] We quote from Schumpert v. Dillard, 55 Miss. 360: "It is said in Shepp. Touch. 53, that the names of parties are inserted to ascertain them, and, if sufficient be shown to point out grantor and grantee, the deed is good. Illustrations: A grant by the Duke of Norfolk without his baptismal name; a grant to T. and his wife, Ellen, when her name was Emeline. The maxim, 'Id certum est quod certum reddi potest,' applies to deeds. A grantee may be described by his office or relationship. It is immaterial that there is a mistake in the Christian name. A deed to Robert, Bishop of E., is good, though his name was Roland. In Fletcher v. Mansur, 5 Ind. 268, the grant was to Barratt. The Christian name was omitted. The court responded that the deed was delivered to Barratt, and the ambiguity could be supplied by proof. In Hoffman v. Porter, 2 Brock. 158, Fed. Cas. No. 6,577, Chief Justice Marshall sustained a conveyance to Peter Hoffman & Son. Though there were several sons, it was easy to apply the description to the son connected with the father in business."

instrument is regarded as a mortgage to the bank of which he is cashier, and may be enforced by it in its own name.[49] When a married woman, to bar dower or homestead right, joins in her husband's deed of his own hand, her name is generally inserted as that of a grantor in the inter partes or other opening clause. The deed, however, is just as binding upon her if at the end, say in the testimonium clause, her name is first introduced, provided it is coupled with words barring or releasing those rights: e. g. "In witness whereof, Mary Doe, wife of John Doe, who hereby releases her dower, has set her hand and seal." [50]

The addition of an official or fiduciary character to the grantor's signature, when the body of the deed shows that he is conveying his own property, does not invalidate his grant; the addition being considered a mere descriptio personae, just as if he had added an academic degree or military rank to his name.[51]

§ 48. The Seal—Herein of Blanks.

A colonial statute of Virginia, enacted in 1748, and having its counterpart in other colonies, requires of a deed, to be effectual as a conveyance of land, that it be "made by writing, sealed and indented." The deeds of that day, including the land patents which were issued by the colonial governors, were indented; but only one reported case can be found, in which the deed was held of less account for not being indented; and in the state in which this decision was made, Maryland, a statute as early as 1794 dispensed with indenting.[52] And with the disuse of parchment the habit of indenting documents fell into desuetude.

The seal remained. While Blackstone defines it as "wax impressed," the impression soon came to be made on bits of paper, at-

[49] Michigan State Bank of Eaton Rapids v. Trowbridge, 92 Mich. 217, 52 N. W. 632.

[50] Davis v. Jenkins (Ky.) 20 S. W. 283. Indeed, in some states this is considered the safer course.

[51] Brayton v. Merithew, 56 Mich. 166, 22 N. W. 259. The principle is familiar in the law of promissory notes, and generally in that of contracts.

[52] Morehead & B. Ky. St. p. 429, from 5 Hen. St. at Large, 409; Gittings v. Hall, 1 Har. & J. (Md.) 14.

tached by wafer or mucilage to the deed, and in many of the Southern and Western states the seal soon degenerated into an ink scroll (or scrawl), generally in the form "L. S." which was appended to the grantor's signature. At last some of the states came to dispense with the seal entirely; while the signature or subscription not required by the older statutes, became everywhere obligatory under the statute of frauds. Delivery of a deed is of its essence, and in all the states remained indispensable. An acknowledgment of the deed is in most of the states essential to pass the estate of a married woman. In a few states it is, with or without attestation of witnesses, required before any person's deed of conveyance will carry the legal title. But in most states, in deeds of persons other than married women, the acknowledgment or attestation is of importance only as the basis for recording or registration; and this is only required to make the deed effective against creditors or purchasers.

The laws of the states as to each requisite must be treated in order. First, the seal, which at common law is the one great feature of a deed. The seal of a corporation or of a public officer has always its own device and legend, which identifies it and attests the genuineness of the instrument, as the handwriting does as to that of an individual, and as anciently the private seal did, when men could not write. But for centuries, ever since it became customary to sign deeds as well as to seal them, any impression on "wax or other tenacious substance that will receive and retain an impression" [53] was a good private seal; and where a deed is signed by several, and only one piece of impressed wax or wafer is attached, it will stand as the seal of all the signers, if it seems to have been adopted by all of them as their seal.[54] In the following states a deed conveying the legal title to land must be sealed, and the seal must fit the above definition, a "scroll" or scrawl being insufficient: The New England states, other than Connecticut. In Delaware, except when the seal is recited, as it usually is. Until lately, in New York, Maryland, and North Carolina; in the first of these states the word "seal" or let-

[53] Leigh, N. P. p. 730 (a wafer will do); Tasker v. Bartlett, 5 Cush. 359. The impression need not be discernible. Hughes v. Debnam, 8 Jones (N. C.) 127; Lunsford v. La Motte Lead Co., 54 Mo. 426.

[54] Mackay v. Bloodgood, 9 Johns. 285; Atlantic Dock Co. v. Leavitt, 54 N. Y. 35; Tasker v. Bartlett, supra.

ters "L. S.," written in a ring behind the name, may now take the place of wax or wafer; in the two others, an ink scroll.[55] The word "seal" or letters "L. S." are also sufficient in Connecticut, Idaho, and Utah, and such word or letters, or a mere scroll of almost any shape, make a good private seal, by statute, in New Jersey,[56] Illinois, Michigan, Wisconsin, Virginia, West Virginia, Georgia, Florida, Mississippi, Colorado, California, Oregon, Washington, Wyoming, and New Mexico, and by judge made law or custom in Pennsylvania,[57] South Carolina,[58] and Arkansas;[59] but lately in Texas,[60] and still in Delaware, where the instrument recites the affixing of a seal.[61] All private seals are dispensed with in the following states: Kentucky (as early as 1812 as to obligations, only in 1843 as to deeds),[62] Tennessee,[63] Alabama (but the deed must indicate that it is meant as a conveyance),[64] Ohio (only since 1884),[65] Connecticut (since 1888), Iowa, Kansas, Nebraska, Texas, Oklahoma, Arizona, Dakota, Montana, and Idaho,[66]—while the Revised Statutes of Indiana contain two con-

[55] A scrawl is not a seal. Warren v. Lynch, 5 Johns. 239. Followed in New York ever since.

[56] Revision 1877, "Evidence," p. 387, § 52 (enacted in 1875). Another and older section applies only to obligations. Secus before the act. Perrine v. Cheeseman, 11 N. J. Law, 174.

[57] Long v. Ramsay, 1 Serg. & R. (Pa.) 72. A ribbon run through the parchment is not a seal. Duncan v. Duncan, 1 Watts, 322.

[58] Parks v. Duke, 2 McCord, 380; Relph v. Gist, 4 McCord, 267. But an unsealed deed conveys no title, and is not within the recording law. Arthur v. Screven, 39 S. C. 78, 17 S. E. 640. It is not even a "writing in the nature of a mortgage." Harper v. Barsh, 10 Rich. Eq. 149.

[59] Bertrand v. Byrd, 4 Ark. 195.

[60] Flemming v. Powell, 2 Tex. 225, under Act Feb., 1840, which required a writing sealed and delivered, a scroll to be deemed a seal. Such is also the Code of 1875.

[61] Armstrong v. Pearce, 5 Har. (Del.) 351. See, for similar rule formerly prevailing in other states, Boynton v. Reynolds, 3 Mo. 79; Long v. Long, 1 Morris (Iowa) 43.

[62] Acts 1843, p. 11, now embodied in section 2, c. 22, Gen. St.

[63] Code, § 2478.

[64] Code, § 2694 (seal not necessary to convey title).

[65] See Rev. St. 1890, § 4, from Acts 1884, p. 198; Acts 1883, p. 79.

[66] Iowa, Rev. Code, § 2112; Nebraska, Consol. St. § 4417 (use of private seals abolished); Kansas, Gen. St. par. 1116 (deed to be subscribed; nothing said about seal); Dakota Territory, Code, § 623; Nevada, Gen. St. § 2667 (seal

tradictory provisions, one of which says that no private seal or ink scroll shall be necessary to any conveyance of land, while another requires that all conveyances, bonds, or powers of attorney as to lands shall be executed with a seal.[67] With the exception of Kentucky, Iowa (1852), and Alabama (where the recital of the seal in the witnessing clause was by an act of 1839 made equivalent to sealing,[68] the abolition of private seals is comparatively modern. But the use of an ink scroll instead of wax or wafer has been almost universal in the West ever since Kentucky introduced it in 1796. A private seal is unknown to the Roman, and therefore to the Spanish, law; hence a deed executed in Missouri before 1816, when a statute of frauds and of conveyances was enacted, was good without a seal;[69] and the same may be said of Texas and other Mexican acquisitions.

Where a seal is required, but a paper purporting to be a conveyance of land is made without it, the instrument will nevertheless have the effect of an executory contract and raise an equity in the grantee; not, however, such a "dry naked trust" as will defeat an ejectment or writ of entry by the grantor or his heirs.[70] When the courts of Massachusetts had only a limited equity jurisdiction, they could not relieve against a deed under seal, on the ground of an unsealed defeasance, nor would the supreme court of Vermont enforce an unsealed memorandum to reconvey land.[71] But the necessity for a seal is not raised by construction; thus, where the California stat-

or L. S. unnecessary); Idaho, Rev. St. § 2920 (conveyance by writing subscribed and delivered). Such also is the language in the Statutes of Arizona (section 214) and Oklahoma (section 1695).

67 Both sections of the Revised Statutes of 1888 (sections 2999 and 4925) are from the Statutes of 1852, which were adopted in separate chapters; hence the last ought to prevail. The usage in Indiana is to put a scroll to deeds of land.

68 It was not so before the statute, and that is not retrospective. Williams v. Young, 3 Ala. 145; Moore v. Leseur, 18 Ala. 606. Contra, Shelton v. Armor, 13 Ala. 647. Seal now unnecessary under section 2654 of the Code.

69 Moss v. Anderson, 7 Mo. 337.

70 Worrall v. Munn, 5 N. Y. 229; Switzer v. Knapps, 10 Iowa, 72 (deed made before act of 1852, abolishing private seals); Frost v. Wolf, 77 Tex. 455, 14 S. W. 440 (under act of 1840). Contra, Jewell v. Harding, 72 Me. 124. But the paper will always operate as a license to enter.

71 Kelleran v. Brown, 4 Mass. 443; Arms v. Burt, 1 Vt. 303. The principles

ute enabled a married woman to convey her land by deed with the consent of her husband, a deed signed and sealed by her was deemed sufficient, though the consent of her husband was given in an unsealed memorandum.[72]

As long as a seal is deemed necessary to a deed of conveyance, the power of attorney to execute such a deed must itself be under seal. It must, in the language of the common law, be a deed.[73] It follows that a blank which the grantor leaves in a sealed deed when he delivers it cannot be filled up so as to complete the deed, unless the person who fills the blank is authorized to do so by a sealed power of attorney; and such has been the ruling in North Carolina, Tennessee, and Georgia. While in California, though private seals are disused, the same result is reached under the statute of frauds, which requires all writings affecting the title to land to be subscribed either by the principal or by an agent appointed in writing.[74]

This doctrine is, however, not recognized in most of the states, but is generally exploded as too technical to fit into modern American law. The supreme court of the United States gave it, in 1864, as the "better opinion" of that day that a parol authority for adding to and for completing a sealed instrument is good enough; and disallowed the force of the deed then before it only because the grantor was a married woman, who, under the law of Iowa, cannot act by

of equity are now so fully enforced everywhere as to render such decisions obsolete.

[72] Ingoldsby v. Juan, 12 Cal. 564.

[73] Davenport v. Sleight, 2 Dev. & B. (N. C.) 381. This doctrine is elementary. It has often been applied to sealed contracts for the payment of money, which would have been just as good without the seal; so that the note given by one partner in the firm name has been held invalid as against the other, because he attached a scroll. See next note.

[74] Humphreys v. Finch, 97 N. C. 303, 1 S. E. 870, goes back to Shep. Touch. 57, and Co. Litt. 52a, for principle that power to make deed must be given by deed, and disapproves Lord Mansfield's nisi prius opinion in Texira v. Evans, mentioned in note to Master v. Miller, 1 Anst. 229, and which is overruled in England in Hibblewhite v. M'Morine, 6 Mecs. & W. 200, 216. Same principle (Mosby v. Arkansas, 4 Sneed [Tenn.] 324) applied to a bond; also, Viser v. Rice, 33 Tex. 139 (since overruled. See note 77); also in Ingram v. Little, 14 Ga. 173. Applied to a mortgage in Parker v. Parker, 17 Mass. 370 (incomplete by reason of blank, is like not delivered).

attorney at all.[75] In a later case before the same court, the modern doctrine was affirmed, but again the deed was held to be invalid, because the blank for the grantee's name had not been filled up till after delivery; in fact, not till after the grantor's death. The more liberal doctrine has been recognized in quite early cases in Massachusetts and South Carolina; in New York (as to bonds); in Pennsylvania; in Alabama, Maine, New Jersey, Missouri, Indiana, Wisconsin, Texas, Nebraska, and Oregon; in Minnesota, on the ground of estoppel in pais; in Iowa, on the broad ground that private seals are abolished, and there is no longer any room for the old rule that an attorney to make a deed must be created by deed.[76] In Texas it seems quite common to indorse a deed with a blank left for the grantee on the back of a land certificate, which the buyer fills up with his own name after he has entered and located land by means of the certificate.[77] It has been held in New York and in Missis-

[75] Drury v. Foster, 2 Wall. 24. The court thinks that to apply here the doctrine of estoppel against the married woman would deprive her of the protection intended by the law to be given to her.

[76] Woolley v. Constant, 4 Johns. 54; In re Decker, 6 Cow. 60 (neither case very strong); Wiley v. Moor, 17 Serg. & R. (Pa.) 438; Allen v. Withrow, 110 U. S. 119, 3 Sup. Ct. 517 (admits that such is the rule in many states); McClung v. Steen, 32 Fed. 373 (Judge, now Mr. Justice, Brewer); Gibbs v. Frost, 4 Ala. 720 (case of a judicial bond, which the clerk filled up after delivery, construed into a redelivery); Smith v. Crooker, 5 Mass. 538; Richmond v. Davis, 7 Blackf. (Ind.) 412; Camden Bank v. Hall, 14 N. J. Law, 583; Ragsdale v. Robinson, 48 Tex. 379; Lockwood v. Bassett, 49 Mich. 551, 14 N. W. 492; Pence v. Arbuckle, 22 Minn. 417 (where the certificate of acknowledgment is much dwelt on); Cribben v. Deal, 21 Or. 211, 27 Pac. 1046 (decided in November, 1891, where the blank was filled up after acknowledgment); Van Etta v. Evenson, 28 Wis. 33; Swartz v. Ballou, 47 Iowa, 188 (overruling Simms v. Hervey, 19 Iowa, 273); Field v. Stagg, 52 Mo. 534; Schintz v. McManamy, 33 Wis. 299; Duncan v. Hodges, 4 McCord (S. C.) 239 (based, like most of the first cases on this side in each state, on Lord Mansfield's nisi prius opinion in Texira v. Evans); Inhabitants of South Berwick v. Huntress, 53 Me. 89. But the authority to fill up must appear affirmatively. Cooper v. Page, 62 Me. 193. In Smith v. Crooker, supra, the blank was for the obligor's own name, and could not have been filled up in any other way; but the court went beyond the facts, relying on Zouch v. Claye, 2 Lev. 35 (tem. Car. II.), a very short and vaguely worded case. Reed v. Morton, 24 Neb. 760, 40 N. W. 282; Dobbin v. Cordiner, 41 Minn. 165, 42 N. W. 870.

[77] Dean v. Blount, 71 Tex. 271, 9 S. W. 168.

sippi that where an instrument recites in its testimonium clause that it bears a seal, but there is none in fact, the signer cannot have affirmative relief in equity;[78] yet in an action against him such recital is not the equivalent of a seal, unless the statute says so.[79]

In other states, on general principles of equity, in Michigan by the words of the statute, the lack of the seal, or of any other formality in execution, reduces the effect of the deed from that of conveying the legal title into that of a declaration of trust, or of an executory contract, which equity will enforce.[80] We shall treat elsewhere of the seals to be appended to the deeds of corporations or of public officers.

§ 49. Signature or Subscription.

The other and now the most important step in the execution of a deed is the signature or subscription. These two words have by no means the same meaning; for, while to subscribe is to write one's name at the bottom of an instrument, a signature may be at the beginning, in the middle, or at the end.

The necessity for signing a deed first arose in England under the statute of frauds and perjuries; in the colonies under it or under a re-enactment of those parts of that statute which relate to the transfer of interests in land.[81] Under this statute the deed or contract must

[78] McCarley v. Board of Supervisors, 58 Miss. 483 (case of a bond); relying on Kent's decision in Wadsworth v. Wendell, 5 Johns. Ch. 224 (also an obligation); and on Rutland v. Paige, 24 Vt. 181.

[79] McPherson v. Reese, 58 Miss. 749.

[80] How. Ann. St. § 5727; Dreutzer v. Baker, 60 Wis. 179, 18 N. W. 776 (such equity carries the right of possession, and will maintain as well as defend an action of trespass).

NOTE. In Florida the Revision of 1892 contains no provision authorizing the use of a scroll; and it was deemed safest to append wafer or wax to a deed till the "scrawl" (sic) was restored to its dignity by an act of April 28, 1893, professing to have retrospective force.

[81] The following is the form of that section as re-enacted in New Jersey (see Revision, "Frauds and Perjuries," 1), and almost literally in the corresponding section of the Digest of Pennsylvania statutes: "(1) That all leases, estates, interests of freehold or term of years, or any uncertain interests of, in, to, or out of any messuages, lands, tenements, or hereditaments, made or created, or hereafter to be made or created, by livery and seisin only, or by

be "in writing, signed by the party." Hence, the grantor's name might be written by him in any part of the deed. And this has been held very often as to contracts for the sale of goods, the only limitation being that the instrument must be apparently complete; that the name was not purposely left off at the end, because the obligor or grantor had not fully assented.[82] A deed without a signature at the end, but containing the grantor's name in the beginning, the whole deed, including that name, being in the handwriting of a scrivener, but acknowledged and delivered by the grantor, has in one case been deemed sufficiently signed, though not subscribed, to have the effect of a written instrument, within the statute of frauds.[83]

Not all state have gone to this length; and, as against married women, whose conveyances are hedged about with particular safeguards, such a ruling would be hardly sustained.[84] In some states (including those which have built on the "Field Code") the word "subscribed" is in the statute of frauds substituted for "signed," at least as to contracts for the sale of lands.[85] Those parts of the statute

parol, and not put in writing, and signed by the parties so making or creating the same, or the agents thereunto, lawfully authorized by writing, shall have the force and effect of leases or estates at will only, and shall not, either in law or equity, be deemed or taken to have any other or greater force or effect, any consideration for making any such parol leases or estates notwithstanding; except, nevertheless, all leases, not exceeding the term of three years from the making thereof." The form adopted in Maine, c. 73, § 10, is very much shorter.

[82] A leading case is Johnson v. Dodgson, 2 Mees. & W. 659, decided by Lord Abinger; also, Penniman v. Hartshorn, 13 Mass. 87; McConnell v. Brillhart, 17 Ill. 354, 361; Fulshear v. Randon, 18 Tex. 277; People v. Murray, 5 Hill (N. Y.) 470. As to the dispute whether the statute of frauds did really require a deed to be signed, see hereafter under "Deeds of Corporations."

[83] Newton v. Emerson, 66 Tex. 142, 18 S. W. 348. The paper could not operate as a deed, as it had no seal which the statute then required, and which would have been enough, as the statute of conveyances, which called for "a writing sealed and delivered," must have prevailed over the more general words of the statute of frauds. The matter is now regulated in Texas by articles 997, 1000, and 1003 of the Code, which require that a deed be subscribed; and this is the tendency of modern legislation, as will be found in the sections on the "Execution of Wills."

[84] Adams v. Medsker, 25 W. Va. 127.

[85] California, Civ. Code, § 1741; Dakota, Civ. Code, § 993. Montana, Gen.

which required a signed instrument, in writing, for the conveyance of a freehold, or leasehold, are generally re-enacted as the leading section in a chapter on conveyances, which prescribes the requisites of a valid deed of lands. Here either "signing" or "subscribing" may be demanded, or the statute of conveyances may simply call for a deed, or direct that a "deed must be executed." Thus the Revised Statutes of New York demand that every grant of a freehold estate must be "subscribed and sealed." Connecticut (by her last Revision), California, the Dakotas, Idaho, Indiana, Arizona, and (in effect) Texas, ask only that the deeds be subscribed; Alabama, in plain terms, that it be signed at the end. Among the states that call only for a deed or for executing a deed are New Jersey, Pennslyvania, Kentucky, Minnesota, Kansas, Delaware, while Massachusetts, Vermont, Ohio, Illinois, Tennessee, Nebraska, and Oregon are among those which require the deed to be "signed." [86]

Where the signature is not at the end there must be something to show that the instrument was finished; and hardly anything will indicate this but such formal acknowledgment before an official as is required by the recording laws.[87]

The grantor's name written out for him by way of signature or subscription, in his presence, by another person, by his direction (the old books have it "by his commands"), or even with his consent, or even a signature which he adopts as his own before delivery of the deed (which, again, is best proved by the acknowledgment), is as good as if it had been made by the grantor himself.[88] A cross mark is usually made by or for an illiterate grantor, with the words

Laws, § 217. The same states introduce the word "subscribe" again among the requisites of a deed for conveying land.

[86] The word "signed" or "subscribed" or simply "executed" will be found generally in the same sentence with that containing or not containing the word "sealed," referred to in note to section on "Seal." For Indiana, see Rev. St. § 2919.

[87] Newton v. Emerson, supra.

[88] Conlan v. Grace, 36 Minn. 276, 30 N. W. 880. The doctrine is familiar, to be found in elementary books, and has never been seriously controverted. See another Minnesota case,—Schmitt v. Schmitt, 31 Minn. 106, 16 N. W. 543; Wood v. Goodridge, 6 Cush. 117; also, Bartlett v. Drake, 100 Mass. 174; quoting Greenfield Bank v. Crafts, 4 Allen, 447; Lovejoy v. Richardson, 68 Me. 386; Mutual Benefit Life Ins. Co. v. Brown, 30 N. J. Eq. 193.

"his [or her] mark" over and under it, and the grantor's given name to the left, the surname to the right of the mark, and the signature of an attesting witness near it. It has been held in North Carolina—First, that the words "his mark" are not necessary; second, that there need be no attesting witness to a mark, except where the law requires it to the grantor's signature, leaving the mark, like a real signature, to be proved by any competent proof; third, that the mark need not be explained by writing the name around or under it, when that name appears in the testimonium clause, under a statute which calls only for a signed, not for a subscribed, deed.[89] A fortiori, if a person chooses to sign his Christian name only, but the name, full enough to identify the grantor, appears in the body of the deed, or if the name be misspelt in the signature, the deed will be deemed valid, as long as it is apparent that the grantor wrote or caused to be written such defective or incorrect name as and for his signature.[90] But in Connecticut the statute says expressly that the grantor's name must be annexed to the mark, and in Alabama the law allows only those unable to write to sign a deed with a mark, and requires the name to be added to it and a witness able to write to attest such a signature; and in West Virginia it must be attested.[91]

At common law, an illiterate grantor may demand that a deed which he is called on to seal should first be read to him. But if it is not read at his request, and he signs it nevertheless, he seems to waive his right, and to withdraw his request; and so the rule is cut down to this; that if the reading be refused or withheld by any trick or false pretence, and he is thus induced to put his mark and seal to the deed, he may repudiate it as not being his deed.[92]

[89] Howell v. Ray, 92 N. C. 510; Devereux v. McMahon, 108 N. C. 134, 12 S. E. 902; quoting Yarborough v. Monday, 3 Dev. 420; Sellers v. Sellers, 98 N. C. 13, 3 S. E. 917.

[90] Zann v. Haller, 71 Ind. 136, where a mortgage of the feme's land was signed by her husband and her, thus, "R. Zann, Catherine," but the body of the deed and the acknowledgment gave her name in full. In Middleton v. Findla, 25 Cal. 76, a title was deemed good, though a grantor named Edward Jones might have signed his name Edmund Jones.

[91] Connecticut, Gen. St. § 2954; West Virginia, c. 98, § 1; Alabama, § 1. Under this clause it would seem insufficient for another person to write the grantor's name in his presence and at his request.

[92] School Committee v. Kesler, 67 N. C. 443.

The subscription of a deed must connect itself with its body. If a deed were written in the first person, there is no reason why the signature at the end should not connect itself with the pronoun "I" or several signatures with the pronoun "we," in a deed, just as much as they do in a promissory note. "I hereby grant Whiteacre to John Doe and his heirs. [Signed] Richard Roe. [Seal],"—is probably a valid deed. But if the deed were written thus: "I, Richard Roe, hereby grant," etc.,—and were signed and sealed not only by Richard Roe, but also by Susan Roe, the latter name would not grammatically connect itself with the body of the deed. It could not be inferred whether this signature imported any grant, and, if it did, what the signer intended to grant; and it must be rejected as unmeaning.[93] And it has also been held that a person named in a deed as a grantee only, who signs and otherwise executes the deed, will not thereby become a grantor,[94] though probably a court of equity would put such person (generally the widow) to an election, and not allow her to claim the granted, as well as the original, interest.

NOTE. As to mining grants under Mexican law, see infra, "Spanish and Mexican Grants."

§ 50. Other Requisites.

A deed signed or subscribed, sealed, and delivered, in most of the states, passes the title, without further ceremony, between the grantor and grantee, and the acknowledgment or proof by attesting witnesses is needed only for the purposes of registration, or binding a married woman. But in some of the New England states either attestation by two witnesses or the grantor's acknowledgment before an official, or both formalities, were required, by colonial and early state statutes, to pass the title, just as the English statute required the enrollment of deeds of bargain and sale within six months of their execution, as a substitute for the livery of seisin, which was dispensed with. From Connecticut the requirement of both attestation and acknowledgment passed into the ordinance of

[93] Catlin v. Ware, 9 Mass. 218.

[94] Prather v. McDowell, 8 Bush (Ky.) 46; Adams v. Medsker, supra. See however, under "Dower," for exceptions to this rule. As to the grantor's own estate, such a deed is clearly bad. Stone v. Sledge (Tex. Sup.) 26 S. W. 1068.

1787 for the Northwestern Territory; and it is still in full force in Ohio. The effective words of the statute of Connecticut are: "Attested by two witnesses with their own hands, and acknowledged by the grantor to be his free act and deed;" after which the officers, in or out of the state, are named, who may take and certify the acknowledgment.[95] New Hampshire, having by a colonial statute of 1701 required an acknowledgment only, added the formality of two attesting witnesses in 1791.[96] A Massachusetts act of 1783 provided for deeds acknowledged before certain magistrates, or proved, as a mode of conveyance; but this and subsequent statutes were never so construed as to make either attestation or acknowledgment a prerequisite for passing the title between the grantor and the grantee.[97] The statute of Vermont, dating back to 1797, also requires every deed or conveyance of land to be "signed by two witnesses, and acknowledged by the grantor, before" certain officers named, and to be recorded at length; but another section indicates that the acknowledgment and recording are needed only to make the deed effectual against other persons than the grantor or his heirs.[98] After these formalities had been observed for over 50 years, under the government of New Hampshire and of Vermont, the supreme court declared, very properly, that the law was meant to be exclusive of all other methods of conveying lands, and that, though the acknowledgment is only necessary towards recording (in fact, the grantor may be compelled to acknowledge his deed), the two witnesses are as indispensable as the signing and sealing.[99]

[95] Gen. St. § 2954, from Gen. St. 1875, p. 352, § 5, amended in 1878 and 1881.

[96] See history of these laws in French v. French, 3 N. H. 263.

[97] Marshall v. Fisk, 6 Mass. 24; Dole v. Thurlow (1846) 12 Metc. (Mass.) 162. The unacknowledged deed was deemed good as "a covenant to stand seized" in Wallis v. Wallis, 4 Mass. 135; and the statute of uses was deemed in force in Marshall v. Fisk; but Dole v. Thurlow was put on the ground that the statute required proof or an acknowledgment only for purposes of recording, as notice to subsequent purchasers.

[98] R. L. §§ 1927, 1931. A notary public may take the acknowledgment, and certify it without his seal.

[99] Isham v. Bennington Iron Co., 19 Vt. 230 (case really involves other points); Wood v. Cochrane, 39 Vt. 544 (acknowledgment naming grantee instead of grantor cannot be corrected); Town of Lemington v. Stevens, 48 Vt. 38 (lack of acknowledgment leaves deed good as against grantor).

The second section of the ordinance of 1787 speaks of conveying land "by lease and release, or bargain and sale, signed, sealed, and delivered by the person, * * * and attested by two witnesses, provided * * * such conveyances be acknowledged, or the execution thereof be duly proved, and be recorded within one year after execution." [100]

While the legislative power of the Northwestern Territory was vested in the "governor and judges," a decree made in 1795 adopted the common law of England, as modified by antecolonial statutes; and this was followed by a territorial act of 1802 which clearly dispensed with these formalities. But in Ohio, by an act of 1805, taking effect on the 1st of June, both formalities—attestation and acknowledgment—were again required; and so by all subsequent Revisions.[101] On the other hand, the Indiana Territory, which then embraced both Indiana and Illinois, in its first compilation of 1807 left out these requisites; and the common law, as modified by English statutes, being made the rule of decision, there has been no need for either formality in either Indiana or Illinois ever since.[102]

The territory of Michigan, which then embraced Wisconsin, adopted the Ohio statute in 1820, and in a modified form it is still retained in both the states, Michigan [103] and Wisconsin, in which conveyances may be made by deed signed and sealed by the person, etc., "or by his lawful agent or attorney, and acknowledged or proved as directed by this chapter," while another section provides for the attestation of the deed by two witnesses. Hence, the acknowledgment before the designated officer does away with the necessity for the two attesting witnesses on whose oath the "proof" might be made; or the affidavit of the attesting witnesses would complete the deed, and fit it for record, without an acknowledgment.[104]

The ordinance of 1787 became the provisional law of the "South-

[100] The ordinance is printed in the Revisions of Ohio, Michigan, and Wisconsin in the introductory matter.

[101] Moore v. Vance, 1 Ohio, 12; present law, Rev. St. 1890, § 4106.

[102] Stevenson v. Cloud, 5 Blackf. 92, gives the history of the law, speaks of the old "his testibus" clause of deeds of feoffment as becoming obsolete in the reign of Henry VIII., and quotes Co. Litt. 7a, and 356, to show that attestation is not a necessary part of either a common-law or a statutory conveyance.

[103] How. Ann. St. § 5707.

[104] Wis. Ann. St. §§ 2203, 2206.

western Territory," afterwards formed into the states of Alabama and Mississippi. But it was held in the former state that the ordinance was set aside by the adoption of the state constitution; and it seems that this provision was not enforced in any reported case.[105] But an early statute of Alabama, which was carried into all the later Revisions, directs that "the execution of [such] conveyance [unless duly acknowledged] must be attested by one, or, where the party cannot write, by two witnesses, who are able to write, and who must write their names as witnesses."[106] The rule derived from the ordinance seems, however, never to have been either recognized or re-enacted in Mississippi.

The course of decision under the statutes has varied somewhat. In some of the older New Hampshire cases the force of the statute has been frittered away by the argument that the statute of uses (27 Hen. VIII.), which transfers the possession to the use, is still in force, and that the unattested or half-attested deed takes effect as a bargain and sale, or covenant to stand seised; while the two witnesses and acknowledgment are the substitutes for livery of seisin, and thus both kinds of deeds are left for choice.[107] A statute enacted in 1829 expressly forbade this evasion of the prescribed formalities; and they have since been respected.[108] The witnesses need not be "credible" or disinterested, yet a grantor's wife will not count as a witness; neither can the signature of the magistrate at the bottom of the acknowledgment be counted.[109] Whether the signatures of two persons other than the grantor are an attestation, without words indicating that the deed wes executed in their presence, is left undecided.[110]

In Connecticut the attestation of two witnesses and acknowledg-

105 Wiswall v. Ross, 4 Port. (Ala.) 321, quotes Robertson v. Kennedy, 1 Stew. (Ala.) 245, for abrogation of the ordinance.

106 Alabama, St. § 1789. The words "with their own hand," in the Connecticut statute (section 2954), seem also to call for attesting witnesses who are able to write.

107 French v. French, 3 N. H. 263 (covenant to stand seized). See, however, Smith v. Chamberlain, 2 N. H. 441.

108 Stone v. Ashley, 13 N. H. 38, under act of 1829.

109 Frink v. Pond, 46 N. H. 125; Corbett v. Norcross, 35 N. H. 99; Rundlett v. Hodgdon, 16 N. H. 239 (point conceded).

110 Forsaith v. Clark, 21 N. H. 409 (the deed being made before 1791).

ment has been steadily enforced by the courts; and, though the statute did not use the word "credible," it has been held (even since parties were allowed to testify) that a person having a direct interest, such as a stockholder of the grantee corporation, cannot be an attesting witness to a deed, and that it fails as a deed for want of two disinterested witnesses.[111]

The Ohio statute has been fairly enforced. It was held that a deed signed by only one witness does not carry the legal title, and cannot be lawfully recorded; and a deed with a defective acknowledgment is no better: e. g. where the grantor's name is left blank in the certificate, or the official does not subscribe it, or does not give himself his official title.[112] But that the witnesses attest only the "sealing and delivery," and not the signing, or that the certificate bears an earlier date than the deed, has been held immaterial.[113] In Michigan the older statute, worded like that of Ohio, was also strictly enforced, so that a deed with only one attesting witness was deemed unrecordable.[114]

In Minnesota, as the law stood in 1854, a deed of conveyance not attested by two witnesses was void, even against purchasers with notice; but the present law does not require attestation.[115] In

[111] Winsted Sav. Bank v. Spencer, 26 Conn. 195. The question whether the certifying magistrate must be disinterested is also left undetermined.

[112] Smith v. Hunt, 13 Ohio, 260; Hout v. Hout, 20 Ohio St. 219; Johnston v. Haines, 2 Ohio, 55. So, if the acknowledgment is written out on a separate strip of paper (a very common practice in many states). Winkler v. Higgins, 9 Ohio St. 599. The common form of attestation in Ohio is "signed, sealed, and delivered in presence of." Courcier v. Graham, 1 Ohio, 331 (one attesting witness, the deed confers an equity only); White v. Denman, 1 Ohio St. 110 (magistrate's signature to acknowledgment is not counted as attestation). In Illinois, though a part of the old Northwestern Territory, a common-law deed is good, except as affected by the registry laws. Roane v. Baker, 120 Ill. 309, 11 N. E. 246.

[113] Fosdick v. Risk, 15 Ohio, 84 (name of county in venue of acknowledgment supplied from deed, and magistrate thus located in his county); Beckel v. Petticrew, 6 Ohio St. 247; Fisher v. Butcher, 19 Ohio, 406 (date immaterial).

[114] Galpin v. Abbott, 6 Mich. 17; Hall v. Redson, 10 Mich. 21.

[115] Thompson v. Morgan, 6 Minn. 295 (Gil. 199). The court went so far that a mortgage attested by one witness only was not helped against the junior mortgage by the clause in the latter, "subject to M.'s mortgage."

Wisconsin, under the territorial act of 1839, which directed that the deed must be acknowledged "or proved by one or more of the subscribing witnesses," which is embodied in the Revision of 1849, it was held (in view of other parts of the statute) that a deed would, without either attestation or acknowledgment, pass the title between the parties, and that the lack of these formalities would only render the deed unrecordable, and thus without effect against subsequent purchasers.[116]

The rule of the ordinance of 1787 has traveled further westward to the states of Oregon and Washington. Oregon has, ever since its first territorial statutes, demanded the attestation by two witnesses, and the acknowledgment, in nearly the same words as those used in Connecticut; and an early decision (1855) declared that a mortgage lacking in either of these formalities would operate only as an equitable incumbrance, and must be postponed to a later, but regular, mortgage; but later decisions have been much more indulgent.[117]

Most important, perhaps, is the clause in the New York statute under which a deed, if not duly acknowledged before delivery, and the execution and delivery be not attested by at least one witness, shall not take effect against a purchaser or incumbrancer until so acknowledged or attested. The word "purchaser" has been construed in its widest sense; the qualifications of good faith or "for value" being rejected. Hence, a deed unacknowledged and unattested has in New York but little more force than a will. It can at any moment be revoked by another deed.[118] Maryland also requires

[116] Myrick v. McMillan, 13 Wis. 188 (a deed made in 1848); followed, without further remark, in Quinney v. Denney, 18 Wis. 485. See, also, Chase v. Whiting, 30 Wis. 544,—all as to acknowledgment. And lack of witnesses does not affect deed as between parties. Gilbert v. Jess, 31 Wis. 110; Leinenkugel v. Kehl, 73 Wis. 238, 40 N. W. 683. No particular form of attestation. Webster v. Coon, 31 Wis. 72. One set of witnesses good for several grantors. Hrouska v. Janke, 66 Wis. 252, 28 N. W. 166.

[117] Moore v. Thomas, 1 Or. 201. The unacknowledged mortgage in this case was postponed to that of subsequent mortgagees having actual notice. See, contra, Goodenough v. Warren, 5 Sawy. 494, Fed. Cas. No. 5,534 (attesting no part of execution).

[118] 1 Rev. St. pt. 2, c. 1, tit. 2, § 137, after some hesitation, and an equal division in the court of appeals, thus construed in Mutual Life Ins. Co. v. Corey, 135 N. Y. 326, 31 N. E. 1095.

attestation by one witness, at the least, as a prerequisite to the passing of the title; and, as it seems, also acknowledgment before the proper officer. But the attestation by a witness is, upon the construction of the whole article on conveyances, held not to be necessary for a mortgage, as the form for such an instrument given by the statute does not, like that of an absolute deed, wind up with the words: "Test: A. B.,"—at the bottom.[119]

In Rhode Island, by statute, all deeds of conveyance must be acknowledged; and the requirement cannot, as formerly in New Hampshire, be evaded by reliance on the statute of uses, for deeds of bargain and sale, etc., are expressly named. And the deed not acknowledged is void against all parties except the grantor and his heirs; but there are provisions, under which an acknowledgment can be compelled.[120]

There are other states in which the section of the statute which directs how a deed shall be executed says also that it shall be "acknowledged or proved"; such are Indiana, Maine, Minnesota, North Carolina, Tennessee, Arkansas, Texas, Nevada, Idaho, Montana, Wyoming, Alabama, Florida, Arizona. But it seems that in these states the acknowledgment or attestation which leads to proof by the attesting witnesses is only the means of fitting the deed for record; and the deed, when signed or subscribed and sealed, but not acknowledged nor attested, has only the defects of an unrecorded conveyance.[121]

In the states in which the omission of attesting witnesses or of the acknowledgment lowers the deed into a declaration of trust or executory contract, enforceable in equity only, the result is at all events to postpone it to the claims of subsequent purchasers for value without notice; but the states differ in the treatment which they give to such imperfect deeds, as well as to unrecorded conveyances, in the

[119] Pub. Gen. Laws, art. 21, § 51 (deeds); Id. 59 (mortgages). The difference is pointed out in Carrico v. Farmers' & Merchants' Bank, 33 Md. 235.

[120] Gen. St. c. 162, §§ 2, 4, 6–8, based on an act of 1822. Where the deed of a resident of Rhode Island was taken before a justice of Boston, Mass., the deed was held void as against creditors. Richards v. Randolph, 5 Mason, 115, Fed. Cas. No. 11,772. Rhode Island had until lately no system of equity; and a deed not good at law could not be helped out by "notice."

[121] Minnesota, c. 40, § 7; North Carolina, § 1245.

contest with creditors and volunteers. This must be discussed in connection with the recording laws. In the deed of a married woman, the lack of any of the prescribed formalities is much more fatal. It results in the utter nullity of the instrument, except in those states which have removed the disabilities of married women altogether. Of this hereafter.

It is one of the first maxims in the "Conflict of Laws" that both the outward formalities, and the construction and effect of every deed for the transfer of land, depend on the law of the state or country in which the land is situate. But a number of the states have expressly provided by statute that a deed granting a part of their soil may be executed elsewhere in the United States, or even in a foreign country, according to the forms prescribed by the laws of the place of such execution. Such is the law in Connecticut, Ohio, Illinois, Michigan, Wisconsin, Minnesota, Kansas, Nebraska, Oregon, and Florida; this mode of execution being, of course, optional, and not excluding one in conformity to the law of the situs. These states differ, however, in this: Illinois allows only the acknowledgment to be made in the form of the place where it is taken. The others extend this tolerance to all the forms in executing deeds, but Connecticut only to the law of some state or territory of the United States; Minnesota only to the laws of foreign countries; while Ohio, Wisconsin, Kansas, Nebraska, Oregon, Florida, and Iowa allow deeds to be executed, both in and out of the Union, according to the local law of the place of execution.[122] Wherever the statute allows a deed to conform either to the home law or to the foreign law, the one or the other must be pursued throughout; the compliance with one in part, with the other in the remaining requisites, is unavailing.[123]

These statutes are, of course, intended to facilitate the execution of deeds by owners living permanently, or sojourning, abroad; but introduce the difficulty of proving the foreign law on which the validity of the grant is made to depend; and, with this object in view, some of the statutes in question have provided for a certificate of

[122] The sections authorizing the use of these foreign forms are easily found among those governing the execution and acknowledgment of deeds; e. g. in Minnesota it is section 10 of the chapter on Deeds and Mortgages (chapter 40).

[123] Kruger v. Walker (Iowa) 59 N. W. 65; Conneli v. Galligher, 36 Neb. 749, 55 N. W. 229.

some officer abroad, to the effect that the execution and certificate of acknowledgment are in conformity with the laws of the place.[124] The statutes of Kentucky and Missouri expressly provide that deeds written abroad, in a foreign language, shall have full force for the conveyance of land, and direct how such deeds may be admitted to record.[125]

§ 51. Delivery.

A deed or a written obligation, sealed or unsealed, executed or executory, is of no effect until it is delivered; that is, until the grantor or obligor has put the paper or parchment writing out of his own hands into those of the grantee or obligee, or his agent, or has done something held equivalent thereto in the law. The question about this last step which gives efficacy to a deed arises often in the case of an escrow (deed put into the hands of a stranger to be delivered to the grantee on fulfillment of condition)—of which hereafter; also when the deed is put into the hands of a third party, not then the agent of the grantee, for the grantee's use, the latter not assenting at the time, nor recognizing the third party as his agent, until at some subsequent time, when the rights of others may have intervened; or when there has been only a momentary exhibition of the deed, which is afterwards found in the custody of the grantor; and sometimes when there is, in plain English, no delivery at all.[126]

[124] Illinois provides for certificate of clerk under seal.

[125] Kentucky, Gen. St. c. 24, § 37; St. 1894, § 517; Missouri, Rev. St. § 2404.

[126] "It is requisite to every deed that it be delivered, and also that it be accepted;" quoting 4 Kent, Comm. 451. This does not mean that there must be a manual delivery to the grantee. It may be to his agent. Also, "delivery to the recording officer or a stranger will be valid, and the acceptance by the grantee presumed from his conduct without an express acceptance." Ward v. Small's Adm'r, 90 Ky. 201, 13 S. W. 1070. "Delivery may be effected by words without acts, or by acts without words, or by both acts and words." Ruckman v. Ruckman, 32 N. J. Eq. 259. The intention of both parties, it is here said, may amount to delivery, though the deed remains with the grantor; but in this case, and in Dukes v. Spangler, 35 Ohio St. 119, the two deeds from the husband to "conduit," and from the latter to the wife, were in fact delivered; the latter to the husband for the wife. The matter of this and the next section is treated in 2 Bl. Comm. 307, 4 Kent, Comm. pp. 454, 455. A momentary delivery is enough to pass the title, which cannot fail because the paper is returned to the grantor. Trustees of M. E. Church v. Jaques, 1 Johns, Ch. 450.

In strictness, there can be no delivery without an acceptance; and, when the person to whom a deed is handed for the grantee is not empowered by him beforehand to receive it, the deed can, upon principle, have no effect until the grantee learns of its existence, and, by word or act, shows his assent. This is the doctrine in its extreme form, in which some of the states have enforced it. The English, and many American, authorities do not go so far, but generally sustain a delivery to a third person for the grantee's use, though that person be not his agent. When the contest arises between the grantee and those who derive title after the delivery to the third person, and before acceptance by the grantee, this distinction is quite important. The authorities cannot be reconciled. There are some, of the highest rank, which are satisfied with an acceptance assumed on the ground that a given deed is altogether for the grantee's benefit, and that there could be no reason on his part for declining it;[127] but many American courts of last resort take the broad ground (at least for all conveyances other than deeds of gift or family settlements) that a grantee cannot accept the benefits of a deed, if he does not know of its existence.[128] Deeds of gift, however, especially when made to infants of tender years, or by a husband to the wife, or generally to a married woman, have been sustained, not only upon a delivery to the guardian, parent, or husband, or to some friend or confidential person,[129] but in some cases without any manual delivery at all, the grantor retaining the deed among his own papers.

127 Brooks v. Marbury, 11 Wheat. 96; Tompkins v. Wheeler, 16 Pet. 106, quoted approvingly in Grove v. Brien, 8 How. 429, a case of a sale or pledge of goods, in which the court expressly say that the proof of a previous assent of the party receiving them was not necessary, and that, in the absence of all proof to the contrary, the presumed assent to a beneficial grant or transfer is enough.

128 Goodsell v. Stinson, 7 Blackf. (Ind.) 439; affirmed in Woodbury v. Fisher, 20 Ind. 387. Samson v. Thornton, 3 Metc. (Mass.) 275 (case of a ship; stronger, perhaps, for acceptance than Grove v. Brien, supra), which goes back to Maynard v. Maynard, 10 Mass. 456, where no rights of third persons intervene, but where a deed from father to son, sent to the registry and recorded, was held to be undelivered at the son's death, because the son, though in possession of the land, never knew of it. Jackson v. Richards, 6 Cow. (N. Y.) 617 (no delivery without acceptance). But the broad maxim here stated is not borne out by the New York authorities.

129 "By the common law, all persons whatever may be grantees in a deed,

In 1875, the supreme court of Iowa, in passing on a deed from a father to an infant child, admitted that the facts before it would, under many of the American precedents, be deemed insufficient; but, following former cases in the same state it held (1) that manual delivery and acceptance by the grantee are not essential, as otherwise a deed could never be made to a child of tender years; (2) that knowledge by the grantee is not essential; (3) that the grantor need not part with the possession of the paper—the intention to make the disposition of the property final being, it seems, the only test.[130] In fact, some English cases carry the constructive delivery thus far, even as to deeds among adults for business purposes. The opposite view —that a deed of gift, remaining among the grantor's papers, unknown to the world, and found only after his death, is "nothing more than

because it is supposed to be for their benefit. But infants, married women, or persons of insane memory may disagree to such deed, and waive the estate thereby conveyed to them." Cruise, Dig., quoted in Cowell v. Daggett, 97 Mass. 434, 437. Here the father of an infant grantee accepted land conveyed by an executor to her in lieu of a legacy, and his acceptance was held good; she having assented to his acting for her. In Douglas v. West, 140 Ill. 455, 31 N. E. 403, a deed left with a neighbor for grantee, without special instructions, was held to be delivered and enforced, though destroyed by grantor's wife.

[130] Newton v. Bealer, 41 Iowa, 334, following Foley v. Howard, 8 Iowa, 56, 60, and Stow v. Miller, 10 Iowa, 460, 463 ("if a father dies, leaving among his papers a deed of land duly executed in form to one of his children, the law will give effect to the same if there is anything indicating the intention of the intestate that it should become effective"), and adding: "Where one who has the mental power to alter his intention, and the physical power to destroy a deed in his possession, dies without doing either, there is but little reason for saying that his deed shall be inoperative because during life he might have done that which he has not done." In the English case of Doe v. Knight, 5 Barn. & C. 671, a debtor had written out a mortgage to secure a debt of which the creditor did not know, and put it in the hands of his own sister, telling her that it belonged to the latter, but keeping power over it so far that she let him have it when he wanted it. It was admitted that delivering a deed for the grantee's use to one who is not his agent is a good delivery; but the court in banc went further, and thought that the merely formal "I deliver this," spoken to the attesting witness, would have been enough. The New York case of Church v. Gilman, 15 Wend. 656, is oftenest quoted for delivery to a third person. Delivered to scrivener for grantee, death of grantor thereafter immaterial. Colyer v. Hyden, 94 Ky. 180, 21 S. W. 868.

a will defectively executed"; that it cannot operate as a conveyance; and that there can be no delivery after the grantor's death—is borne out by cases in New Hampshire, Indiana, Illinois, Massachusetts, Wisconsin, and North Carolina.[131]

The English, and some high American, authorities maintain that an "instrument may be good as a voluntary settlement, though retained by the grantor in his possession until his death; but such a deed, when not actually delivered to the grantees, or to some one for their use, should be made and kept, under circumstances showing that the grantor deemed the instrument binding, and did not reserve to himself any power" of revocation; at least, nothing to the contrary should appear; though two early Connecticut cases quoted by the supreme court of Pennsylvania have sustained a deed as well delivered, over which the grantor had expressly reserved the right to recall it from his depositary at any time before his death.[132] Reading the deed to the attesting witness, still more, reading it to the grantee, sending it to the registry for record, are strong circumstances to show finality.[133] It seems that, while the rule in favor of "voluntary settle-

[131] Cook v. Brown, 34 N. H. 460, overruling Shed v. Shed, 3 N. H. 432; Parker v. Dustin, 2 Fost. (N. H.) 424 (if grantor retains control over deed handed to stranger, to be delivered after his death, the title will not pass till then, and hardly even then); Johnson v. Farley, 45 N. H. 510 (the decisions of the United States supreme court [see note 127] in favor of presumed acceptances are said not to be law in New Hampshire. If the person receiving the deed is not the agent of the grantee, he is the agent of the grantor); Mills v. Gore, 20 Pick. 28, and other Massachusetts cases quoted in notes 128 and 135; Baldwin v. Maultsby, 5 Ired. (N. C.) 505; (grantor must actually part with the deed, see Illinois cases in note 134). Prutsman v. Baker, 30 Wis. 644 (grantor reserving power over deed in hands of depository defeats delivery; followed afterwards in case of supposed escrow). The decisions in Alabama on escrows approve this line of authorities. Lang v. Smith, 37 W. Va. 725, 17 S. E. 213; Barrows v. Barrows, 138 Ill. 649, 28 N. E. 983 (possession of grantor's agent is his); Cazassa v. Cazassa, 92 Tenn. 573, 22 S. W. 560.

[132] Belden v. Carter, 4 Day (Conn.) 66; followed in Stewart v. Stewart, 5 Conn. 317; quoted by Sharswood, J., in Stephens v. Rinehart, 72 Pa. St. 434, 441.

[133] Bunn v. Winthrop, 1 Johns. Ch. 336 (Chancellor Kent), where a deed attested by two witnesses giving a leasehold to the grantor's mistress and natural child was found in a package with his will. The chancellor quotes Clavering v. Clavering, 7 Brown, Parl. Cas. 410: Boughton v. Boughton, 1 Atk. 625; Johnson v. Smith, 1 Ves. Sr. 314 Where the deed was not ex-

ments" is not denied, the later cases, both in the federal and state courts, incline against the validity of deeds retained by the grantor;[134] while in some states the distinction in favor of family settlements is, as we have seen, unknown. Having the deed put on rec-

hibited before attesting witnesses, it was, under otherwise like circumstances, held for naught. Stillwell v. Hubbard, 20 Wend. 44. In Souverbye v. Arden, 1 Johns. Ch. 240 (which has become a sort of leading case), Chancellor Kent reasserted the doctrine of the former case, but really found on the proof a delivery in fact. He gives a full review of the English cases, among them Naldred v. Gilham, 1 P. Wms. 577, where Lord Macclesfield allowed the grantor to set aside a deed of settlement made on an infant nephew, which she had retained in her own possession. Where a husband in a deed names himself and another trustee for his wife, reading the deed to the cotrustee, who accepted it, was held a good delivery. Huse v. Den, 85 Cal. 390, 24 Pac. 790. For a recent case between husband and wife, see Toms v. Owen (E. D. Mich.) 52 Fed. 417.

[134] Younge v. Guilbeau, 3 Wall. 636: "The grantors must part with the possession of the deed. The presumption [of delivery from registration] is repelled by attendant and subsequent circumstances;" quoting Jackson v. Phipps, 12 Johns. 419, and Jackson v. Leek, 12 Wend. 105; also Maynard v. Maynard, 4 Edw. Ch. 747 (a case taking very strong ground for manual delivery and actual acceptance); Cline v. Jones, 111 Ill. 563. One judge, dissenting, relies on Bunn v. Winthrop, supra, and on Masterson v. Cheek, 23 Ill. 76, where the grantor's intent is said to be the controlling element. The majority rely on Basket v. Hassell, 107 U. S. 602, 2 Sup. Ct. 415 (a case of a gift mortis causa of personalty); Olney v. Howe, 89 Ill. 556 (similar case); Byars v. Spencer, 101 Ill. 429 (demanding, as an equivalent for manual delivery, the grantor's clear disavowal of all further control). They distinguish Scrugham v. Wood, 15 Wend. 545, and Doed v. Knight, 5 Barn. & C. 671, in which the court went beyond the facts before them. An older Illinois case (Hulick v. Scovil, 4 Gilm. 178) sets forth the whole doctrine thus: "(1) Delivery by the grantor and acceptance by the grantee are essential to the validity of a deed. It takes effect only from its delivery. There can be no delivery without acceptance, express or implied; delivery and acceptance being simultaneous and correlative acts. Jackson v. Richards, 6 Cow. 617; Church v. Gilman, 15 Wend. 658. (2) Delivery may be made, first, to the party himself, or to any one by his appointment, or to any one authorized to receive it; or, second, to a stranger for and to the use of him to whom it is made without authority, under certain circumstances. Touch. 57. (3) In case of delivery to a stranger, the accceptance of the grantee at the time of delivery will be presumed under the following concurring circumstances: First, that the deed be upon its face beneficial to the grantee; second, that the grantor part entirely with all control over the deed; third, that the grantor accompany delivery by a declaration or intimation that the deed is delivered to the use of the

ord is not always sufficient proof of the grantor's intent, quite aside of the question of acceptance by the grantee.[135]

Sometimes the question of fraud on creditors is mixed up with that of delivery. An equivocal disposition of the deed may be caused by the grantor's intent to keep up a false credit, to play fast and loose with the conveyance, and to let the grantee claim the land as against creditors only. In such cases, the incomplete delivery is likely to be disregarded as feigned and fraudulent.[136] But the effect of acts which would otherwise suffice as a delivery is not weakened by the grantor's effort to keep a deed of gift secret from the world, or even from the grantee, till his own death.[137]

grantee; fourth, that the grantee has eventually accepted the deed, and acted under it." The facts were these: A., an intruder on B.'s land, had gotten from the auditor the deed made to C., a purchaser at a tax sale, without the latter's knowledge or consent, and sought to set it up as a defense in ejectment to show that B., the plaintiff, had no title. The deed was ruled out, as never delivered. In Kingsbury v. Burnside, 58 Ill. 310, the supreme court regrets that the old rule allows a deed in any case to become binding on the grantor without the acceptance of the grantee. See, also, Cazassa v. Cazassa, 92 Tenn. 573, 22 S. W. 560.

135 Davis v. Williams, 57 Miss. 843 (deed to grantor's grandchildren found in his chest after his death held inoperative); Powers v. Russell, 13 Pick. 69 (case of mortgage to a brother, attested as sealed and delivered, but proved to have been given to a third party, who redelivered to grantee; not sustained, on the authority of Maynard v. Maynard, supra); Chess v. Chess, 1 Pen. & W. (Pa.) 32 (deed being placed on record, not conclusive of delivery). Kentucky, while taking extreme ground as to mortgages, sustained a family settlement on very slight circumstances in Alexander v. De Kermel, 81 Ky. 345. A number of cases on the delivery of voluntary deeds, mainly in favor of children too young to accept intelligently, have been very lately decided in Missouri, in accordance with the above views. Crowder v. Searcy, 103 Mo. 97, 15 S. W. 346; Sneathen v. Sneathen, 104 Mo. 201, 16 S. W. 497; Allen v. De Groodt, 105 Mo. 442, 16 S. W. 494, 1049; Tyler v. Hall, 106 Mo. 313, 17 S. W. 319; Hall v. Hall, 107 Mo. 101, 17 S. W. 811; Pitts v. Sheriff, 108 Mo. 110, 18 S. W. 1071. Georgia does not deem a father's deed to a child delivered when he reads it to the attesting witnesses, and then retains it till his death. Oliver v. Stone, 24 Ga. 63, where Doe v. Knight, 11 E. C. L. 632, is doubted.

136 Blackman v. Preston, 123 Ill. 381, 15 N. E. 42. In Fairbanks v. Metcalf, 8 Mass. 230, the nondelivery of a deed for many years was held rather proof of good faith.

137 Diefendorf v. Diefendorf, 132 N. Y. 100, 30 N. E. 375 (sick husband deliv-

It happens, frequently, that the grantor, in the absence of the grantee, leaves the deed, acknowledged by himself, with the recording officer. Unless it is done in accordance with a previous understanding with the grantee, this does not amount to a delivery; for the recording officer is not the agent of the grantee. Should the latter afterwards withdraw the deed, or act under it, such acceptance completes the delivery; but the deed can date only from such acceptance, and cannot override an intermediate sale or incumbrance, whether voluntary or by process of law.[138] Where a grant or conveyance is made to a trustee for one or more beneficiaries, the acceptance of the trustee is in almost all cases sufficient to pass the whole interest, as far as it is needed to feed all the trusts; but, where the same deed transfers several interests to several grantees, none being named as trustee for the others, each must accept for himself, or the deed will pro tanto remain undelivered, and, to that extent, be of no effect; though, if the grantees had a joint interest, a delivery to one would inure to all.[139] In the nature of things, the deeds

ering deed for his wife to physician); Crain v. Wright, 114 N. Y. 307, 21 N. E. 401 (mother handing a deed of gift for daughter to the latter's husband, —both with injunction of secrecy.) See, also, Douglas v. West, 140 Ill. 455, 31 N. E. 403, where the grantor's wife, who had joined in his deed to grandchildren, destroyed it.

138 Hedge v. Drew, 12 Pick. 141, is a leading case for the position that the delivery "dates from the time of such assent." Building on the lot granted shows the assent of the grantee. Snow v. Orleans, 126 Mass. 453; Springfield v. Harris, 107 Mass. 532. It matters not that before such assent the deed left with the recording officer is lost or stolen. Molineux v. Coburn, 6 Gray, 124. In Georgia the magistrate's certificate of acknowledgment is deemed prima facie proof of delivery. Highfield v. Phelps, 53 Ga. 59. The New Jersey cases on conduct amounting to delivery (Crawford v. Bertholf, 1 N. J. Eq. 467; Commercial Bank v. Reckless, 5 N. J. Eq. 430; Den v Farlee, 21 N. J. Law, 285; Armstrong v. Armstrong, 19 N. J. Eq. 357; Cannon v. Cannon, 26 N. J. Eq. 319), though recognizing favorable precedents, all turn out unfavorable to those claiming under doubtful deliveries.

139 Bell v. Farmer's Bank of Kentucky, 11 Bush (Ky.) 34, is a strong case. The owner of land made a mortgage in favor of several creditors, without a trustee, stating the sum due to each. The deed was put to record. One of the creditors named did not learn of it till after some unsecured creditors had attached the land, while all the other mortgagees had accepted. The one not accepting was postponed, because not knowing of the deed he could not accept. See, also, Com. v. Jackson, 10 Bush, 424, 427. It scouted the

which the grantor thus puts out without the grantee's co-operation are of the kind to benefit the latter, being either deeds of gift or securities for a subsisting debt. Hence, if the presumption of acceptance can be drawn from the character of the deed, proof will hardly ever be needed.[140] Manually placing a deed into the grantee's hands is not, in all cases, a delivery; for words or actions may disprove, as well as prove, a valid delivery,[141]—for instance, where the grantor hands to the grantee a package of papers, including the deed, for safe-keeping, or intrusts the instrument to him, that he may submit it to his lawyer for an opinion as to its sufficiency; and so, in all cases in which the possession of the instrument is wrongfully, or, as the law terms it, surreptitiously, obtained.[142] In strictness, a deed thus obtained is no better than a forged deed; for delivery is just as essential to make a binding instrument as signing or sealing.

proposition that the statute of conveyances, by demanding that a deed must be signed, acknowledged, and recorded, lessens the common-law necessity for delivery. Delivery to one of several joint grantees is good. Carman v. Pultz, 22 N. Y. 547. And, where a mortgage is made for a sum in gross to secure several creditors, an acceptance by one is an acceptance by all. Shelden v. Erskine, 78 Mich. 627, 44 N. W. 146. But the acceptance by the husband of a deed to the wife, where she never acted upon it, was held not to make out a good delivery. Hutton v. Smith (Iowa) 55 N. W. 326. Where the creditor causes a mortgage to be drawn up, the lodging for record is a delivery. Greene v. Conant, 151 Mass. 223, 24 N. E. 44.

140 Where the statute forbids preferences among creditors, and subjects those accepting a preference from an insolvent to costly law suits, a mortgage for an antecedent debt is not always a benefit, and may often be refused. See Johnson v. Farley, 45 N. H. 505.

141 Benneson v. Aiken, 102 Ill. 284; Price v. Hudson, 125 Ill. 284, 17 N. E. 817; going back to Herbert v. Herbert, 1 Breese (Ill.) 354,* and Wiggins v. Lusk, 12 Ill. 132, where the recording of a deed in favor of an absent grantee, who knew nothing of it till after the grantor's death, was held insufficient.

142 Bovee v. Hinde, 135 Ill. 137, 25 N. E. 694 (the question was somewhat mixed up with that of undue influence in obtaining a deed of gift); Pennington v. Pennington, 75 Mich. 600, 42 N. W. 985 (deed gotten hold of by false pretense); Major v. Todd, 84 Mich. 85, 47 N. W. 841 (grantee obtaining deed before conclusion of the business); Comer v. Baldwin, 16 Minn. 172, Gil. 151 (deed left for examination); Parker v. Parker, 1 Gray, 409 (to get signature of grantor's wife). See, for a case of "no delivery," Farmers' & Traders' Bank of Bonaparte v. Haney (Iowa) 54 N. W. 61.

Hence, where the grantee obtains possession of a deed without the grantor's consent, he has no title in law or equity, and cannot confer it, even on a purchaser for valuable consideration, acting in good faith, and without notice of the defect,—a rather harsh doctrine, against which equity might, perhaps, relieve an innocent purchaser where the deed has passed from the grantor's hands under circumstances showing gross negligence.[143]

In some of the states, the statute setting forth the requisites for executing a deed specially name that of delivery;[144] but it is doubtful whether such a clause in the statute has had any bearing on the decisions of their courts as to demanding more or less actual delivery. In Massachusetts, a statute of 1892 makes recording conclusive proof of delivery, in favor of purchasers from the grantee.[145]

A land patent from the United States or a state takes effect from its execution, without delivery; but it is otherwise with a deed made by a tax officer, sheriff, or master in chancery, where the public officer does not convey a part of the public domain, but the land of the citizen.[146] It has even been said that the deed of a corporation, when sealed with the common seal, is good without delivery.[147] In the absence of any proof to the contrary, a deed is supposed to be delivered on the day of its date; but another day, either later or earlier,

[143] Harkreader v. Clayton, 56 Miss. 383; Everts v. Agnes, 4 Wis. 343, 6 Wis. 453; Tisher v. Bechwith, 30 Wis. 55; Steffian v. Milmo Nat. Bank, 69 Tex. 513, 6 S. W. 823 (with intimation as to equitable estoppel); Van Amringe v. Morton, 4 Whart. (Pa.) 382. See, however, Pratt v. Holman, 16 Vt. 530.

[144] This is the case in Massachusetts, Rhode Island, Georgia, Florida, Indiana, California, and Texas. "A grant takes effect from delivery" in New York where however very slight circumstances of delivery have been deemed sufficient; in California and in the Dakotas.

[145] Laws 1892, c. 256.

[146] U. S. v. Schurz, 102 U. S. 378, 408 (case of a land patent, which was preceded by Marbury v. Madison, 1 Cranch, 137, 160); Hammond v. Johnston, 93 Mo. 198, 6 S. W. 83; U. S. v. Le Baron, 19 How. 73 (on commissions to officers). As to tax deeds, contra, Hulick v. Scovil, 4 Gilm. (Ill.) 159; commissioner's deed under decree, Mitchell v. Bartlett, 51 N. Y. 447.

[147] There is a dictum to that effect in Bason v. King's Mountain Min. Co., 90 N. C. 417, quoting Grant, Corp. 63. But I do not believe that the point has been actually decided by any American court, so as to give effect to an undelivered deed by reason of the common seal.

may be shown by parol proof.[148] Of course, the possession of the deed by the grantee is always prima facie proof that it was delivered to him at some time since its execution.[149] As to a deed of partition, retention by a grantor is not proof of nondelivery, as every grantor is also a grantee.[150]

§ 52. Escrows.

The consideration of what is, and what is not, an escrow, is inseparable from that of modified or doubtful delivery of deeds in general. Where a deed is put into the hands of a third person, with directions to deliver it to the grantee after the lapse of a given time, or upon the happening of such a contingency as the grantor's death, this is not, strictly speaking, an escrow. The direction must be to deliver the deed upon the performance of a condition, the most usual being the payment of the whole or of part of the purchase money, or the doing of some act desired by the grantor. The deed of the first kind is "deemed the grantor's deed presently. Still it will not take effect as a deed until the second delivery, but when thus delivered it relates back to the first delivery."[151] But the real escrow takes

[148] Parke v. Neely, 90 Pa. St. 52; Ford v. Gregory's Heirs, 10 B. Mon. (Ky.) 175, 180; Hall v. Benner, 1 Pen. & W. (Pa.) 402; Wood v. Owings, 1 Cranch, 239 (the Maryland act of 1766 has other requisites for passing the estate, but the deed is delivered without these); Pawling v. U. S., 4 Cranch, 219 (where several grantors execute at different dates, the last shows the delivery); Robinson v. Wheeler, 25 N. Y. 252 (date of deed, not of lodging for record); Duke of Cumberland v. Graves, 7 N. Y. 308, and People v. Snyder, 41 N. Y. 397 (nor even the date of acknowledgment); Purdy v. Coar, 109 N. Y. 448, 17 N. E. 352. But in Van Rensselaer v. Vickery, 3 Lans. (N. Y.) 57, it was thought that the date of canceling the revenue stamps on the deed was most probably that of delivery. Contra, Loomis v. Pingree, 43 Me. 299 (date of acknowledgment).

[149] Kille v. Ege, 79 Pa. St. 15 (the presumption is strengthened by acknowledgment and recording); Critchfield v. Critchfield, 24 Pa. St. 100 (though thus strengthened may be rebutted); Strough v. Wilder, 119 N. Y. 530, 23 N. E. 1057. But possession alone is proof. Roberts v. Swearingen, 8 Neb. 371, 1 N. W. 305; Molineux v. Coburn, 6 Gray, 124.

[150] Smith v. Adams, 4 Tex. Civ. App. 5, 23 S. W. 49.

[151] Chief Justice Shaw in Foster v. Mansfield, 3 Metc. (Mass.) 414; quoted by Sharswood, J., in Stephens v. Rinehart, 72 Pa. St. 434, 440, and by the

effect, for all purposes, from the second delivery only,—that is, from that by the third person to the grantee, after condition performed,—and would, at law, be defeated by any intermediate grant or incumbrance.[152]

The intervention of a third person is required, to make an escrow.[153] A deed cannot be delivered on condition to the grantee or to his agent. Such a delivery would pass the estate at once,[154] though we have seen that a deed might be handed to the grantee for inspection only, and that this would not amount to delivery. And if the deed is incomplete on its face (that is, if it lacks the seals or signatures of parties named in it as signers or grantors), the possession of the deed may have been given to the grantee in order to enable him to obtain their signatures; and, when these are still lacking, proof would be admissible that such was the unfulfilled purpose

court of appeals of New York in Hathaway v. Payne, 34 N. Y. 92, 105; actually applied in Ruggles v. Lawson, 13 Johns. 285 (deed for love and affection of A. to his son, to be delivered to C. in case A. should die without will. He died so, and deed delivered. Held to be valid from first delivery); Tooley v. Dibble, 2 Hill, 641 (on similar facts, the quitclaim deed of the son during father's lifetime held to pass the title. These follow the older cases of Wheelwright v. Wheelwright, 2 Mass. 447, and Belden v. Carter, 4 Day (Conn.) 66. The distinction between "contingency" and "condition" is deemed rather thin in Kent's Commentaries, and is discountenanced by the supreme court of Wisconsin in Prutsman v. Baker, 30 Wis. 644.

[152] Ford v. James, *43 N. Y. 300; Stanton v. Miller, 58 N. Y. 192, 201; Daggett v. Daggett, 143 Mass. 516, 10 N. E. 311. See Kent's review of the cases of Taw v. Bury, 2 Dyer, 167b; Alford and Lea's Case, 2 Leon. 110; and Butler and Baker's Case, 3 Coke, 26b (4 Comm. 455, 456, note). The deed deliverable on contingency was given immediate effect in Toole v. Dibble, 2 Hill (N. Y.) 641, so as to support the grantees' grant.

[153] But where grantor hands a deed to grantee, with the understanding that he will hand it over to the agreed depositary to hold as an escrow, he cannot hold it as validly delivered. Gilbert v. North American Fire Ins. Co., 23 Wend. 43.

[154] Duncan v. Pope, 47 Ga. 445—(an extreme case, where the deed was delivered to an attorney representing an infant of tender years); Cherry v. Herring, 83 Ala. 458, 3 South. 667; Flagg v. Mann, 2 Sumn. 486, Fed. Cas. No. 4,847 (arguendo); Miller v. Fletcher, 27 Grat. (Va.) 403; Arnold v. Patrick, 6 Paige, 310; Frost v. Beekman, ubi supra; Worrall v. Munn, 5 N. Y. 229. But where the seller of land intrusted his deed to one of a committee of a corporation, to be delivered on payment of the price, a delivery without payment was held ineffectual. Rhodes v. School District, 30 Me. 110.

of the possession given, and that it does not amount to a true delivery.[155]

The conditions upon which an escrow is to be delivered may be set down in writing, or may be spoken, or partly written and partly spoken.[156] This state of the law is unfortunate, in so far as it makes the title to land, notwithstanding the statute of frauds, rest in parol.[157] The use of the word "escrow," or of any formal set of words, is not essential to make the deed an escrow.[158] Where the grantor has deposited a deed with a common agent of both parties, to be delivered to the grantee without condition, he cannot impose conditions afterwards; and, when he has so delivered it upon conditions agreed between them, he cannot thereafter annex other conditions.[159] But, where the conditions are inconsistent with the deed,—for instance, that a deed reciting payment in money should be delivered in return for notes and a mortgage,—it would seem that an agreement by words of mouth cannot be proved, as against the deed, and that the grantor would be at liberty to countermand his directions.[160] And in some of the cases it is intimated that the delivery of a deed to the grantor's own ordinary agent (e. g. his lawyer) is no delivery at all, even so as to make it an escrow, and leaves the paper within the grantor's control.[161] And, of course, if the grantor alone, or both

155 Hicks v. Goode, 12 Leigh (Va.) 479, and other cases in same state down to Wendlinger v. Smith, 75 Va. 309; Shelby v. Tardy, 84 Ala. 387, 4 South. 276.

156 Gregory v. Littlejohn, 25 Neb. 368, 41 N. W. 253; Ayres v. Milroy, 53 Mo. 518; Pepper v. State, 22 Ind. 399.

157 A regret for this state of the law is expressed by the supreme court of the United States in Pawling v. U. S., 4 Cranch, 219.

158 Abbott, C. J., in Murray v. Stair, 2 Barn. & C. 87, exploding the statement to the contrary in Sheppard's Touchstone; followed in White v. Bailey, 14 Conn. 274 ("many people don't know what the word 'escrow' means"). See, also, Jackson v. Catlin, 2 Johns. 248, 259; Clark v. Gifford, 10 Wend. 310.

159 Blight v. Schenck, 10 Pa. St. 285, quoting Doe d. Lloyd v. Bennett, 8 Car. & P. 124.

160 Campbell v. Thomas, 42 Wis. 437 (the deed under such circumstances is not an escrow, but undelivered); Fitch v. Bunch, 30 Cal. 208 (the deed may be recalled from depositary, when the conditions are not fully agreed on). But where the condition is in accordance with the deed (e. g. to pay cash, where the deed calls for cash), the escrow is irrevocable. Cannon v. Handley, 72 Cal. 133, 13 Pac. 315.

161 Wier v. Batdorf, 24 Neb. 83, 38 N. W. 22. The ruling is rather harsh,

grantor and grantee, reserve any control, there is no escrow.[162]

There are exceptions to the rule that an escrow takes effect only from the second delivery. Should the grantor die, or fall under disability (e. g. a feme sole marrying) before conditions performed, and it be thereafter fulfilled in good time, the fiction is indulged in that the deed was actually delivered while the grantor was alive and free from disability; and the escrow is, in such cases, said to refer back to the first delivery. But this fiction must not work injustice; that is, it cannot override such conveyances, leases, or incumbrances as have been made in good faith in the meanwhile. Its only purpose is to evade the technical objection that the dead or disabled grantor cannot deliver the deed.[163]

A substantial compliance with the condition is generally deemed good enough to justify delivery, and to pass the title. At all events, if the grantee fulfills his own part of the conditions imposed, the deed belongs to him by right, though the grantor and the depositary have failed to do their part.[164] And it has been maintained by some courts of last resort that, upon the compliance of the grantee with the conditions, the deed is his, and the title passes, whether it be actually delivered to him by the depositary, or not,—a somewhat inconvenient doctrine, which enlarges still further the dependence of land titles on the memory of witnesses.[165] On the other hand, should

and not well sustained by authority. If grantor and grantee agree on a depositary, it can matter but little that he is usually the business agent of one or the other.

[162] James v. Vanderheyden, 1 Paige, 385.

[163] Kent, Comm., as in note 151; discussed in Frost v. Beekman, 1 Johns. Ch. 288, and in Simpson v. McGlathery, 52 Miss. 723. In Whitfield v. Harris, 48 Miss. 710, a judgment lien between first and second delivery was cut out. Contra, Jackson v. Rowland, 6 Wend. 666, where an intermediate execution or attachment was preferred. See, also, Ruggles v. Lawson, 13 Johns. 285 (not a true escrow); Jackson v. Catlin, 2 Johns, 248, on error, 8 Johns. 120,—which cases follow Wheelwright v. Wheelwright, supra; Quick v. Milligan, 108 Ind. 419, 9 N. E. 392; Ware v. Smith, 62 Iowa, 159, 17 N. W. 459.

[164] In Frost v. Beekman, supra, the conveyance was to be delivered when mortgage for purchase money "is executed and recorded." The mortgage was correctly drawn and lodged for record, but incorrectly registered, to mortgagee's loss. Held, that the escrow was rightly delivered. Elston v. Chamberlain, 41 Kan. 354, 21 Pac. 2, 9.

[165] White Star Line Steam-Boat Co. v. Moragne, 91 Ala. 610, 8 South. 867,

the depositary hand the deed over to a grantee who has not complied with the conditions, this would not be a good delivery. The possession of the deed by the grantee would be deemed surreptitious, and, strictly speaking, no estate passes to the grantee, and none can be conferred by him, even on purchasers in good faith.[166] It is to avoid such mischievous results that not only a substantial compliance is deemed sufficient, but that in the case of escrows the courts have, in many states, relaxed, or even abandoned, the rule as to "surreptitious" possession of the deed, as running counter to the policy of letting land titles depend on the public record; and this may be justified on the ground that the seller of lands, who intrusts his deed to a third person for delivery, may be deemed guilty of laches when he chooses a depositary who does not obey his instructions.[167]

Where the deed requires for its validity the signature and acknowledgment of husband and wife, the husband, having possession of the deed with the wife's consent, may, without her co-operation, deliver it as an escrow, and make out a statement of the terms on which it may be delivered; and this will be binding, and cannot be recalled by either.[168]

The title to the land (that is, the question whether the grantee has or has not complied with the conditions of the escrow) should not be tried in an action of replevin for the possession of the paper deed.[169] Should it, however, be adjudged in such an action, without an issue having been tried involving the right to the land, the unsuccessful party would not be prejudiced in an ejectment or writ of

where this is claimed to be the "better opinion," quoting Shirley v. Ayres, 14 Ohio, 307; Prutsman v. Baker and Simpson v. McGlathery, supra; and Campbell v. Larmone, 84 Ala. 409, 4 South. 593,—which hardly bear out the position here taken. The case is at best a dictum, as there was in fact no compliance.

[166] See preceding section, note 143; several of the cases there cited being of escrows improperly handed over.

[167] Quick v. Milligan, 108 Ind. 419, 9 N. E. 392 (where the grantee received his deed improperly, and had also possession of the land); Simson v. Bank of Commerce, 43 Hun, 156.

[168] Hughes v. Thistlewood, 40 Kan. 232, 19 Pac. 629.

[169] Knopf v. Hansen, 37 Minn. 215, 33 N. W. 781. Secus, where purchaser has notice, he is bound by the validity or the failure of the escrow. Conneau v. Geis, 73 Cal. 176, 14 Pac. 580.

entry for the land itself.[170] But it is quite usual to sue in chancery (or by analogy to a bill in chancery) both for the delivery of the deed and the land, making both the grantor and the depositary defendants to the suit.[171]

§ 53. Deeds by Married Women.

Until 1848 the only way for a married woman to convey lands was to join in a deed with her husband, except where she was empowered to convey as executrix, or otherwise, as the donee of a power in a deed or will,[172] or where she held a "separate estate," within the meaning of the usage in equity, which separate estate itself (to be treated elsewhere) was derived from the doctrine of powers. Except in Massachusetts, Maine, New Hampshire, Vermont, Connecticut, and South Carolina, an acknowledgment of the deed by husband and wife was also requisite, the acknowledgment of the latter to be made on privy or separate examination. And, where the older American rule prevails, it seems that the married woman cannot even execute a mortgage for the purchase money of land just conveyed to her, without the husband's assent, notwithstanding the strong equity of the vendor.[173] And, as her warranty and covenants of title are void, her joint deed, where she is still under disabilities, would not carry her after-acquired title.[174] But in 1844 the legislature of Maine set on foot a movement for giving to married women the same power of disposition over all their property which the courts of equity had long recognized in so-called "separate estates." New York followed with her acts of 1848 and 1849, and many other states have fallen into line. When a wife could act without her husband, she could no longer pretend to stand in fear of him; and the separate or privy examination, imitated from the "fine" in the old English practice, was no longer deemed necessary by the states which

[170] Flanuigan v. Goggins, 71 Wis. 215, 36 N. W. 846.

[171] Daggett v. Daggett, 143 Mass. 516, 10 N. E. 311.

[172] Sugd. Powers, 148–155; 4 Kent, Comm. 224; Jackson v. Edwards, 7 Paige, 386, affirmed 22 Wend. 498; Wetherill v. Mecke, Brightly (Pa.) 135; Tyree v. Williams, 3 Bibb (Ky.) 368; even where the power results from a secret trust, Gridley v. Wynant, 23 How. 500; Gridley v. Westbrook, Id. 503.

[173] Concord Bank v. Bellis, 10 Cush. 277.

[174] Wight v. Shaw, 5 Cush. 56.

gave her the powers of an unmarried woman over all her property, and this formality was abolished even in many of the states which still require the husband's joinder in the wife's deed of her own estate. The Maine act of 1844 only took from the husband his marital rights in the wife's property. The wife's power of disposition followed in 1861.

In some states the husband's curtesy or analogous rights (in Ohio, his dower) cannot be taken from him without his concurrence. But, as far as her own estate goes, so as to bar herself and her heirs by blood, she can now, without the husband's assent, pass the title in the following states, since the times indicated, for the enactment of the law, marriage, or acquisition of the property: In Alabama, though all the property of the wife, whether held before or acquired after marriage, is by the Code called "separate," yet the husband must join in her deed.[175] In Arkansas as to all property acquired since November 1, 1874, and since March, 1891, as to all property, until which time the joining of the husband and an acknowledgment on privy examination were deemed necessary as to lands acquired before the first-named date.[176] In Colorado since 1861.[177] In Delaware since April, 1873, more fully since 1877.[178] In Connecticut for parties who have married since April 20, 1877, or have by record entry submitted to the new regime.[179] In Georgia since 1866; certainly since the constitution of 1868.[180] In Illinois since July 1, 1874; privy examinations abolished July 1, 1872.[181] In Kansas since Oc-

175 Code, §§ 2341, 2348. See, for exceptions, below.

176 Const. 1868, art. 12, § 6, clogged by a requirement of registration of the wife's separate property. Again, Const. 1874, art. 9, § 7; Dig. §§ 648, 659, however require the husband's joining and a privy examination, and it is held that the constitution is only prospective as to property acquired thereafter. Roberts v. Wilcoxson, 36 Ark. 355; Ward v. Ward, Id. 586. An act of 1891 has dispensed with the privy examination.

177 Section 198.

178 15 Del. Laws, c. 165, § 1, amended by chapters 464, 465, 467 of same volume. The first-named act turns all property of a married woman into separate estate.

179 Gen. St. Conn. 1888, § 2796, referring to Acts 1877, c. 114. Section 2796 makes land bought with the proceeds of her personal services her separate estate.

180 See Huff v. Wright, 39 Ga. 41; Code, § 1754 (1744).

181 Rev. St. c. 68, § 9, and Id. c. 30, § 20.

tober 31, 1868.[182] In Maine, where parties have married since April, 1861; but lands held by gift from the husband, or by gift or devise from his kindred, are still excepted.[183] In Massachusetts since 1874.[184] In Michigan since April 20, 1877.[185] In Mississippi since 1870.[186]

[182] Gen. St. 1889, pars. 3752, 3753, being sections 1, 2, of act of above date. The "homestead" can be conveyed or leased only by joint deed. Const. Kan. art. 15, § 9. See hereafter, under "Homestead."

[183] Rev. St. c. 61, §§ 1, 2. By chapter 73, § 14, the joint deed of husband and wife conveyed her property, in which he has an interest. She may, without the husband's consent, convey land which he has given her before marriage. Reed v. Reed, 71 Me. 156. The old law excepted land directly or indirectly conveyed by the husband, or given or devised by one of his relatives. Under the act of February 12, 1889, only lands conveyed to the wife directly by the husband are withdrawn from her powers.

[184] Pub. St. c. 147, § 1, re-enacted from Acts 1874, c. 184, § 1 (she cannot impair husband's curtesy). Before 1864 the wife could only with the husband's assent in writing convey her separate real estate; that is, any land in which he had no interest other than as a husband. This assent could be given informally, in a way which would not have sustained a joint deed. Hills v. Bearse, 9 Allen (Mass.) 403. Even a signature as attesting witness is enough (Child v. Sampson, 117 Mass. 62) or guarantying a note reciting that it is secured by the wife's mortgage (Cormerais v. Wesselhoeft, 114 Mass. 550).

[185] Act April 20, 1877, now section 5662 of the Annotated Statutes, which re-enacts and validates an act of April 22, 1875, which would have come into force August 3, 1875, but was perhaps void for a flaw in its title. It provides for married women the same form of acknowledgment as for others. How. Ann. St. § 6295. The constitution of 1850, in securing to married women their property, did not empower them to convey it without assent of husband. Brown v. Fifield, 4 Mich. 322. Under the act of February 18, 1855, the married woman may convey without husband, and without acknowledgment, Durfee v. McClurg, 6 Mich. 223, 232 (it was the assignment of a mortgage), and may mortgage her land for husband's debt, Watson v. Thurber, 11 Mich. 457. In Burdeno v. Amperse, 14 Mich. 91, and Ransom v. Ransom, 30 Mich. 328, it is held that since 1850 the husband can convey directly to the wife, and intimated that she might in like manner convey to him. The privy examination was abolished by an act of April 22, 1875, in force August 3, 1875, of doubtful validity, but ratified by act of April 20, 1877, now sections 5662, 5662a, Ann. St.

[186] The constitution under which Mississippi resumed her place in the Union guaranteed equal property rights to men and women, power being reserved to the legislature to regulate the conveyance of homestead. See hereafter, under "Title by Marriage," section on "Conveyance of Homestead."

In Nebraska since June 1, 1871.[187] In Nevada, as to other than community property, since March 10, 1873.[188] In New York progressively under the acts of April 7, 1848, of April 11, 1849, March 20, 1860, April 10, 1862 (the husband's assent being required between the two last acts).[189] In North and South Dakota since 1877, but

[187] Consol. St. § 1412, part of sections 1411–1416, which comprise "An act concerning married women" (Acts 1871, p. 68). Married woman may mortgage her property for debt of husband (Stevenson v. Craig, 12 Neb. 468, 12 N. W. 1); but there must be a consideration, not for an antecedent debt, unless there be such (Kansas Manuf'g Co. v. Gandy, 11 Neb. 448, 9 N. W. 569.

[188] Gen. St. § 507. The separate property must be inventoried in the manner pointed out in sections 501–503. The power of the wife over her separate property is treated in Cartan v. David, 18 Nev. 310, 4 Pac. 61; Rickards v. Hutchinson, 18 Nev. 216, 2 Pac. 52, and 4 Pac. 702.

[189] Act 1848, c. 200, by section 1 makes the property of all females marrying thereafter "sole and separate" property; by section 2 makes all property of women already married "sole and separate," except as to liability for husband's antecedent debts; by section 3 enables a married woman to receive land from all others but her husband by gift, grant, devise, or bequest, and hold it as sole and separate. This section is amended by the act of 1849 (chapter 375) by adding the words "by inheritance," thus making all subsequent acquisitions her "separate property" as if she were unmarried, except what she might earn in business. The act of March 20, 1860 (chapter 90) directs that all property which a married woman "now owns," and that which comes to her by descent, devise, gift, or grant, or which she acquires by trade, business, labor, or service, shall be her sole and separate property; and she may bargain, sell, and convey it, but only with the consent in writing of her husband, or by order of the supreme court. These restrictions were removed by the act of April 10, 1862 (chapter 172). In Yale v. Dederer, 18 N. Y. 265, 271, is a dictum that the acts of 1848 and 1849 make the wife's deed good without privy examination, or the husband's assent; followed by direct decision in Wiles v. Peck, 26 N. Y. 42. But these laws were held unconstitutional, as robbing the husband of vested rights as to property acquired by the wife before passage, Westervelt v. Gregg, 12 N. Y. 202; also Ryder v. Hulse, 24 N. Y. 372 (where the wife, after 1849, attempted to bequeath effects which she had acquired before that time, and in which it was held the husband had vested rights); but valid as to property afterwards acquired by women married before the acts, Thurbu v. Townsend, 22 N. Y. 517. The consent required by the act of 1860 need not be given by joining in the conveyance, but, if given at any time, will validate the deed. Wing v. Schramm, 79 N. Y. 619, affirming s. c. 13 Hun, 377. The acts do not authorize a deed from the wife to the husband, White v. Wager, 25 N. Y. 328; Winans v. Peebles, 32 N. Y. 423 (contra in Michigan, see note 185), but husband and wife may make deed of partition direct under Act 1880, c. 472, and any deeds under Act 1887, c. 537,

not as to lands held by "entireties."[190] In Ohio since March 19, 1887.[191] In Oklahoma from the beginning.[192] In South Carolina since the constitution of 1868.[193] In Virginia when the parties intermarried or the property was acquired since May 1, 1888.[194] In Washington since the Revision of 1881.[195] In Wyoming since 1882, except as to the homestead, as to which the husband must join and the wife be privily examined.[196] In Wisconsin since the Revision of 1850, more fully and clearly since that of 1858; but not as to lands received from the husband.[197] In Utah since 1887.[198] In Arizona since February,

both embodied in Rev. St. 1889. A single case decided by a divided court of appeals (Albany Fire Ins. Co. v. Bay, 40 N. Y. 9) holds that, even without the legislation beginning in 1848, a married woman in New York could bind herself and heirs, though not her husband, by her sole deed.

[190] See, as to South Dakota, Comp. Laws, § 2451, and Act March 7, 1891.

[191] Rev. St. § 4107, which is copied from an act of March 19, 1887. The husband's "dower" cannot be extinguished without his consent; and, as all marital rights of value had been taken away long before, no objection seems to be made to the retrospective effects of the act.

[192] This seems to be the effect of St. Okl. c. 23, § 1 (1695), by which "all persons twenty-one years of age or over" may convey. Section 10 (1704) of the same chapter indicates that husband and wife must join in the sale of the homestead.

[193] Article 14, § 8, gives power to devise, bequeath, or alienate all property, real and personal, and is retrospective as to lands then owned by married women.

[194] Sess. Acts 1888.

[195] Gen. St. 1891, § 1397 (section 2408 of 1881) "may sell, convey and incumber"; section 1400 (2410), referring to community lands, requires deed executed and acknowledged by both husband and wife. There is no privy examination.

[196] Rev. St. § 2.

[197] Ann. St. Wis. §§ 2340, 2342. Property held jointly with the husband (in entireties) is included by an act amending section 1 of chapter 95, Rev. St. 1858, to meet decision in Bennett v. Child, 19 Wis. 362, in which such property was subjected to the husband's debt. Property received from husband's father, or conveyed to wife by a stranger, though in fact paid for by the husband, is separate property, and is subject to the wife's conveyance (Smith v. Hardy, 36 Wis. 417; McVey v. Green Bay & M. Ry. Co., 42 Wis. 532; Lyon v. Green Bay & M. Ry. Co., Id. 548), or property bought by wife with money received of her husband for her release of the homestead right (Allen v. Perry, 56 Wis. 178, 14 N. W. 3).

[198] Utah, St. 1887, § 2 (Acts 1882, c. 1, § 1), a married woman may convey,

23, 1887.[100] In the District of Columbia since June 22, 1874, except as to property coming to the wife by gift or conveyance from her husband.[200] Many of these acts give effect only to the granting clause in the feme's deed, not to her covenants of title; other acts give effect to both. Of this we shall treat hereafter, under "After-Acquired Interests." In many of these states the end was attained by declaring the property of married women, acquired either before or after marriage, to be "separate," and thus extending to it the qualities which "separate estates" had under the usages of equity; but in all these states the power to "dispose of" or to convey has been conferred in express words. The narrower powers which the wife has over "community" property, or over the common homestead, will be discussed in another chapter.

In the following states, which still require the co-operation of the husband in the wife's deed, the privy examination is not in use: In New Hampshire, Vermont, and South Carolina, in which it never was known; just as it never was in use in Massachusetts and Maine, where, indeed, one of several grantors might acknowledge the deed for all of them, even the husband, on behalf of himself and his wife.[201] In Iowa.[202] In Maryland; but the certificate of acknowledgment must describe the feme as the wife of the male grantor.[203] In Minnesota.[204] In Missouri; though the certificate must still describe the feme as the wife of her husband.[205] In New Mexico, where the separate examination was of course unknown under the old Spanish laws.[206] In Montana since February 18, 1881.[207]

At common law a woman whose husband had "abjured the realm"

etc.; section 13, a nonresident married woman must join with the husband, and they must acknowledge the deed.

199 In Arizona, by section 225 of the Revised Statutes of 1887, any married woman over 17 can convey her separate land (but not the homestead) without her husband joining, and without privy examination.

200 2 Rev. St. U. S., Dist. of Col. §§ 727, 728.

201 Massachusetts, c. 147, § 1; Maine, c. 61, § 1.

202 Section 1935.

203 Article 45, § 2.

204 Gen. St. c. 40, §§ 2, 7–10.

205 Section 2408.

206 See "Title by Marriage."

207 Comp. St. Mont. div. 5, §§ 236, 239; the latter being act of 1881.

was deemed a feme sole; and Lord Mansfield thought that a woman coming to reside in England while separated from her husband had the power to bind herself by contract. The doctrine has been recognized in Massachusetts and in Maryland,[208] and, in analogy to it, the law in several states frees married women from their disability in similar cases. In Pennsylvania an act of 1718 recognized as "feme sole traders" all wives whose husbands have gone to sea and left them behind to earn a living. This law was extended to all wives whose husbands, by reason of drunkenness or profligacy, fail to provide for them. A decree may be obtained to declare the wife's character; but even without it the deserted wife can alien her lands and bar the curtesy by doing so.[209] In New Hampshire and Rhode Island, a woman coming into the state, and staying six months in the former or twelve months in the latter, without her husband, becomes emancipated; but falls again under disability should he follow her and live with her.[210] In Tennessee, if the wife abandons her husband, or he abandons her, or becomes insane, she has full power of disposition.[211] In West Virginia any woman, living separate and apart from her husband can convey her lands without his assent.[212] In New Jersey a woman, whose husband is idiotic or insane, or is confined in the state penitentiary of any state, or lives apart from him under a decree of separation, can dispose of her lands without his assent, but not so as to affect his curtesy. And similar provisions are found in the statutes of other states.[213] And a decree of divorce a mensa et thoro will generally have this effect, though it do not impair curtesy or dower.[214] In Kentucky the wife coming into the state by herself has

[208] Gregory v. Paul, 15 Mass. 34; Gregory v. Pierce, 4 Metc. (Mass.) 478; Rhea v. Rhenner, 1 Pet. 105.

[209] Pennsylvania, Purd. Dig. "Feme Sole Traders"; Black v. Tricker, 59 Pa. St. 13; Wilson v. Coursin, 72 Pa. St. 306; Foreman v. Hooler, 94 Pa. St. 418; Elsey v. McDaniel (without decree) 95 Pa. St. 472.

[210] New Hampshire, Pub. St. c. 176, § 8; Rhode Island, c. 165, § 1 et seq.

[211] Tennessee, Code, §§ 3346, 3347; the latter section directing that such a woman shall be examined by the judge or clerk of the chancery court.

[212] West Virginia, Code, c. 66, § 3.

[213] In Alabama, under section 2348, the husband need not join, if he is non compos, or nonresident, or has abandoned the wife, or been sentenced to two years or more of imprisonment.

[214] Dean v. Richmond, 5 Pick. 461, only decides that a woman having a

the powers of a feme sole; otherwise she can obtain the powers of a feme sole only by the decree of the court of equity for the county of her residence, either because the husband has abandoned her, in or out of the state, or is confined in the penitentiary for an unexpired term of a year or more, or is deranged in his mind. And she may also obtain like powers on other grounds, by petition with or against her husband, which can only be heard after a newspaper notice of at least 10 days, without which notice the decree would be void.[215] There are laws by which the courts can confer full powers of disposition on a married woman, for some of these causes, in New Jersey, Rhode Island, Indiana, Alabama, and Florida; also, in Michigan and Oregon, where, in view of the general emancipation of women, they are hardly needed, at least not for the ordinary conveyance of land.[216]

Where husband and wife have to join in conveying the estate of the latter, or where the wife releases her dower to a purchaser of her husband's land, they generally appear both as grantors in a single deed, thus: "We, John Doe and Susan Doe, his wife, hereby grant," etc. In most states this is the only course. The wife may, however, join in a deed with the attorney in fact of her husband.[217] In Texas the husband may assent in writing to his wife's deed; in Kentucky the husband may convey first, and the wife make her conveyance afterwards; in Rhode Island they may convey by one deed or by separate deeds.[218]

decree a mensa can sue by herself; but many of the statutes allowing such decrees plainly or implicitly give her all the power of a feme sole,—e. g. the Kentucky statute removes all property effects of marriage, except dower, curtesy, and distributive share.

215 Gen. St. Ky. c. 52, art. 2, §§ 1, 2, 5, 6. The powers given under these statutes are not cumulative, but supersede the doctrine of the wife of one who has "abjured the realm," regaining her powers. Hannon v. Madden, 10 Bush, 664. The last-named section is taken from an act of February 14, 1866 (Myers' Supp. p. 728). As to woman coming into the state by herself, see chapter 52, art. 2, § 10. As to publication to support the decree, see Hart v. Grigsby, 14 Bush, 542; Dunn's Ex'rs. v. Shearer, Id. 574; Mann v. Martin, Id. 763.

216 E. G. Florida, §§ 1505–1509; Alabama, § 2350; Rules in chancery 21.

217 Glenn v. Bank of U. S., 8 Ohio, 72.

218 Kentucky, St. 1894, § 506; Rhode Island, Pub. St. c. 166, § 7. Although this statute only provides for the conveyance of land of which husband and wife are seised, it has been extended (with or without the help of Act 1868,

Whenever, in the joint deed of husband and wife, the execution by the latter becomes void, by reason of the lack of a good acknowledgment or otherwise, the deed is nevertheless good against the husband; which rule is in our days of much less importance than formerly, as almost all the states have taken the power from the husband to dispose, during the wife's lifetime, of his marital rights other than his curtesy. It is the better opinion that, wherever the husband has to join in the wife's deed, he must be named as a grantor (perhaps the pronoun "we" in the granting clause might connect itself with the signature, as in a note); a mere mention in the testimonium clause is not enough. But it has been held otherwise in Massachusetts and New Hampshire.[219] It has been held in Texas that land warrants or "certificates" that are not yet located are no more than choses in action, and may be transferred by the owner, if a married woman, with the concurrence of her husband, without acknowledgment or privy examination.[220]

While married women were under disabilities which prevented them from binding themselves by executory contract, the covenants in a conveyance or lease coming from a married woman were indeed void; but, as the power to convey included that of charging the land, the object could, where a reversion was retained, be generally attained by giving a lien in aid of the covenant. Thus a married woman joining with her husband in a building lease might make her contract to pay for the improvements at the end of the term effective by charging her fee in the land with the sum to be paid.[221]

c. 726) to the sale of remainder interests. D'Wolf v. Gardiner, 9 R. I. 145. Among late acts in this direction is that of Florida of May 31, 1893, by which a wife can convey her land by herself, when the husband has been insane, or been declared insane, for one year; and of Minnesota, of April 20, 1891, when the husband has been insane for three years; and the Alabama act of 1887, No. 41, where the husband is non compos, has abandoned the wife, or been convicted and sentenced for two years or more of hard labor.

[219] Gaston v. Weir, 84 Ala. 193, 4 South. 258. Under the Massachusetts act of 1887 the husband can thus give his assent. Chapman v. Miller, 128 Mass. 269. He can assent to a mortgage by guaranteeing the note. Child v. Sampson, 117 Mass. 63.

[220] See "Texas Titles" in next chapter. Ballard v. Carmichael, 83 Tex. 355, 18 S. W. 738.

[221] Bullock v. Grinstead, 95 Ky. 261, 24 S. W. 867.

Where the statute empowers a married woman to convey her own property, or to release her dower, with or without her husband, with or without a separate examination and acknowledgment, it does not follow, by any means, that she can appoint an attorney to make such a conveyance in her behalf. Some of the modern statutes are indeed so broad, in the removal of all the disabilities of coverture, that the capacity to act by attorney would follow. But, under the statutes which impart only certain rights, that of making an attorney is never implied; and the older statutes of conveyances either confer this power on all or on some married women (e. g. on nonresidents) in separate clauses, or they are understood to withhold it altogether. Hence, "powers of attorney by married women" must be discussed along with Letters of Attorney.

§ 54. The Privy Examination.

In the states not excepted in the preceding section, even now (and in most of those there named within times recent enough to bear upon the land contests of the future) the deed of a married woman, in order to pass the title to her own estate, or to relinquish her dower in that of her husband, is not fully executed until the feme has been examined separate from her husband and the contents of the instrument made known to her, and until she has thereupon acknowledged it to be her free act and deed, and, in some states, has declared "that she does not wish to retract it" or "consents that it be recorded," and until these facts are certified on the deed by the officer taking the acknowledgment. The wording of the statutes differs considerably, the oldest being generally the fullest, guarding against "coercion or compulsion" of the husband, or his undue influence or threats of displeasure; and "separate" is sometimes better defined as "without the hearing of her husband."

The oldest of the statutes that are still in force is the colonial act of Pennsylvania of February 24, 1770. Under it, the husband and wife were to appear before a judge of the supreme court or justice of the county court of common pleas (other officers in and out of the state were afterwards added), and to acknowledge the deed, in doing whereof the judge or justice shall "examine the wife separate and apart from her husband, and shall read or otherwise make

known to her the full contents of such deed; and if, upon such privy examination, she shall declare that she did voluntarily, and of her own free will and accord, seal and deliver said deed, without coercion or compulsion of her husband," the deed is to be valid. The justice must be of the court of the county in which the land lies.[222] The Virginia act of 1785 is, in some of its features, still in force in Kentucky, and prevailed for a long time in Virginia and West Virginia; but the county clerk or his deputy was, after a few years, substituted for the county court, composed of all the justices, in which anciently the deeds of Virginians were acknowledged or probated, and ordered to record. Under this act of 1785, the deed being sealed and delivered by husband and wife, and the latter having been "examined privily and apart from her husband," she must "declare to him (the justice) that she did freely and willingly seal and deliver the said writing, to be then shown and explained to her, and wishes not to retract it," or, when the acknowledgment is taken elsewhere than in the presence of the recording court, she "consents that the same may be recorded." In the later Kentucky statute, it is made the duty of the officer "to explain to her the contents and effect of said deed." [223]

This phrase, "and wishes not to retract the same," is also required by the laws of Rhode Island, Texas, Idaho, and Arizona, and by those until 1891 in force in California; while North Carolina has the equivalent words "and does still voluntarily consent thereto"; while Tennessee, Delaware, and New Jersey use no words of like import.[224]

[222] Brightly's Purd. Dig. p. 568, "Deeds and Mortgages," pl. 22.

[223] Kentucky, Morehead & B. St. p. 432; Virginia, 12 Hen. St. 154, amended from colonial act of 1748 (Morehead & B. p. 429); Virginia, 5 Hen. St. 408. The present Kentucky law (Gen. St. c. 24, § 21) requires that the officer, before taking a married woman's acknowledgment, should "explain to her the contents and effect of the deed, separate and apart from her husband"; and, "if she freely and voluntarily acknowledges the same, and is willing for it to be recorded," he shall certify it, if he be a clerk within the state, in general terms, compliance with the law being presumed; if an officer outside of the state, he must state these facts in a mode prescribed, winding up "and consented that the same might be recorded." As to the husband, the deed may be proved by witnesses.

[224] "She shall be examined privily and apart from her husband, and shall declare to the officer that the deed or instrument shown and explained to her, etc., is her voluntary act, and that she does not wish to retract the same."

The forms that were formerly in use in Ohio, New York, Illinois, Maryland, Michigan, Wisconsin, Arkansas, and Missouri, may still have a bearing on present questions of title. It is thought best to refer, in a note, either to the requirements of the law or to the

Rhode Island, Pub. St. c. 166, § 8. "And upon an examination without the hearing of her husband, I made her acquainted with the contents of the within instrument, and thereupon she acknowledged to me that she executed the same and does not wish to retract such execution." Idaho, Rev. St. 1887, §§ 2922, 2956. "And having been examined by me privily and apart from her husband, and having the same fully explained to her, she the said * * * acknowledged the same to be her act and deed, and declared that she had willingly signed, sealed and delivered the same, and that she wished not to retract it;" or any certificate substantially showing these facts. Texas, Rev. St. art. 4310. "Personally appeared * * *, known to me (or proved to me on the oath of * * *) to be the person whose name is subscribed to the within instrument, described as a married woman, and upon an examination without the hearing of her husband I made her acquainted with the contents of the instrument, and thereupon she acknowledged to me that she executed the same, and that she does not wish to retract such execution." California, Civ. Code, § 1191. "And * * *, wife of the said * * *, having appeared before me privately and apart from her husband, the said * * * acknowledged the execution of the said deed to have been done by her freely, voluntarily and understandingly without coercion or restraint from her said husband, and for the purposes therein expressed." Tennessee, Code, § 2891. "And the said * * * being by me privately examined, separate and apart from her said husband, touching her voluntary execution of the same, doth state that she signed the same freely and voluntarily, and without fear or compulsion of her said husband, or any other person whatsoever, and does still voluntarily consent thereto." North Carolina, Code, § 1246. "And the said * * * being at the same time privately examined by me apart from her said husband, acknowledges that she executed the said indenture willingly, without compulsion or threats or fear of her husband's displeasure." Delaware, Rev. Code, c. 83, §§ 4, 9. "And the said [wife] being by me privately examined, separate and apart from her husband, further acknowledged that she signed, sealed and delivered the same as her voluntary act and deed, for the uses and purposes therein expressed." New Jersey, Revision, p. 154, "Conveyances." § 9. In Arizona (for deeds of homestead): "Before me personally appeared * * *, wife of * * *, known to me (or proved to me by oath of ——) to be the person whose name is subscribed to the foregoing instrument, and having been examined by me privily and apart from her husband, and having the same fully explained to her, she acknowledged such instrument to be her act and deed and declared that she had willingly signed the same for the purposes and consideration therein expressed, and that she did not wish to

forms.[225] The statutes on the acknowledgment of deeds have many provisions applicable to all persons alike, as much to married women as to others, such for instance, as the declaration required, by many states, of the magistrate that he knows the grantor personally.

retract it." Arizona, Rev. St. § 2583, taken from Arkansas form. In Wyoming, § 2784 (homestead deeds only), the officer must "further certify that * * * wife of said * * * was by me first examined, separate and apart from her said husband, in reference to the signing and acknowledging of the foregoing deed, that she was fully apprised by me of her right and the effect of signing and acknowledging the same, and that while separate and apart from her husband she did sign the said deed and did acknowledge that she freely and voluntarily signed and acknowledged the same for the uses and purposes therein set forth." In the District of Columbia as to dower or joint deeds: "And the said * * *, wife of said * * *, being by me examined privily and apart from her husband, and having the deed aforesaid fully explained to her, acknowledged the same to be her act and deed, and declared that she had willingly signed, sealed and delivered the same, and she wished not to retract it." Rev. St. U. S. District Laws, § 451,—before that the Maryland form under the colonial act of 1765 was in force. In Alabama, as to the homestead (though even the acknowledgment of a common deed recites that, "being informed of the contents," husband and wife executed the conveyance "voluntarily"), the officer must certify: "Came before me the within named * * *, known to me (or made known to me) to be the wife of the within named * * *, who being examined separate and apart from the husband, touching her signature to the within [deed] acknowledged that she signed the same of her own free will and accord, and without fear, constraint or threats on the part of her husband." Code, § 2508.

[225] In Ohio, after the general acknowledgment of husband and wife, the certificate would proceed: "And the said * * * wife of said * * * being examined by me separate and apart from her said husband, and the contents of said instrument being by me explained and made known to her as the statute directs, did declare that she did voluntarily sign and acknowledge the same, and that she is still satisfied therewith as her act and deed." The Revised Statutes have this provision, going back to Acts of 1805, 1820, and 1827, referred to in notes to section 4 of this chapter. In New York the Revised Laws of 1813 and Revised Statutes of 1829 (part 2, c. 3, § 10) required only resident wives (nonresidents being by the next section allowed to acknowledge like feme soles) to acknowledge "on a private examination apart from her husband, that she executed such conveyance freely and without any fear or compulsion of her husband"; being a substantial re-enactment of Colonial Laws of 1771 and 1773. In Maryland the examination was governed by Colonial Acts of 1715 and 1765. Then, by an act of 1830, until the married woman's act of 1858, embodied in the General Public Laws of 1889 as article

While the neglect of such a provision in the certificate might render the deed of a man or of a feme sole only unfit for being recorded, it must defeat the deed of a married woman entirely wherever a cer-

45, § 2, it was required that a judge or justice should "examine her out of the presence and hearing of her husband whether she doth execute and acknowledge the same freely and voluntarily and without being induced to do so by fear or threats of or ill usage by her husband or by fear of his displeasure, or to that effect; and she must sign and seal such deed before such judge or justice and he must endorse and annex a certificate," etc. At present the certificate of acknowledgment only requires that the grantors should be named as "* * * and * * *, his wife." Under the former law of Mississippi the feme had to acknowledge on "a private examination, separate and apart from her husband (before a judge or justice authorized, etc.), that she signed, sealed, and delivered the same as her voluntary act and deed, freely and without any fear, threats, or compulsion of her husband." Mississippi, Laws 1840, c. 34, § 19; Rev. Code 1871, § 2315. The Michigan acts regulating acknowledgment by married women are the territorial acts of August 29, 1805, re-enacted April 12, 1827, Rev. St. 1838, pp. 258, 263,—"separately and apart from her husband she declared that she executed the deed without any fear or compulsion of her husband"; April 1, 1840, embodied as chapter 65, § 12, in Rev. St. 1846,—"Without fear or compulsion from any one." See note to present Annotated Statutes (section 5662). The officer cannot make his examination through an interpreter. Dewey v. Campau, 4 Mich. 565. Substantially the same form as in Michigan was used in Wisconsin and Iowa as long as separate acknowledgments were used in those states. In Arkansas the acknowledgment of the wife is taken by her "voluntarily appearing before the proper court or officer, and in the absence of her husband declaring that she had of her own free will executed the deed or instrument in question (or had signed the relinquishment of dower) for the purposes therein contained and set forth, without compulsion or undue influence of her husband." Dig. 1884, §§ 648, 659. In Missouri the act of 1825 (section 12) required the married woman to appear before a court of record; that of 1845 (sections 34, 37) before a court, judge, clerk, justice, or notary. The latter act is contained in the Revision of 1855, p. 363. She must be known or proved by two witnesses to the court or officer to be the person, etc., and "such court [or judge, etc.] shall make her acquainted with and explain to her the contents of such deed * * * and examine her separately and apart from her husband," etc., "and if such woman shall, upon such examination, acknowledge such deed," etc., "that she executed the same voluntarily, freely and without compulsion or undue influence of her husband and does not wish to retract it," it shall be certified. Justice may take the acknowledgment under Laws 1855; Mitchell v. People, 46 Mo. 203, overruling West v. Best, 28 Mo. 551. The Illinois form was, under the act of 1833, literally the same as what was required as above stated in Missouri.

tificate of acknowledgment is deemed an essential part of a married woman's deed.[226]

As to the facts that make up the privy examination and acknowledgment, the better opinion is that the certificate cannot be eked out by parol proof when it is defective,[227] nor contradicted by parol proof when it is in proper form and covers the whole ground. And it seems that only in obedience to curative acts (of which hereafter) has parol evidence been allowed to eke out a defective certificate. In California, also, under a former law which allowed the officer to amend his certificate under orders of the county court, or a law now in force (though the separate examination is no longer used) allowing the district courts under their equity powers to correct the certificate, it is said that the wife's deed is fully executed by her acknowledgment,—not, as formerly, when a good certificate was written out.[228] In Missouri, it was held that the certificate may be contradicted, being only prima facie proof of the facts stated; and such was the rule in Minnesota from an early day, under the express provision of the statute.[229] In Kentucky, since the Revision of 1852

[226] Thus, in Tennessee, the omission of the words, "who is known to me as such," concerning the female grantor, rendered her deed void. Garnett v. Stockton, 7 Humph. (Tenn.) 84. The older cases on the requisites of a valid deed by a married woman are gathered in Heaton v. Fryberger, 38 Iowa, 185.

[227] Thus, where blanks had been left for the names of the husband and wife (Merritt v. Yates, 71 Ill. 636), the deed was void; and an amendment made by the justice post litem motam was held unavailing. But, where the names had been inserted where they first occur, leaving the subsequent blanks, referring to them, unfilled, the certificate will be good (Donahue v. Mills, 41 Ark. 421).

[228] California, Civ. Code, § 1202; Wedel v. Herman, 59 Cal. 507 (certificate reformed). But not in the absence of such a statute. Barnett v. Shackelford, 6 J. J. Marsh. (Ky.) 532; Still v. Swan, Litt. Sel. Cas. (Ky.) 156; Elliott v. Peirsol, 1 Pet. 338; Jourdan v. Jourdan, 9 Serg. & R. 268.

[229] Wannell v. Kem, 57 Mo. 478, where the magistrate had at first written a plain acknowledgment, and long afterwards added the privy examination, the jury were justified in believing the grantor's testimony in contradiction. In this case the grantee was not allowed to prove that the female grantor knew the contents of the deed without having them explained. In Dodge v. Hollinshead, 6 Minn. 25 (Gil. 1), the acknowledgment by the feme is said to be as material as the signature. In Hughes v. Lane, 11 Ill. 123, a very defective certificate was allowed to pass muster on the ground that the feme might show by parol that the examination was not carried on according to law.

county clerks within the state need no longer write out the facts, the law assuming that they, being acquainted with its requirements, would act accordingly; and when they certify that a grantor who is the wife of a cograntor has acknowledged a deed, it is evidence that she has done so in the prescribed way. It was held that this evidence is not conclusive, but may be met by proof. This doctrine was carefully limited by later decisions;[230] and, under the Revision of 1873, the certificate can only be assailed for fraud in the grantee or mistake in the clerk.[231] And so, in Tennessee, the act of the clerk or other officer certifying the acknowledgment is said to be quasi judicial; that to contradict it by outside proof must upset the security of titles; and that it should only be assailed for fraud or duress,—that is, on the same grounds on which the deed of a person sui juris might be impeached,—a doctrine which would protect purchasers in good faith,[232] and which pervails also in Ohio, Maryland, Texas, and other states, being, as above stated, the better rule; with the distinction, however, which is sometimes taken between an imperfect examination or acknowledgment and the lack of any, the wife never appearing before the officer at all, in which latter case the certificate has been called a forgery.[233]

[230] Woodhead v. Foulds, 7 Bush, 222, and Foard v. Teal, Id. 156, are the only Kentucky cases in which the evidence against the certificate was allowed to prevail. In these and in those following, in which the objection did not prevail, the contest was with the grantee himself.

[231] In Moorman v. Board, 11 Bush, 135, where the wife had heard the deed explained in her husband's presence, and would not listen to a second explanation apart from him, it was held good; and in Jett v. Rogers, 12 Bush, 564, 567, the court says, if she understands the deed already, there is no use in explaining it again. The contradictory evidence "must be convincing," etc. Gen. St. c. 81, § 17. See it applied in Tichenor v. Yankey, 89 Ky. 508, 12 S. W. 947.

[232] Shields v. Netherland, 5 Lea, 196. Contra, Coleman v. Satterfield, 2 Head, 259, where the deed was obtained by duress, but held good in hands of bona fide purchaser, the certificate being in form.

[233] Baldwin v. Snowden, 11 Ohio St. 203; Hartley v. Frosh, 6 Tex. 208. A bona fide purchaser is protected by the certificate. As against others, it may be overthrown by proof of fraud or duress. Heeter v. Glasgow, 79 Pa. St. 79, where the certificate is called a "judicial act," as in Jamison v. Jamison, 3 Whart. (Pa.) 457; as also in Tennessee in Shields v. Netherland, 5 Lea, 196. Duress by the husband without guilty knowledge of the grantee does not vitiate the acknowledgment. Singer Manuf'g Co. v. Rook, 84 Pa. St. 442;

Defects in the several parts of the certificate must now be considered. It may be said, in general, and will be found in all the cases quoted, that the very words of the statute need not be used, as long as their substance is fully reproduced. If it does not appear that the wife was examined apart from her husband, or examined generally, as the case may be, this is, of course, fatal.[234] It has been held that the word "privately" means apart from all other persons but the examining magistrate; that it is not the same as "apart from her husband," and cannot be omitted. In New Jersey, the contrary conclusion has been reached.[235] It must appear that the contents of the deed have been made known to the married woman;[236] but slight deviations from the words of the statute on this head have generally been overlooked, such as "contents" where the statute said "contents and effect"; or "she was made acquainted with," instead of the deed being "made known and explained to her."[237] In

Donahue v. Mills, 41 Ark. 421. So, also, Central Bank v. Copeland, 18 Md. 305. The magistrate was not allowed as a witness to contradict his certificate, distinguishing Bissett v. Bissett, 1 Har. & McH. 211. And in Florida it can only be impeached for fraud. Shear v. Robinson, 18 Fla. 379. So, also, Johnston v. Wallace, 53 Miss. 331. In Louden v. Blythe, 16 Pa. St. 532, the grantee having means for knowing the fraud, proof was admitted against him. The feme not having appeared before the officer at all, the certificate was treated as a forgery; Michener v. Cavender, 38 Pa. St. 334; Allen v. Lenoir, 53 Miss. 321. Same doctrine in Meyer v. Gossett, 38 Ark. 377. Wife's own testimony not enough to overcome the certificate even for fraud. Hart v. Sanderson's Adm'rs, 18 Fla. 103. See, also, in favor of the conclusiveness of the certificate, Hall v. Patterson, 51 Pa. St. 289; McCandless v. Engle Id. 309; Schrader v. Decker, 9 Pa. St. 14. In California, the certificate may be attacked for fraud (De Arnaz v. Escandon, 59 Cal. 486), but not simply contradicted (Le Mesnager v. Hamilton, 101 Cal. 532, 35 Pac. 1054; Banning v. Banning, 80 Cal. 279, 22 Pac. 210); but the distinction in Johnston v. Wallace, 53 Miss. 331, is recognized where the notary did not see the wife.

[234] Thompson v. Morrow, 5 Serg. & R. (Pa.) 289; Ellett v. Richardson, 9 Baxt. (Tenn.) 294; Barnet v. Barnet, 15 Serg. & R. 72; Graham v. Long, 65 Pa. St. 363.

[235] Warren v. Brown, 25 Miss. 66. Contra, Den v. Geiger, 9 N. J. Law, 225; Thayer v. Torrey, 37 N. J. Law, 339.

[236] Silliman v. Cummins, 13 Ohio, 116, and Connell v. Connell (1834) 6 Ohio, 353, are still good law elsewhere, though overruled under pressure in the same state, in Chesnut v. Shane, 16 Ohio, 599, and other cases in the same volume, on the ground of "communis error facit jus."

[237] The act of June 8, 1893, gives to a woman full power to convey if only

stating that the feme acknowledged the execution of the deed, the words of the statute for denoting this execution "signed and sealed," or "signed, sealed, and delivered," or "executed," etc.), being incidental only, need not be strictly followed.[238]

Under the older laws on conveyances the certificate under a deed in which the feme only relinquished her dower in the husband's land used to state such relinquishment as being made and acknowledged by her; thus differing from the certificate of acknowledgment which would be appended to a deed of the wife's own land. As the former class of deeds was far more common, the officer would often, from ignorance or mistake, append the certificate of relinquishment to the wife's deed of her own land, thus indicating that the deed was not understood by him, and that he could not have explained it to her. In Kentucky, the intrusion of these words was held destructive, but in Missouri it was rejected as surplusage;[239] while the omission of the words about relinquishing dower, where the statute prescribed them, would defeat a release of dower, these words being of the very essence.[240] It has been contended that a court of equity cannot correct a mistake in the deed of a married woman as to description or terms; because to do so would imply that the paper had not been rightly explained to her, and the new deed would not be her own free act. In California, this contention has been allowed. Not so in a late case before the court of appeals

the husband joins, and seems to dispense with privy examinations. As to the former law, see Hornbeck v. Mutual Building & Loan Ass'n of Elizabeth, 88 Pa. St. 64; Gill v. Fauntleroy's Heirs, 8 B. Mon. (Ky.) 117; Martin v. Davidson's Heirs, 3 Bush (Ky.) 572. The case of Stevens v. Doe, 6 Blatchf. (Ind.) 475, goes further in condoning defects in this and all other parts of the certificate. See, also, Hughes v. Lane, supra.

238 Martin v. Davidson's Heirs, supra; Nantz v. Bailey, 3 Dana (Ky.) 111. But the omission of the words "for the consideration and purposes," and the substitution of "she willingly acknowledged" for "she acknowledged" that she willingly executed, were each held fatal in Hayden v. Moffatt, 74 Tex. 647, 12 S. W. 820.

239 Still v. Swan, Litt. Sel. Cas. (Ky.) 156. Contra, Chauvin v. Wagner, supra. In Hughes v. Lane, 11 Ill. 123, there were two lots, one belonging to the husband, one to the wife. The relinquishment was referred to the former only, "ut res magis valeat.," etc.

240 Russell v. Rumsey, 35 Ill. 362, where the necessity for the relinquishment clause was inferred from the general usage and the accepted blanks and

of Kentucky, which was formerly so watchful over married women's rights. This question is akin with that of blanks in a married woman's deed filled up after acknowledgment, which has been discussed in a former section.[241]

The words expressing that the feme acknowledges her action to have been free vary greatly from state to state. The courts of Tennessee, Alabama, and Arkansas have insisted on close compliance with the law in this part of the certificate. For instance, the word "understandingly" was thought indispensable in Tennessee. "For the purposes therein expressed" is essential in Arkansas; but that she "executed and delivered," or the words to that effect, need not follow the statute closely, no stress falling on them in the sentence.[242] The closing words "consents that it be recorded," or "wishes not to retract it," wherever called for, have been held essential, except in Illinois, where the court thought that they were not intended to form a part of the certificate, but were only intended for the guidance of the magistrate. In Ohio, the last case allows a very weak substitute for these words.[243]

form books. O'Ferrall v. Simplet, 4 Iowa, 381. Also Barnett v. Shackelford, supra, under the older Kentucky law.

[241] Leonis v. Lazzarovich, 55 Cal. 49, 56. Contra, Tichenor v. Yankey, 89 Ky. 508, 12 S. W. 947. And see notes to latter part of section 48 of this chapter.

[242] Wright v. Dufield, 2 Baxt. (Tenn.) 218; Henderson v. Rice, 1 Cold. (Tenn.) 223; Hunt v. Harris, 12 Heisk. 244. A divergence from the Alabama statute in the declaration as to acting freely (Clay, Dig. p. 155, § 27) was held fatal in Boykin v. Rain, 28 Ala. 332, but the words as to what she acknowledged doing, such as "signed, sealed and delivered," or "executed and delivered," are rather formal, and a variance here is of little import. Martin v. Davidson's Heirs, 3 Bush, 573.

[243] Grove v. Zumbro, 14 Grat. 501; Linn v. Patton, 10 W. Va. 187; Landers v. Bolton, 26 Cal. 408; Belcher v. Weaver, 46 Tex. 294; Chauvin v. Wagner, 18 Mo. 531. In the latter case some minor discrepancies from the words of the statute, such as "made acquainted with," instead of "made known and explained to her," or "that she signed," instead of "executed," were condoned. Strictness was, however, applied, as the acts regulating privy examinations (acts 1821 and 1825) alone, after the common law had been introduced, gave married women the power to convey their land. A number of the older cases are quoted, among them McDaniel v. Priest, 12 Mo. 545,—rather liberal; Jones v. Lewis, 8 Ired. (N. C.) 70,—not enough to indorse "private examination had" without stating all the facts. The certificate was held defective

The courts have been stricter in insisting that a duly-authorized officer should take the acknowledgment than about its form or contents.[244] Generally, but not always, the same officer who might certify a man's acknowledgment might also take and certify that of husband and wife. Some of the older laws require, for a release of dower, and still more for the acknowledgment of a deed conveying the wife's own land, a greater solemnity,—a higher official, or two justices, or justices to whom a dedimus is directed by the proper county court. The Code of Tennessee still provides a special commission for taking the acknowledgment of the wife when she is prevented by infirmity from coming to the courthouse. These provisions have led to many miscarriages in the conveyance of the wife's own land.[245] The difficulty is increased when the deed is executed outside of the state, though the appointment of "commissioners of deeds" for each state residing in other states, under the recommendation of congress, has furnished at least to the dwellers in large cities a pretty safe outlet. Abroad, all kinds of acknowledgments can generally be received by diplomatic and consular officers; but it is doubtful whether a state law giving authority to a consul to certify a deed is satisfied with a vice consul or deputy consul. A list of the officers named by each state, who are authorized to take

as not showing the required declarations in Rhode Island. Churchill v. Monroe, 1 R. I. 209; Petition of Bateman, 11 R. I. 585. Browder v. Browder, 14 Ohio St. 589 ("doth acknowledge"), but the total omission was held fatal in Ward v. McIntosh, 12 Ohio St. 237. But in Illinois the words "she does not wish to retract" were deemed in Hughes v. Lane, 11 Ill. 123, not a part of the certificate under the statutes of 1833. There was a strong dissent. But a mistake through illiteracy, like "contract" for "retract," is immaterial. Belcher v. Weaver, supra.

[244] However, a benignant construction has been followed when feasible. Thus "chief justice, mayor or justice," in another state, was construed to include justices of the peace. Helms v. O'Bannon, 26 Ga. 132. A deputy clerk, under age, signing only his own name, it was held good in Kentucky. Talbott v. Hooser, 12 Bush, 408. Clerk generally includes deputy clerk, all of which will be referred to under the head of "Acknowledgments" generally.

[245] Pearce's Heirs v. Patton, 7 B. Mon. (Ky.) 162, to be quoted hereafter on the constitutional question, arose from the want of a dedimus to the certifying justice. As to dedimus in Tennessee, see Code, §§ 2892, 2893; and the cause of appointment must appear, or the act is invalid. Perry v. Calhoun, 8 Humph. 551.

privy or other acknowledgments in or out of the state or county can be found in any of the yearly law directories.

The Virginia act of 1785, which, till December 1, 1873, was, to that extent, the law in Kentucky, passed the estate, or barred the dower, of the feme, only when her well-executed and acknowledged deed was actually lodged for record; and this could be done effectually only within a named time,—within 8 months from the execution when the grantors resided in the commonwealth; within 18 months, when out of it; afterwards, 12 months only when elsewhere in the United States. Otherwise, the deed had to be redelivered and reacknowledged. An act of 1831 seemed to revoke this rule, but was construed not to have such an effect. The Revised Statutes of 1852 again proclaimed it, and it was only abrogated on December 1, 1873. But the feme's deed, must still be recorded before it takes effect, though this may be done at any time.[246] It is recognized as a principle that courts of equity have no power to relieve against a mistake by which a married woman's deed is void under the statute for noncompliance with any of its requisites. Such a deed is considered as not having been executed.[247]

§ 55. Deeds by Corporations.

At common law the conveyances of a corporation aggregate, like all of its more important contracts, were made under its corporate seal; those of natural persons, under their private seal. For the

[246] Virginia Acts of 1748 and 1785, supra; Kentucky Acts of 1792 and 1796; More & B. pp. 434, 436, et seq.; Prewit v. Graves, 5 J. J. Marsh. 120; Kentucky, act of 1831 (More & B. St. p. 450; Rev. St. 1852, c. 24, § 23; Gen. St. c. 24, § 22), copied otherwise from the old section, but leaving out the words excluding married women's deeds from its operation. Some difficulty has arisen in Kentucky recently where a deputy takes the acknowledgment, and it is afterwards written out by the principal clerk or another deputy. See Act of 1854, made section 38 in chapter 24, Gen. St., which, while intended to settle the difficulty, made it worse, and was therefore amended May 10, 1884; Franklin v. Becker, 11 Bush, 595; Drye v. Cook, 14 Bush, 459; McCormack v. Woods, Id. 78; Gordon v. Leech, 81 Ky. 229; Woods v. James, 87 Ky. 511, 9 S. W. 513,—the last perhaps incorrect, as the short memorandum made at the time was a good enough certificate.

[247] Heaton v. Fryberger, 38 Iowa, 185; Martin v. Dwelley, 6 Wend. 9; Butler v. Buckingham, 5 Day (Conn.) 492; Carr v. Williams, 10 Ohio, 305.

use of the seal in the former case there are two grounds: The supposed necessity of finding a symbol for expressing the consent of many minds by a single act; and the importance of the act itself, which transfers the freehold in land. In many states the statute has done away with the necessity of private seals in all cases; and everywhere the rule which formerly allowed corporations to contract only under their common seal has broken down completely as to all contracts which individuals are in the habit of making by word of mouth, or in the form of unsealed instruments. But where the two grounds for the seal concur (that is, in the conveyance of land by a corporation) the usage of all the states is still on the side of the seal; and in but few states could such a conveyance, when without the common seal, be relied on as passing the legal title.

Under the common-law rule, the seal, when appended to a deed, in prima facie proof that it was affixed by the authority of the corporation,—especially if it was put to the deed by the officer intrusted with the custody of the seal. The burden rests upon those who deny the deed to show that the seal was put to it without authority, or as they call it "surreptitiously." [248]

It has been held repeatedly that a corporation may adopt any device, though it be not at all distinctive, as its corporate seal; and in a late Missouri case a scroll containing the word "Seal," evidently intended for the seal of the corporation,—there being no proof as to the use of any other,—was deemed sufficient.[249] But, even if

[248] U. S. Bank v. Dandridge, 12 Wheat. 70; Lovett v. Steam Saw-Mill Ass'n, 6 Paige, 54; Flint v. Clinton Co., 12 N. H. 430; Chouquette v. Barada, 28 Mo. 491; Trustees Canandarqua Academy v. McKechnie, 90 N. Y. 618; Union Bank v. Call, 5 Fla. 409; Koehler v. Black River Falls Iron Co., 2 Black, 715. There is a wholly unexplained Massachusetts decision (Smith v. Smith, 117 Mass. 72), declaring unauthorized a release of mortgage by the president under the common seal, given by mistake.

[249] Missouri Fire-Clay Works v. Ellison, 30 Mo. App. 67, where a separate scroll was set down as the seal of the corporation. Reynolds' Heirs v. Trustees of Glasgow Academy, 6 Dana (Ky.) 37, 39, where a scroll had been set opposite the name of each signer. In this case the words "Trustees of" was part of the corporate name. It is possible that the present Kentucky statute (Gen. St. c. 22, § 2) abrogates the use of scrolls, which are no longer needed for private grantors; but it is not likely that the courts would for that reason demand a seal with an impression from a corporation. In Porter v. Andros-

the seal be distinctive and descriptive, it does not prove itself. The party producing the corporate deed has the burden of proving that the seal is that of the corporation, unless he be relieved thereof by the law governing the acknowledgment of the deed by the officers.[250] In some of the states (e. g. in California, and the Dakotas) the statute dispensing with the use of seals is so broad that it would apparently do away with all need for corporate or private seals. Yet in all these states the statute law recognizes the corporate seal. The right to have one, in each of them, is among the powers of corporations. Even the mode of impressing it upon the paper is, in some states, regulated.[251] Hence, as a rule, the corporate seal is everywhere appended to deeds for the conveyance or incumbrance of lands, made by a corporate body, except where the statute provides another method of authenticating the deed.

Affixing the corporate seal does not, by itself, make a corporate deed, unless the corporation be named as the grantor, and its property (as distinguished from the shares of the members) be granted by the words of the instrument, though it is by no means necessary, in conveyances either to or from corporations, that the corporate name should be rendered exactly; a misnomer being immaterial as long as the body meant as the grantor or grantee can be recognized.[252]

Under our American statutes, a deed must not only be sealed, but also signed or subscribed. The name of the corporation should therefore appear at the end.[253] And it should also appear by whom it is put there. In the absence of any statute, the president or

coggin & K. R. Co., 37 Me. 349, it is held that a corporation may use any seal. The clause "sigillum nostrum commune" is said not to be essential. See, also, Mill-Dam Foundry v. Hovey, 21 Pick. 417.

250 Den v. Vreelandt, 7 N. J. Law, 352.

251 Says the Dakota Territory Civil Code (section 925), taken from the California Civil Code (section 1629): "All distinctions between sealed and unsealed instruments are abolished." On the other hand, in Kentucky corporate seals are expressly excepted from the abolition of seals and scrolls. Gen. St. c. 22, § 2. For recognition of corporate seals, see Civ. Code Dak. T. § 924; Civ. Code Cal. § 1628.

252 Guthrie v. Imbrie, 12 Or. 182, 6 Pac. 664; Wheelock v. Moulton, 15 Vt. 519. See, as to misnomer, Walrath v. Campbell, 28 Mich. 111; Kentucky Seminary v. Wallace, 15 B. Mon. (Ky.) 35, 44.

253 At least where a deed has to be "subscribed" or "signed at its foot,"

chief officer is the proper man to do so, and he should subscribe his own name and title.[254] In several states it is expressly directed that the corporate deed shall be signed or that it shall be acknowledged by the president alone; in some, by the president and secretary, while in North Carolina a statute, which is held to be permissive, says that the deed may be authenticated by the corporate seal and the signature of the president and three other members.[255] Where the power rests with the chief officer, but the deed is signed by the vice president, claiming to act in the chief's place, the court will assume that the proper case has arisen for his taking such place.[256] Where the law of the state requires only the president's signature, but a by-law requires that of another officer in addition, a stranger is not bound by the latter requirement, not being bound to know the by-laws.[257]

etc., see section 49 of this chapter. Isham v. Bennington Iron Co., 19 Vt. 230. The question whether the section of the English statute of frauds which requires a deed or will in writing for the conveyance of a freehold in land (which is still the law in Pennsylvania and New Jersey) required the deed to be signed is answered by Blackstone in the affirmative; but Mr. Preston, in his edition of Sheppard's Touchstone, comes to the opposite conclusion. The learned discussion is given in Cooch v. Goodman, 2 Adol & E. (N. S.) 597, and in Den v. Tunis, 25 N. J. Law, 633.

254 In Brinley v. Mann, 2 Cush. 337, a corporate deed, good enough in its body, but signed "The N. E. Silk Co., by A. B., Treasurer," was, partly on that ground, held to be invalid; but the cases of Haven v. Adams, 4 Allen, 80, and Sherman v. Fitch, 98 Mass. 59, pretty nearly offset this.

255 Delaware (chapter 83, § 6), Florida (Rev. St. § 1955), Nebraska (section 350), Texas (Rev. St., art. 600), require only the president or chief officer to sign and acknowledge. Where the common law prevails, the custom of a corporate body may authorize some other officer to execute grants. Thus the treasurer's assignment of a mortgage was held good in Jackson v. Campbell, 5 Wend. 574. Of course, in equity, where the mortgage follows the note or bond, an assignment by the managing officer is enough. Lay v. Austin, 25 Fla. 933, 7 So. 143. In Minnesota the secretary is the proper party to make oath to the execution with a view to recording. Bowers v. Hechtman, 45 Minn. 238, 47 N. W. 792. As to the North Carolina statute, see Bason v. King's Mountain Min. Co., 90 N. C. 417.

256 Smith v. Smith, 62 Ill. 493 (under common law); Ballard v. Carmichael, 83 Tex. 355, 18 S. W. 734 (under a statute which requires the president to sign).

257 Smith v. Smith, ubi supra. In Scott v. First Methodist Church, 50 Mich. 528, 15 N. W. 891, parol evidence was admitted to charge a corporation as the true grantor in a deed not properly signed.

A deed signed by the proper officer, and sealed with the corporate seal may, even at common law, be invalid in the hands of the immediate grantee, or purchasers with notice, when it is not authorized by the corporation, and when its execution is known to be against its policy and custom.[258] But the consent of the board of directors need not be given by a vote entered on its minutes, though that is always the safest way of expressing it.[259] Where the seal is impressed in the presence of the directors while sitting as a board, or where they receive the avails of a conveyance or mortgage, or act upon it, the authority is so complete as not only to sanction or ratify a deed formally signed and sealed, but even one that is defective on its face.[260] However, in some states the statute demands a more formal authority, as will be seen hereafter; and there is also a principle of the law of corporations, supported by a long line of cases, according to which directors or members of any governing board, whether in a private or in a municipal body, have no powers to act, or to bind the general body, except when they are assembled as a board.[261]

[258] Fitzhugh v. Franco-Texan Land Co., 81 Tex. 306, 16 S. W. 1078. Similar is Enterprise Imp. Co. v. Wilson (1889) 11 Ky. Law Rep. 4. So in Leggett v. New Jersey Manuf'g & Banking Co., 1 N. J. Eq. 541, the court went behind the common seal of the bank and the signatures of the president and secretary. In the former case the officer signing the deed was likened to an agent, whose authority is opened to proof. But it was held in Pennsylvania (Manhattan Hardware Co. v. Phalen, 128 Pa. St. 110, 18 Atl. 428) that, where a mortgage recites that it is made by order of the board, and is sealed and signed by the proper officers, the mortgagee loaning money on its faith must be protected.

[259] Cook v. Kuhn, 1 Neb. 473, where a vote was taken, but the minutes had not been signed. Ft. Worth Pub. Co. v. Hitson, 80 Tex. 216, 14 S. W. 842, 848. That no "vote" can be found was held insufficient to overcome the presumption in favor of the seal in Fidelity Ins., T. & S. D. Co. v. Shenandoah Val. R. Co., 32 W. Va. 244, 9 S. E. 180; Ruffner v. Welton Coal & Salt Co., 36 W. Va. 244, 15 S. E. 48. That the directors met in another than the home state when they authorized the deed is not fatal to it. Thompson v. Natchez Water & Sewer Co., 68 Miss. 423, 9 South. 821.

[260] Zihlman v. Cumberland Glass Co., 74 Md. 303, 22 Atl. 271 (not a land case), where the seal was affixed in the presence of the assembled board, but without a resolution. Ratification by using proceeds. Ottawa Northern Plank R. Co. v. Murray, 15 Ill. 336.

[261] Baldwin v. Caufield, 26 Minn. 43, 55, 1 N. W. 261, where the contract for

The absence of the corporate seal must, where it is not dispensed with by statute, render the supposed deed of the corporation void, at least at law; and this has been so held in some very late cases,—especially so in states in which the statutes declare, in accordance with the common law, the necessity for the seal.[262] But where the deed is made for a full and valuable consideration, and in good faith; where the proceeds (that is, the purchase price of an absolute conveyance, or the money loaned on a mortgage) have come into the hands of the corporation, and been disposed of by its governing body,—the courts have either worked out a ratification or an estoppel, or have treated the writing as they would a defective deed made by an individual (that is, as an obligation to convey or to incumber, enforceable in equity).[263] On the other hand, where the purpose of the deed was inequitable, the want of the corporate seal would be gladly taken hold of to defeat it, as where the directors gave a mortgage of the corporate lands to indemnify one of their own number, thereby excluding outside creditors.[264]

In Vermont, New Hampshire, and Minnesota, the common will

a deed made by the sole stockholder, and a deed signed at different places and times by all the directors, were deemed insufficient; the opposite interest arising from a pledge of shares by the former. So in the English case of D'Arcy v. Tamar, K. H. & C. Ry. Co., L. R. 2 Exch. 158, three directors (that being a quorum) having separately ordered the secretary to affix the common seal to a deed, it was held unauthorized. Same principle in Edgerly v. Emerson, 23 N. H. 555; Schumm v. Seymour, 24 N. J. Eq. 143; Junction R. Co. v. Reeve, 15 Ind. 237.

[262] Duke v. Markham, 105 N. C. 131, 10 S. E. 1007 (in North Carolina the seal is recognized by statute, and is, moreover, required in deeds by individuals), a mortgage made by the president, secretary, and two other stockholders was held not to be a recordable instrument. In McElroy v. Nucleus Ass'n, 131 Pa. St. 393, 18 Atl. 1063, a mortgage for purchase money was held void for want of seal.

[263] Congregation Beth Elohim v. Central Presbyterian Church, 10 Abb. Prac. (N. S.) 484 (corporation may agree to sell without seal).

[264] Danville Seminary v. Mott, 136 Ill. 289, 28 N. E. 54, where the trustees of an extinct "eleemosynary" corporation sold its lands for a consideration of one dollar, in order to prevent its reverter to the founder. Mott v. Danville Seminary, 129 Ill. 403, 21 N. E. 927. The deed in this case was also deemed void, as being ultra vires under its charter. Lowry Banking Co. v. Empire Lumber Co., 91 Ga. 624, 17 S. E. 968.

may, under the statute, be gathered otherwise than through the common seal. A vote is had to name an agent who is to convey on behalf of the corporation, and this "vote" may be spread on the record in the office in which the deed would be registered.[265] In Vermont this mode is deemed exclusive of the common-law method. Not so in Minnesota.[266] In an early Nebraska case a deed thus made by an agent under a resolution was held valid without such a statute, but mainly on the ground of estoppel.[267] Connecticut has gone no further in regulating deeds of corporations than to allow witnesses and magistrates who are not disinterested (i. e. stockholders) to attest and to certify the acknowledgment for fear that deeds to or from corporations might otherwise frequently fail.[268]

But there is another class of statutes, contrived to protect the stockholders of trading and manufacturing corporations, from the unauthorized acts of their officers, or even of the governing bodies. Thus, in California, and neighboring states which have borrowed its laws, it is enacted that "the corporate powers, business and property * * * must be exercised, conducted and controlled by a board of * * * directors," a majority of which may act "when duly assembled," and whose doings should be recorded.[269] In the former state it has been held that neither the president nor the secretary, nor both together, can, without the previous order of the board, mortgage the lands of the corporation; and a ratifica-

[265] Vermont, § 1926; New Hampshire, Gen. Laws, c. 135, § 2; Minnesota, vol. 1, c. 40, § 2, copying the words of the Vermont statute (section 3 directs the recording of a certified copy of the vote).

[266] Isham v. Bennington Iron Co., 19 Vt. 230. Contra, Morris v. Keil, 20 Minn. 531 (Gil. 474). The supreme court of Massachusetts, in passing on the New Hampshire statute, gives to it the latter construction. Saltmarsh v. Spaulding, 147 Mass. 224, 17 N. E. 316. In the District of Columbia, without any statute requiring such a course, it is the habit of all corporations to appoint an attorney in fact by vote of the governing body. The appointment is generally recited in the deed, but it is also signed by the president and secretary, and sealed with the corporate seal.

[267] Cook v. Kuhn, 1 Neb. 473.

[268] Connecticut St. 1888, § 2955. However, a shareholder might, it seems, without the statute attest a deed from a corporation, as he would be a witness against his own interest.

[269] California, Civ. Code, §§ 305, 308, 377; Dakota Territory, Civ. Code, §§ 407, 408, 417.

tion by the board, not made in direct terms, was deemed insufficient to help out the act of the officers.[270]

Similar laws requiring action by the governing board for the conveying or incumbering of lands prevail in other states; e. g. in New York a "moneyed corporation" cannot dispose of property of greater value than $1,000 without a previous resolution of its board of directors.[271] Again, the laws of New York allow manufacturing or trading companies formed under the corporation act of 1848 to sell and convey their lands freely; but they must not mortgage them without the written consent of two-thirds of all the stockholders, counted by shares. A similar law prevails in Michigan as to all private corporations, including churches. In the latter of course, the count must be made by heads, and the assent has to be given at a meeting. In such cases, where the proceeds of the mortgage or of sale have come into the hands of the corporate body, and the stockholders or members have dealt with the funds received, and have applied them to corporate ends, the courts are very apt to sustain a conveyance or incumbrance made in good faith, and for a full consideration.[272] In Pennsylvania

[270] Bliss v. Kaweah, C. & I. Co., 65 Cal. 502, 4 Pac. 507; Blood v. Marcuse, 38 Cal. 594; Gashwiler v. Willis, 33 Cal. 12; Southern C. C. Ass'n v. Bustamente, 52 Cal. 192; Harding v. Vandewater, 40 Cal. 78. In Alta Silver Min. Co. v. Alta Placer Min. Co., 78 Cal. 629, 21 Pac. 373, a mortgage made by the president and secretary without order of the board was held void.

[271] New York, Rev. St. pt. 1, c. 18, tit. 2, § 8 (from section 186, c. 409, Laws 1882, but in place of a like section of the old Revised Statutes). What is meant by moneyed corporations is shown in sections 214, 215. The provision has been passed upon by the court of errors or of appeals in the following cases: Gillett v. Campbell, 1 Denio, 520; Gillet v. Moody, 3 N. Y. 486; Leavitt v. Blatchford, 17 N. Y. 521; Belden v. Meeker, 47 N. Y. 307 (assignment of mortgage to a bank by its president sustained); Supervisors of Niagara Co. v. People, 7 Hill, 504.

[272] New York, Acts 1864, c. 517; Acts 1871, c. 481, and Acts 1878, c. 163 (the latter as to mortgaging franchises). The original act forbade mortgages altogether. The assent may be given subsequent to the mortgage. Rochester Sav. Bank v. Averell, 96 N. Y. 467. A partial assent is good as far as it goes. Lord v. Yonkers Fuel-Gas Co., 99 N. Y. 547, 2 N. E. 909. The mortgage may be given for a new as well as for an antecedent debt (Id.), and one mortgage to secure several creditors or a series of bonds (Carpenter v. Black Hawk Min. Co., 65 N. Y. 43). Ratified by subsequent assent without preju-

the constitution of 1874, seeking to secure the stockholders in corporations from wanton abuse of power by the directors, forbids the increase of corporate indebtedness unless it is authorized by the stockholders. Under this provision it is held that a mortgage made by way of renewal for an existing debt is valid without the assent of the stockholders.[273]

Aside of such local laws, there is no reason why the governing body of a corporation should not either convey or mortgage its landed estate as freely and effectually as an individual. As a mortgage is at common law only a sale on condition, the power to sell embraces that to mortgage.[274] The power to turn over the whole property of the corporation in payment of debts, or by deed of trust for sale and distribution among creditors, has been denied on the ground of being ultra vires, as such disposition of all the corporate property makes the further pursuit of the ends for which the body was chartered impossible; and this objection might be

dice to intermediate rights. Rochester Sav. Bank v. Averell, 96 N. Y. 467. Assent may be given before land is acquired, and need not specify details. Greenpoint Sugar Co. v. Whitin, 69 N. Y. 632. Mortgage given in accord with terms on which the land is bought seems not to be within the law. McComb v. Barcelona Apartment Ass'n, 134 N. Y. 598, 31 N. E. 613. Stockholders who have paid for shares are counted, though certificates have not been issued to them. On the Michigan statutes, see Scott v. First Methodist Church, 50 Mich. 528, 15 N. W. 891. In Missouri, under section 735 of the Revised Statutes, the written assent of all the stockholders gives force to the corporate act, though there be no resolution of the board (see Manhattan Brass Co. v. Webster G. & Q. Co., 37 Mo. App. 145); and this would be good law in the absence of all statute.

[273] Const. Pa. art. 16, § 7; Powell v. Blair, 133 Pa. St. 550, 19 Atl. 559.

[274] Wood v. Mayer (Miss.) 7 South. 359. Pierce v. Emery, 32 N. H. 503; Richards v. Railroad Co., 44 N. H. 135. And good faith and authority should be presumed with corporate officers as in case of agents. Fitch v. Lewiston Steam-Mill Co., 80 Me. 34, 12 Atl. 732. In Jones v. New York Guaranty Co., 101 U. S. 623, it is said: "At the common law every corporation had, as incident to its existence, the power to acquire, hold, and convey real estate, unless restricted by charter or act of parliament. The jus disponendi was without limit or qualification. It extended to mortgages given to secure the payment of debts." So, also, White Water Valley Co. v. Vallette, 21 How. 414; Aurora Agricultural Soc. v. Paddock, 80 Ill. 263 (following earlier cases in same state). The power to mortgage is implied in that to sell or lease. Watts' Appeal, 78 Pa. St. 370.

very strong if such a disposition were made wantonly, and while the corporation is solvent, and able to fulfill its objects.[275] But when a corporation is insolvent it can assign and convey in trust for its creditors, except when restrained by local statute law.[276] For some reason or other, the legislature of New York has forbidden, and rendered utterly void, all deeds by corporations made, on their face, in contemplation of insolvency, including, of course, the ordinary deed of trust for the benefit of creditors, whether with preferences or without; and this statute has been ruthlessly enforced in favor of judgment liens and executions obtained after such objectionable deeds.[277] It is impossible to give here even a short sketch

[275] In Missouri, an assignment in insolvency can therefore be made only with the consent of the stockholders. Eppright v. Nickerson, 78 Mo. 482. In a New York case not touched by the statute it was held, that only the stockholders can complain of such want of assent. Abbot v. American Hard-Rubber Co., 33 Barb. 580. See contra below, under "Statute." For the same reason the Montana General Laws (section 492) do not allow the board of a mining company to sell the mine without the consent of the stockholders; and an act of April 23, 1880, forbids the sale, lease, mortgage, or disposition of mining ground by the directors, unless it be ratified by two-thirds of the stockholders, in writing or by vote.

[276] Thus, in North Carolina, by statute, unsatisfied creditors may attack any conveyance or mortgage by a corporation within 60 days. Duke v. Markham, 105 N. C. 138, 10 S. E. 1003; De Ruyter v. St. Peter's Church, 3 Barb. Ch. 119 (Chancellor Walworth), affirmed 3 N. Y. 238. The chancellor relies for the general principle that a corporation can (when not restrained by statute) convey whatever land it owns on Coke, Litt. 44; 2 Kent, Comm. 281; Smith v. Barrett, 1 Sid. 162; and for the power of making a deed of trust for creditors on Pope v. Brandon, 2 Stew. (Ala.) 401; State v. Bank of Maryland, 6 Gill & J. 205; Warner v. Mower, 11 Vt. 385; Flint v. Clinton Co., 12 N. H. 431; Ex parte Conway; 4 Ark. 361; Hopkins v. Gallatin Turnpike Co., 4 Humph. (Tenn.) 403; Dana v. Bank of United States, 5 Watts & S. (Pa.) 223. Soon afterwards followed Bank of United States v. Huth, 4 B. Mon. (Ky.) 423. The same was decided in the late case of Rollins v. Shaver Wagon & Carriage Co., 80 Iowa, 380, 45 N. W. 1037, though it appeared that the directors were equally divided, and the president, who signed the deed, was not shown to have given the casting vote. The objection that for a corporation to give up all its property is destructive of its purposes, and therefore unlawful, is silly when the alternative is not going on with its business, but being closed out by the sheriff under the first execution. See Sheldon Co. v.

[277] Sibell v. Remsen, 33 N. Y. 95. And where the statute forbids the assignment, it is not voidable, but void.

of the very lengthy statutes of New York, Michigan, Minnesota, and other states which have in the main followed the lead of New York in legislating separately for all kinds of corporations, charitable, religious, cemeteries, banks, insurance companies, manufacturing, trading, mining, etc., interspersing in these statutes many restrictions on or regulations of the power to sell or incumber lands.[278]

Municipal corporations, in one respect, stand on somewhat different grounds from others. Their records are open to public inspection, and the authority given by the governing body ought to appear on the minutes of its proceedings. There are also quasi municipal bodies, such as the county and the township, or New England town. These can wield only those powers which are given to them in express words. The power "to have and use a common seal, to acquire, hold, and convey property, real and personal," is never given to them in general terms. The laws of some of the New England states prescribe how the town or county may, by the vote of the people, or by that of selectmen or commissioners, appoint agents to make sale of lands, and to execute the conveyance; and the method thus pointed out is undoubtedly exclusive of every other.[279]

In some states the statute, or even the constitution, prescribes a special way in which religious societies must hold their property: It must be vested in trustees. Now, these trustees are not a corporation among themselves. The whole membership make up the corporation. The trustees for the time being hold its lands as joint

Eickermeyer, etc., Co. 90 N. Y. 607, where all the assets were turned over to one creditor.

[278] Gerard, who, in his work on Titles to Real Estate in New York, devotes 22 pages to "Corporations," does hardly more than enumerate most of the acts which regulate corporations other than "moneyed" and "manufacturing"; the latter embracing all the ordinary trading companies. In this matter we must refer the reader to the local law publications of each state or to its statutes. Under the act of 1854 authorizing the supreme court of New York to approve mortgages by charitable and religious bodies, a mortgage made without such approval is void. Dudley v. Congregation Third Order St. Francis, 138 N. Y. 451, 34 N. E. 281.

[279] Massachusetts, Pub. St. Mass. c. 22, § 4; Id. c. 27, § 9. Similar powers are given by the laws of Maine and Massachusetts to corporations made up of "proprietors" of plantations or towns. They can convey by "vote." See Cary v. Whitney, 48 Me. 516.

tenants, in trust for the whole body; and when they make a deed they are themselves the grantors, and they seal their deed with their private seals. The lands of the Methodist Episcopal churches, under the "Book of Discipline," are all held in this way by trustees, and the local churches are not otherwise incorporated.[280]

A "corporation sole" has no common seal, and does not need it. In some of the New England states the parsonage and glebe may be held by the minister as a corporation sole; and his power of disposal is, as in England, restricted, so that his deed, unless it be assented to by the deacons or vestry, will not be valid, beyond his own incumbency. And in many states the Roman Catholic bishops have obtained from the legislature leave to hold lands and other property as corporations sole. Thus, any land given for church purposes to the Roman Catholic bishop of Louisville will, upon his death, resignation, or removal to another see, vest in his successor; not, in any case, in his heirs. In all such cases the deed of such lands must be made by the incumbent, describing himself as "A. B., Roman Catholic Bishop of —— ——," and should be sealed, where a seal is required, with his private seal.[281]

A very important point of corporation law—that corporate acts of the general body can be done and performed only within the sovereignty creating the corporation—has arisen, and may again arise, in passing on the validity of a deed. Directors chosen outside

[280] Massachusetts, Pub. St. c. 39, §§ 4, 5; Maine, Rev. St. c. 12, §§ 19, 21; New York, Rev. St. pp. 1889–1929. Trustees of "gospel lands" in New York, though incorporated, convey under their own hands and seals. De Zeng v. Beekman, 2 Hill, 489; Const. Kan. art. 12, § 3 (see Klopp v. Moore, 6 Kan. 27). "The title to all property of religious corporations shall vest in trustees, whose election shall be in the members of such corporations,"—a provision meant to counteract the policy of the Roman Catholics, by which the property of the church throughout the diocese is vested in the bishop. Michigan St. c. 178, treats of ordinary congregations; other chapters of synods, conventions, etc. By section 4625 (old section 3062) trustees, wardens, etc., may not convey unless two-thirds of members present at a meeting give their assent.

[281] New York, act as to parsonages (1867, c. 265; amended 1868, c. 784, and 1875, c. 408); Pub. St. Mass. ubi supra; Kentucky, Sess. Acts 1844, p. 225, and Michigan, St. c. 179, enable the Roman Catholic bishops of Detroit, Sault Ste. Marie, and Marquette, and of Bardstown, Ky. (a former see), to hold land by succession. Maryland has enacted similar laws for the bishop (now archbishop) of Baltimore.

of the home state cannot be recognized, and the votes there given by the stockholders are void. A deed ordered by the former in pursuance of such votes is void.[282]

§ 56. Letters of Attorney.

When the owner of land, or any estate therein, confers on another person (or persons) the power to convey the whole, or any part thereof, the latter, as attorney in fact, may convey it in the name of the former with like effect as if the owner had done so himself. When the power is given inter vivos, and the instrument conferring it does not transfer any estate or interest in the land, it is called a "letter of attorney" or "power of attorney."

It is important to know: (1) How, to whom, and by whom a power of attorney can be given; (2) how it is construed; (3) how it comes to an end.

Further on it will be seen how it must be executed.

Wherever a seal is required in the execution of a conveyance, the common-law rule "that an authority to make a deed must be given by deed" is also in force; that is, the letter of attorney for sealing a deed must itself be under seal.[283] And where other requisites are demanded by the statute to make a valid conveyance, such as an attestation by witnesses, or an acknowledgment, the same formalities must be

[282] Miller v. Ewer, 27 Me. 509. The corporators had never met "at home."

[283] 1 Com. Dig. "Attorney," c. 5; Reed v. Van Ostrand, 1 Wend. 424; Blood v. Goodrich, 9 Wend. 68; Worrall v. Munn, 5 N. Y. 229. The principle is often invoked against sealed instruments executed by a partner or part owner for himself and his fellows; e. g. in Banorgee v. Hovey, 5 Mass. 11, 17; Cooper v. Rankin, 5 Bin. 613 (neither case referring to land). The rule against filling blanks in a deed (section 48) is also derived from it. But in Cox v. Manvel, 50 Minn. 87, 52 N. W. 273, where the name of the attorney had been left blank, and filled up by an intruder, the letter of attorney was held void without recurrence to the technical rule. The sealed power of attorney cannot be enlarged by parol instructions. Spofford v. Hobbs, 29 Me. 148. Of course, letters of attorney made in California or Texas in Spanish times need not be under seal. Williams v. Conger, 125 U. S. 397, 8 Sup. Ct. 933. A late case enforcing the common-law rule is Caddell v. Allen, 99 N. C. 542, 6 S. E. 399. A power to make an executory sale need not be under seal; one to convey should be. Hunter v. Sacramento Beet Sugar Co., 7 Sawy. 498, 11 Fed. 15.

observed in the letter of attorney, as the stream cannot rise higher than its source.[284] Generally speaking, any person of sound mind, though an infant or a married woman, may be constituted an attorney in fact to bind his principal by any contract, including a conveyance of land. Even a firm, by its firm name, or a corporation, may be appointed an attorney to convey or incumber land, and to assign or to release mortgages; in fact, banks are often appointed for the latter purpose.[285] But an infant or person of unsound mind cannot appoint an attorney. The attempted appointment is not voidable, but void;[286] and, as far as the common-law rule prevails, a married woman cannot appoint an attorney. Hence, where the statute enables her to convey her freehold, or to bar her dower, by deed, with the co-operation of her husband, it does not follow that she can do so through an attorney in fact; but the capacity to do so must be specially conferred.[287] And it

[284] General rule stated in Butterfield v. Beall, 3 Ind. 203; Dunning v. Vandusen, 47 Ind. 423; Goree v. Wadsworth, 91 Ala. 416, 8 South. 712. In Maryland, laid down in the statute. Pub. Gen. Laws art. 21, § 25. Hence, in Kentucky, where a married woman's deed was only good when recorded, the letter of attorney had to be recorded. An unacknowledged power from married woman in Texas is void. Wilson v. Simpson, 68 Tex. 306, 4 S. W. 839. In Clark v. Graham, 6 Wheat. 377, a letter of attorney and deed under it were both ruled out for not being acknowledged or attested according to the Ohio law governing conveyances.

[285] Wife or child habitually bind the husband or father in trade as his agents, and there is no difference in principle between a power to contract and one to convey. See Singleton v. Mann, 3 Mo. 464; Fowler v. Shearer, 7 Mass. 14; Bassett v. Hawk, 114 Pa. St. 502, 8 Atl. 18. And a married woman may act as attorney for another in dealings with her husband. Birdsall v. Dunn, 16 Wis. 235; Weisbrod v. Chicago & N. W. Ry. Co., 18 Wis. 35. A firm may be an attorney. Frost v. Erath Cattle Co., 81 Tex. 505, 17 S. W. 52. A corporation may act as attorney. Killingworth v. Portland Trust Co., 18 Or. 351, 23 Pac. 66.

[286] Saunderson v. Marr, 1 H. Bl. 75; Lawrence v. McArter, 10 Ohio, 37; Pyle v. Cravens, 4 Litt. (Ky.) 17; Whitney v. Dutch, 14 Mass. 457; Knox v. Flack, 22 Pa. St. 337; Waples v. Hastings, 3 Har. (Del.) 403; Pickler v. State, 18 Ind. 266,—all as to infants; Hall v. Dexter, 15 Wall. 9,—as to lunatics. The California Civil Code (section 33), and those codes which follow it, declare delegations of power void. Also Thompson v. McDermott, 19 Fla. 852; Id., 29 Fla. 299, 10 South. 584.

[287] In New Jersey there was no enabling statute until 1872. See Revision

has been held in Texas that, whatever may be said of a letter of attorney from baron and feme to a stranger, the wife cannot give such a power to her husband, as, with such an instrument, the acknowledgment on privy examination would be wholly illusory.[288]

We have already mentioned the conveyance through an attorney appointed by the vote of a corporation, under the statutes of Ver-

1877, "Conveyances," 11, 12. A late act (1883) cures earlier conveyances of a feme by attorney. Supp. Rev. 1877–1886, "Conveyances," 33. Where these acts cannot apply, the deed of feme by attorney is void (Earle v. Earle, 20 N. J. Law, 347), even when it enlarges an interest in the donee of the power (Kearney v. Macomb, 16 N. J. Eq. 189). The Kentucky Statutes (before 1893) allow only nonresident married women to appoint attorneys. The first giving them the capacity was enacted in 1812, requiring even greater solemnities than for deeds. The act of 1818 required only the same formalities as with deeds. This was amended in 1831. But in the Revised Statutes of 1852 the whole subject was omitted, and was restored in 1856, in the belief that otherwise married women could not convey by attorney; and so stands in the General Statutes of 1873. See May's Heirs v. Frazee, 4 Litt. (Ky.) 391 (when the wife was executrix); Stansberry v. Pope, 2 A. K. Marsh. 486; Steele v. Lewis, 1 T. B. Mon. 48; Harris v. Price, 14 B. Mon. 333,—for the construction of these laws. In Minnesota, under the older statutes (before 1857), the deed of a married woman through an attorney was wholly void (Randall v. Kreiger, 23 Wall. 137), though, at least as to dower, capable of being made good by a curative act. A married woman can appoint an attorney only under the express words of a statute. Mott v. Smith, 16 Cal. 533; Dentzel v. Waldie, 30 Cal. 138. Could do so in California under later statutes only by joining with husband. Dow v. Gould & Curry Silver Min. Co., 31 Cal. 629; Douglas v. Fulda, 50 Cal. 77. See, as to married woman's capacity as to property owned before incorporation of California in United States, Racouillat v. Sansevain, 32 Cal. 376. Other states allowed married women to execute letters of attorney like deeds. Rhode Island, c. 166, § 10; Ohio, § 4108 (now superseded by the removal of all disability); Indiana, § 2949; Michigan, § 5725; Minnesota, c. 40, § 2; West Virginia, c. 65, § 12; North Carolina, § 1257; Missouri, § 670; California Civil Code, § 1094; Nevada, § 183; Florida, c. 150, § 11. Under such laws the wife may join with the attorney of the husband. Glenn v. Bank of U. S., 8 Ohio, 72, following dictum in Fowler v. Shearer, 7 Mass. 21.

[288] Mexia v. Oliver, 148 U. S. 664, 672, 13 Sup. Ct. 754; quoting Sayles' Civ. St. arts. 559, 4310, and Cannon v. Boutwell, 53 Tex. 626; Peak v. Brinson, 71 Tex. 310, 11 S. W. 269. So in Arkansas. McDaniel v. Grace, 15 Ark. 465 (quaere, whether under present statute). No objection to such appointment in Nebraska. See Benschoter v. Lalk, 24 Neb. 251, 38 N. W. 746. As to law of New York in 1849, see Hunt v. Johnson, 19 N. Y. 279, 297.

mont, New Hampshire, and Minnesota, and need only say here that what is said hereinafter about construing a letter of attorney will apply to the construction of such a vote.[289] Where the power is coupled with a condition, as where a letter of attorney authorizes the sale and conveyance of land, if it should become necessary for the payment of debts, and the facts are known or confessed, the act of the attorney is, of course, invalid, if the condition is not fulfilled; for such a condition cannot be held to mean simply "if the attorney should deem it necessary." But the question generally arises on the burden of proof, and here both text-books and decided cases are disagreed; the court of appeals of Kentucky and supreme court of Tennessee taking the lead on opposite sides.[290]

The maxim of the Roman law, "omnis ratihabitio retrotrahitur et mandato aequiparatur,"—that is, "A ratification of the attorney's act by the principal after the act is done in his name is as good as an authority given beforehand,"—has been adopted into the common law. But the ratification must, generally speaking, be executed with the same formalities that would have been required in a letter of attorney; e. g. where the latter must be under seal, so must the former, and where the ratification, as it may be in the case of persons sui juris, is worked out by an estoppel, from an acceptance of the proceeds of the attorney's deed, such acceptance must have taken place with full knowledge of the facts.[291]

[289] Miller v. Ewer, 27 Me. 509, under a similar usage in Maine. The burden of showing the "vote" rests on the grantee.

[290] Bruce v. Duke, 2 Litt. (Ky.) 245 (proof on purchaser); Pitman v. Brownlee, 2 A. K. Marsh. 210 (commissions empowered by special act). Contra, Marshall v. Stephens, 8 Humph. (Tenn.) 159; Wilburn v. Spofford, 4 Sneed (Tenn.) 704. A very full discussion is found in Machebeuf v. Clements, 2 Col. 36, where the intermediate ground is taken that the attorney's recital is prima facie proof against his principal. Heath v. Nutter, 50 Me. 378.

[291] Spofford v. Hobbs, 29 Me. 148, where the principal had accepted a mortgage for the purchase money. This is perhaps wrong on even technical reasoning, as the acceptance of a deed is often equivalent to sealing a deed. And the receipt of purchase money has been deemed a ratification in Bocock v. Pevey, 8 Ohio St. 270; Hutchins v. Railroad Co., 37 Ohio St. 282; Zimpelman v. Keating, 72 Tex. 320, 12 S. W. 177, and other Texas cases; and much less has been deemed a ratification of a land sale in Goss v. Stevens, 32 Minn. 472, 21 N. W. 549, and Alexander v. Jones, 64 Iowa, 207, 19 N. W. 913. But where rights of third persons have accrued, they cannot be divested by a later

Where it is desired that the deed which the attorney will make on behalf of the principal should be recorded, and have the additional force of a recorded deed, the letter of attorney should itself be recorded, and be executed and proved or acknowledged in such a way as to fit it for record.[292] In Massachusetts and Maine, and, it seems, in Virginia, the rule was formerly otherwise.[293] "Naked" powers, such as given to an attorney in fact, as distinguished from those coupled with an estate, are narrowly construed, and at all events not extended beyond their natural and grammatical meaning.[294] Thus,

ratification. Wood v. McCain, 7 Ala. 800; McCormick v. Bush, 38 Tex. 314 (where an unauthorized delegation was ratified). But an act in pais will not be deemed a ratification by estoppel unless done with knowledge of the attorney's act. Lester v. Kinne, 37 Conn. 9. For ratifying a lease made by an unauthorized person, a delay of 100 days, while the lessee spent money on improvements, was thought enough in Hoosac Mining & Milling Co. v. Donat, 10 Colo. 529, 16 Pac. 157.

[292] Carnall v. Duval, 22 Ark. 136; Elliott v. Pearce, 20 Ark. 508; Voorhies v. Gore, 3 B. Mon. 529 (following in Kentucky upon Taylor v. McDonald's Heirs, 2 Bibb, 420); Humphrey v. Havens, 12 Minn. 305 (Gil. 196). Thus it has been held in Mississippi under a statute not mentioning powers of attorney, but providing for the registration of written contracts for land. Hughes v. Wilkinson's Lessee, 37 Miss. 482.

[293] Valentine v. Piper, 22 Pick. 85; Newman v. Chapman, 2 Rand. (Va.) 93.

[294] Attwood v. Munnings, 7 Barn. & C. 278; Wood v. Goodridge, 6 Cush. 117; Hodge v. Combs, 1 Black (U. S.) 192; Penfold v. Warner, 96 Mich. 179, 55 N. W. 680 (power by husband and wife to convey their land does not embrace lands then belonging to the husband which come to the wife on his death); Craighead v. Peterson, 72 N. Y. 279 (a power of attorney to draw checks or notes); Dearing v. Lightfoot, 16 Ala. 28 (power to manage all the principal's business and to settle all demands against him did not authorize the attorney to sell the former's slaves). But a power to convey all lands "which I may own," etc., and to release all mortgages "which may be recorded," embraces after-acquired lands and mortgages subsequently taken. Bigelow v. Livingston, 28 Minn. 57, 9 N. W. 31; followed in Benschoter v. Lalk, 24 Neb. 251, 38 N. W. 746. "Power to sell any of my real estate" includes after-acquired. Fay v. Winchester, 4 Metc. (Mass.) 513. Very broad words are construed not to authorize the conveyance of land. Skaggs v. Murchison, 63 Tex. 353. Power to convey to principal upon the payment of debts does not justify sale to stranger. Moss v. Berry, 53 Tex. 633. While, under testamentary powers, that to sell, and especially to sell and exchange, embraces that of making partition. A power of attorney to sell does not justify either partition or exchange. Berry v. Harnagee, 39 Tex. 638. See, also, Reese v. Medlock, 27 Tex. 120; Borel v. Rollins, 30 Cal. 408. Power to

a power "to sell" or "to sell and convey" is, when conferred in a letter of attorney, construed as not giving the power of mortgaging the land; for it is presumably one of the objects of the principal that the attorney should realize the best possible price, which he could only do by an absolute sale, and not merely raise money on the land, as he might by way of mortgage.[295] Or, where land is to be sold by lots, the attorney cannot sell by the acre, as such a sale might not bring as good a price.[296] Generally speaking, a power to sell means to sell for ready money, not on credit, nor even in satisfaction of a debt, unless the attorney be empowered to pay it; and so a power to mortgage land means, if nothing else be said, to do so for advances of money, not to secure an existing debt. Least of all can an attorney with power of sale sell the land in consideration of something, like his or a third person's future support, which in its nature cannot go to the benefit of the principal.[297]

convey the property of A. and B. does not include B.'s separate property. Gilbert v. How, 45 Minn. 121, 47 N. W. 643; Dodge v. Hopkins, 14 Wis. 630; at least when it is not shown that there was no joint property. A power to mortgage for a named sum does not authorize the insertion of an attorney's fee. Pacific Rolling Mill v. Dayton, S. & G. R. Ry. Co., 7 Sawy. 61, 5 Fed. 852. Under power to buy and sell real estate, the attorney can only sell such as he has bought. Greve v. Coffin, 14 Minn. 345 (Gil. 263). A power to sell does not authorize a gift; Dupont v. Wertheman, 10 Cal. 354.

[295] Butler v. Gazzam, 81 Ala. 491, 1 South. 16; Coutant v. Servoss, 3 Barb. (N. Y.) 128; Albany Fire Ins. Co. v. Bay, 4 N. Y. 9; Bloomer v. Waldron, 3 Hill, 361. But where a power of sale is expressly given for the purpose of raising money it embraces that of mortgaging. Gaylord v. Stebbins, 4 Kan. 42. In Texas, a general power to sell, without naming its purpose, was held to authorize a mortgage in Sampson v. Williams, 6 Tex. 110. This is so in Pennsylvania, where a similar power even in a will is construed to include a power to mortgage. Campbell v. Foster Home Ass'n, 163 Pa. St. 609, 30 Atl. 222.

[296] A deed of trust for the benefit of creditors was held to be authorized under a power to sell or convey for securing debts. Marshall v. Shibley, 11 Kan. 114. But a power to mortgage (in Maryland) will include that of giving an absolute deed and taking back a lease in the nature of a defeasance. Posner v. Bayless, 59 Md. 56.

[297] Randall v. Duff, 79 Cal. 115, 19 Pac. 532, and 21 Pac. 610 (not without consideration); Frost v. Erath Cattle Co., 81 Tex. 505, 17 S. W. 52, (nor in discharge of principal's debt); Greenwood v. Spring, 54 Barb. 375 (nor mortgage to secure such debt); Lumpkin v. Wilson, 5 Heisk. (Tenn.) 555 (nor in

A letter asking a friend to manage the writer's land, and to sell when opportunity offers, justifies a contract to sell, but not a conveyance of the legal title, though such conveyance, if made by the party addressed, may be enforced in equity as a contract. But a formal power to sell implies an authority in the attorney to convey the lands sold by him.[298] Sometimes a power to "sell and convey" may be satisfied by a conveyance without a previous sale, when the circumstances show that the object of the giver of the power would thus be accomplished.[299] A power "to exchange and convey" is not

exchange for merchandise); Weare v. Williams, 85 Iowa, 253, 52 N. W. 328; Coulter v. Portland Trust Co., 20 Or. 469, 26 Pac. 565, and 27 Pac. 266 (future support); nor for collateral benefit of principal. Mora v. Murphy, 83 Cal. 12, 23 Pac. 63. And so it was held in case of personalty. Brown v. Smith, 67 N. C. 245; Nippel v. Hammond, 4 Colo. 211. But see, as to what is a cash sale, Plummer v. Buck, 16 Neb. 322, 20 N. W. 342. An agent being authorized to release a mortgage on the execution of a new one, and releasing it without one, the release is void. Foster v. Paine, 56 Iowa, 622, 10 N. W. 214. In Vañada's Heirs v. Hopkins' Adm'rs, 1 J. J. Marsh. (Ky.) 285, it is thought that, where such is the custom, the agent may sell on credit.

[298] Hemstreet v. Burdick, 90 Ill. 444; Fogarty v. Sawyer, 17 Cal. 591; Valentine v. Piper, 22 Pick. 85 ("to sell" includes "to convey"). Farnham v. Thompson, 34 Minn. 330, 26 N. W. 9, authorizes a quitclaim deed which is known to release a mere tax lien. Alexander v. Goodwin, 20 Neb. 216, 29 N. W. 468; Lyon v. Pollock, 99 U. S. 668 (as to informal letter). See, also, the California cases: Billings v. Morrow, 7 Cal. 171; De Rutte v. Muldrow, 16 Cal. 505; Jones v. Marks, 47 Cal. 243,—on the letter of attorney from Capt. Sutter to Schoolcraft, "to represent his real and personal estate, to make contracts, to do all things that concern his interest, real and personal, making him his general attorney"; held good enough to make executory sales, but not to convey. Per contra, a general power of sale enables the attorney to make executory sales. Haydock v. Stow, 40 N. Y. 368. The power of sale, where a mortgage is received for a part of the purchase money, does not extend to releasing this. Hakes v. Myrick, 69 Iowa, 189, 28 N. W. 575; s. p. Coquillard v. French, 19 Ind. 274. A power "confirming all sales, leases, and contracts of every description to be made" enables the attorney to sell and convey land. Sullivan v. Davis, 4 Cal. 291. In Pennsylvania express words are required in power to sell and convey land, Sweigart v. Frey, 8 Serg. & R. 299; while power for "all business as to land," or "as to estate, real and personal," was deemed sufficient to sell and convey in Missouri, Lamy v. Burr, 36 Mo. 85.

[299] Hull v. Glover, 126 Ill. 122, 18 N. E. 198. A power to sell real and personal estate reaches a certificate given to the purchaser at a decretal sale. Cooper v. Finke, 38 Minn. 2, 35 N. W. 469.

a power to sell.[300] A power to sell, or to sell and convey, authorizes the insertion of the ordinary covenants of title, on the ground that deeds to purchasers are expected to contain them, except, of course, when the power is conferred by married women, incapable of binding themselves by covenant, which is of importance, aside of the personal liability, because the covenant of warranty, working by way of estoppel affects all subsequently acquired rights to the land.[301]

Unless the letter of attorney expressly gives the right of substitution to the attorney, he cannot appoint any one to act in his stead, nor can one of two joint attorneys turn over his authority to his companion; though the principal can, of course, ratify the acts of the improperly made substitute.[302] The principle is shortly

[300] Long v. Fuller, 21 Wis. 121. In Dayton v. Nell, 43 Minn. 246, 45 N. W. 231, the power to sell and that to convey are treated as distinct; the latter being carried out separately. Husband and wife having appointed an attorney by deed, the wife, being entitled to the proceeds, was allowed by parol to authorize a deed of gift.

[301] In New York the earlier decisions—Nixen v. Hyserott, 5 Johns. 58; Gibson v. Colt, 7 Johns. 390; Van Eps v. Mayor, etc., of City of Schenectady, 12 Johns. 436; Wilson v. Troup, 2 Cow. 195—denied that the power to warrant was an incident of the power to sell. These decisions were much shaken by Nelson v. Cowing, 6 Hill, 336, and Sanford v. Handy, 26 Wend. 260 (neither of which referred to the sale of land), but were not finally overruled until 1890, when, in Schultz v. Griffin, 121 N. Y. 294, 24 N. E. 480, it was held that an agent employed to make a sale might contract for a general warranty deed. The older English doctrine, by which "all reasonable assurance" does not include any covenants, was said to be "altered," by Twisden, in Lassels v. Chatterton, 1 Mod. 67. The leading American case is Vanada's Heirs v. Hopkins' Adm'rs, 1 J. J. Marsh. (Ky.) 285, 293, in which powers of attorney for the sale of land are thoroughly discussed. Then come Peters v. Farnsworth, 15 Vt. 155, reviewing the English cases; Taggart v. Stanbery, 2 McLean, 543, Fed. Cas. No. 13,724, and Le Roy v. Beard, 8 How. 451, where a covenant of seisin inserted by the attorney was sustained, such being the custom. It was admitted in Wilson v. Troup, supra, that an attorney authorized to give a mortgage, at a time and place at which it was the custom to insert a power of sale to take the place of judicial foreclosure, might do so on behalf of his principal. In Johnson v. Knapp, 146 Mass. 70, 15 N. E. 134, a power to convey "with or without warranty" was held to authorize a covenant against incumbrances. But a power to grant discharges by deed must mean quitclaim deeds, and does not justify a warranty. Heath v. Nutter, 50 Me. 378.

[302] White v. Davidson, 8 Md. 169; Rogers v. Cruger, 7 Johns. 557. A most

stated thus: "Delegatus non potest delegare." When a power of sale is cast on an executor, administrator, or guardian, he cannot give his discretion over to another, except in Georgia;[303] but when such fiduciary has made a sale, he may empower an attorney to make the formal conveyance.[304] As a universal rule, the death of the principal makes an end to the attorney's power; for one who, being dead, can no longer act by himself, cannot act through another,—the attorney's deed being that of the principal ("quod quis per alium fecit, per se fecisse putatur"),—unless, indeed, the power is "coupled

elementary proposition, taken for granted in cases where the substituted attorney seems to stand on special grounds; never denied. Nor can one of two joint attorneys transfer his power to the other. Loeb v. Drakeford, 75 Ala. 464.

303 Sugd. Powers, c. 5, § 1, lays down these rules: Where a man has only a particular power, as to lease for life or years, he cannot make a lease by attorney, quoting Lady Gresham's Case, 9 Coke, 76a; Attorney General v. Gradyll, Bunb. 29. Contra, Orby v. Mohun, 2 Vern. 542. If the power reposes a personal trust and confidence in the donee to exercise his own judgment, he cannot refer it to another. Thus trustees having power to sell cannot sell by attorney, quoting Combes' Case, 9 Coke, 75b. And so, where a power of appointment among children is given, it cannot be delegated. Ingram v. Ingram, 2 Atk. 88; Hamilton v. Royse, 2 Schoales & L. 330. And a person whose consent is made necessary to the execution of a power cannot appoint an attorney to consent. Hawkins v. Kemp, 3 East, 410. And see Berger v. Duff, 4 Johns. Ch. 368. The American cases refer generally to powers of sale in executors; e. g. May's Heirs v. Frazee, 4 Litt. (Ky.) 391, 401 (not easily distinguished from the Kentucky case quoted in next note). One having bare authority, coupled with trust, cannot act by attorney. Black v. Erwin, Harp. (S. C.) 411. See Georgia Code, § 2180,—fiduciary "may sell and convey property by attorney in fact," etc. Cases arising before the Code, Doe v. Roe, 22 Ga. 600; Atkinson v. Central Georgia, A. & M. Co., 58 Ga. 227.

304 Says Sugden, in chapter 5, § 1, subd. 3: When the deed of appointment is actually prepared, or the donee of the power points out the precise appointment he wishes to be made, and thus no discretion is delegated, the deed may be executed by attorney. Where the powers given are only for the donee's benefit, and really constitute a property in him, Sugden shows that they may be exercised by attorney; his latest authority being Warren v. Arthur, 2 Mod. 317. Where executors are directed to sell land for payment of debts and legacies, equity considers it as converted into money, and belonging to the executors; hence they may sell by attorney. Colsten v. Chaudet, 4 Bush (Ky.) 666.

with an interest," which means here with an estate, in the attorney, so that he may act in his own name.[305] And, when the attorney has appointed a substitute, the first attorney's death puts an end to the authority of the substitute.[306] But where the principals are joint tenants, with survivorship, as trustees generally are, the death of one or more, while one survives, leaves the attorney authorized to act for the survivor.[307]

A power, not coupled with an interest in the attorney, or in some third person who has advanced something of value on the faith of it, can be revoked by the principal at any time; and words purporting to make it irrevocable, when inserted in such a power, have been rejected as unmeaning.[308] But, while revocation by death operates independently of any notice to those dealing with the attorney, it is otherwise when the living principal revokes his authority. Then the revocation must be brought home to the purchaser from the attorney, at least if he be a purchaser for value, either by actual notice, or by putting the revocation upon record, in like manner as the revoked power was recorded.[309]

[305] Hunt v. Rousmanier, 8 Wheat. 174, where a power of attorney to sell a ship was given in place of a mortgage on it, is the leading case. That the power is made on its face irrevocable does not help it. Wassell v. Reardon, 11 Ark. 712, s. p. in Smith v. Smith, 1 Jones (N. C.) 138; Smith v. Saltmarsh, 32 Ala. 404 (where the attorney's deed was antedated, but defeated by parol proof of the time of its execution). Huston v. Cantril, 11 Leigh (Va.) 136. Houghtaling v. Marvin, 7 Barb. (N. Y.) 412, and Wood v. Wallace, 24 Ind. 226, on powers coupled with an interest, can hardly aid a naked power of attorney to convey land. The sale by attorney after the principal's death is not voidable, but void, within the meaning of the Texas limitation law. Primm v. Stewart, 7 Tex. 183; Cox v. Bray, 28 Tex. 259. See, also, Lewis v. Kerr, 17 Iowa, 73. Want of notice in purchaser and attorney is immaterial. Davis v. Windsor Sav. Bank, 46 Vt. 728. The death of the wife whose power was void leaves the husband's power in force. Earle v. Earle, 20 N. J. Law, 348. As to presumption of fact about time of death, see Oppenheim v. Lee-Wolf, 3 Sandf. Ch. (N. Y.) 571. A unique decision is Ish v. Crane, 8 Ohio St. 520, sustaining a contract of sale by attorney after principal's death. But see, contra, McClaskey v. Barr, 50 Fed. 712.

[306] Lehigh Coal & Nav. Co. v. Mohr, 83 Pa. St. 228.

[307] Wilson v. Stewart, 3 Phila. 51 (Sharswood, J.).

[308] McGregor v. Gardner, 14 Iowa, 326; Mansfield v. Mansfield, 6 Conn. 562.

[309] Morgan v. Still, 5 Bin. (Pa.) 305. In Maryland the statute (Pub. Gen. Laws, art. 21, § 26, first enacted in 1856) expressly says that the power is

Wherever a married woman is subjected to any of the old disabilities,—such, for instance, as not being allowed to convey her land without the assent of her husband,—the marriage of a woman operates as the revocation of her letter of attorney previously given; for she cannot, after marriage, do by another what she cannot do by herself.[310] And, on like grounds, when the donor of the power becomes insane,—certainly, when he is judicially declared insane,—his attorney can no longer act for him, as he cannot act himself. But, even this revocation has been held not to prejudice purchasers dealing with the attorney without notice of the principal's loss of mind.[311]

The powers of sale inserted in mortgages will be treated in connection with mortgages. These, being "powers coupled with an interest," do not belong to the class of the common "powers of attorney." Powers conferred by will, family settlement, or deed of trust must be treated in a separate chapter on powers.

NOTE. The books sometimes, but, it seems, inaccurately, call the party who issues a letter of attorney the donor, and the party holding, the donee, of a power,—terms which belong properly to those who give or receive powers coupled with an estate or trust.

§ 57. Deeds by Attorneys and Public Officers.

The deed of an attorney in fact does not prove by its recitals that he has the power to execute it; nor does the deed of a public officer who executes it under some statutory power, under the general principles of the law, prove in any way that those facts have occurred which, under the statute, should have preceded the execution of the deed, and without which it would have no validity. Yet, there are cases, in which the recital of a power of attorney in a deed executed by attorney, connected with a long acquiescence of the alleged principal, has been deemed sufficient evidence to go to the jury, from

revoked when the deed of revocation is recorded in the proper office. In other than land cases, the point is met in McNeilly v. Continental Life Ins. Co., 66 N. Y. 23; Claflin v. Lenheim, Id. 301.

[310] Wambole v. Foote, 2 Dak. 1, 2 N. W. 239; Montague v. Carneal, 1 A. K. Marsh. (Ky.) 351.

[311] Matthiessen & Weichers Refining Co. v. McMahon, 38 N. J. Law, 546; Hill v. Day, 34 N. J. Eq. 150.

which the existence of a power of attorney in good form may be presumed; especially where the latter was executed under the Spanish law, and the officer authenticating the conveyance, who was shown the letter of attorney, attested the fact that it was so shown to him.[312] And many statutes under which a public officer (e. g. a tax collector or state auditor) is empowered to convey land by his deed make such deed at least prima facie proof of all the antecedent steps which lead up to the deed, and without which its execution would be unauthorized.[313]

Both an attorney in fact under a power of attorney (which is an instance of a so-called "naked power" not coupled with an interest) and a public officer (such as a sheriff, conveying land sold under execution, or a commissioner, conveying land sold at a judicial sale or in obedience to a decree, or a revenue officer, who sells for delinquent taxes) must in their deed show whose land they convey, and by what authority they do so. The difference between the attorney chosen by the owner and the public officer who derives his power from the state, and exercises it without the consent and even in hostility to the owner, is this: that equity, wherever it is fully developed (and such it is now, perhaps, in every American state other than Louisiana), will aid the defective execution of a private power of at-

[312] Williams v. Peyton's Lessee, 4 Wheat. 77: "The collector's power is a naked power, not coupled with an interest, and in all such cases the law requires that every prerequisite to the exercise of the power must precede its exercise." And, in the absence of words in the statute to that effect, the deed is not even prima facie proof that these prerequisites have been fulfilled. Id., and Stead's Ex'rs v. Course, 4 Cranch, 403; Parker v. Rule's Lessee, 9 Cranch, 64. Where an attorney is empowered to sell "when necessary," his deed does not prove the necessity. Bruce v. Duke, 2 Litt. (Ky.) 244. A fortiori, it does not prove fulfillment of other conditions precedent. McConnell v. Bowdry's Heirs, 4 T. B. Mon. (Ky.) 406.

[313] Forman v. Crutcher, 2 A. K. Marsh. (Ky.) 69; Watrous v. McGrew, 16 Tex. 513; Johnson v. Shaw, 41 Tex. 433.—even as to wild lands not in actual possession, especially where those claiming under the power have paid taxes; Stroud v. Springfield, 28 Tex. 664; Holmes v. Coryell, 58 Tex. 688; Glasscock v. Hughes, 55 Tex. 476; Williams v. Conger, 125 U. S. 397, 8 Sup. Ct. 933. In Harrison v. McMurray, 71 Tex. 122, 129, 8 S. W. 612, the several Texas cases on the point are collected. There is no presumption, from the lapse of time during which a power of attorney has not been acted on, that it has been revoked.

torney, but will not aid the defective execution of a power conferred by positive law.[314]

The first requisite of a deed of conveyance made by an attorney is this: that it appears on its fact to be the deed of the principal. When C. D., under a power from A. B., conveys the latter's land to E. F., the deed ought to run thus: "Know all men that I, A. B., etc., bargain and sell to E. F. and his heirs, etc. In witness whereof I have hereunto set my hand and seal, by C. D., my attorney in fact." The signature attached is: "A. B., by C. D., his attorney"; and the seal set opposite to the signature is deemed the seal of A. B., not of C. D.[315] If this be not done, but the deed proceeds in the attorney's name, as if he were the owner and grantor of the property, it conveys no title at law,[316]—but is aided in equity, if there be a valuable or

[314] Wilks v. Back, 2 East, 142 (42 Geo. III.), holds that a bond signed and sealed in this form: "For Jas. Brown, Mathias Wilks [L. S.]," is the bond of James Brown; the other form: "James Brown, by M. Wilks [Seal]," being admittedly more regular. Mr. Washburn, in his treatise, criticises the case as not in harmony with the authorities; but it has been a precedent too long on the side of liberal construction to be shaken or doubted.

[315] The doctrine that equity aids defective execution of powers, but not the nonexecution, laid down in Tollet v. Tollet, 1 White & T. Lead. Cas. Eq. 365, and which will be discussed in a section of the chapter on "Powers," hereafter, applies as much to deeds under powers of attorney as to conveyances or devices under those "subtler" powers which will be treated in that chapter. See some of the cases below for an application. As an example of the liberal treatment of a deed by a fiduciary, see Pursley v. Hays, 22 Iowa, 11.

[316] Co. Litt. 258a. In Echols v. Cheney, 28 Cal. 157, the granting clause ran in the name of "M., attorney for S.," and such was the signature. The deed was held void under either common or the Spanish law, the words added being only a descriptio personae; more technical than Wilks v. Back, where, as seen in note 314, a signature, "For J. Brown, M. Wilkes," was held good to convey Brown's land. In Fowler v. Shearer, 7 Mass. 14 (the leading American case), and in Bassett v. Hawk, 114 Pa. St. 502, 8 Atl. 18, the wife, empowered by her husband, conveyed in her own name only. Her deed of her own estate was void for want of the husband's co-operation. Also Bogart v. De Bussy, 6 Johns. 94; Locke v. Alexander, 1 Hawks (N. C.) 412. Contra, Oliver v. Dix, 1 Dev. & B. Eq. (N. C.) 158, where "A., attorney for B.," was deemed good enough, the whole deed showing an intent to grant B.'s land. (And in Henby v. Warner, 51 Pa. St. 278, which followed Allison v. Kurtz, 2 Watts, 185, 188, an attorney for the committee of a lunatic conveyed in his own name, even letting his wife join to release dower; he having no estate at all in the land. There being then no court of equity in Pennsylvania, the court

good consideration, as any other informal conveyance might be aided, so far as the statute of frauds will permit.[317] This will hold good, however, only where the principal is a person sui juris; and, where a married woman is allowed by statute law to convey only under given circumstances and in named forms, and her attorney executes a deed running in his own name, as grantor, the deed will be void in equity as well as at law; and it will be considered rather as a case of nonexecution than of faulty execution.[318] In some states, in view of the frequent mistakes made by attorneys in fact when conveying the land of their principals, the statute has stepped in,

of law treated the case like that of a testamentary power, and referred the deed to the owner, rather than let it pass for nothing). Where the attorney deliberately claims the land as his own, and so grants it, he does not execute the power of attorney. Watson v. Sutro, 86 Cal. 500, 531, 24 Pac. 172, and 25 Pac. 64. But, if there be two letters of attorney, one invalid, the other good, the deed, though referring to the former, is sustained by the latter. Link v. Page, 72 Tex. 592, 10 S. W. 699. The power must be referred to in some way, Shirras v. Craig, 7 Cranch, 34; not in the body only, but the attorney must sign the principal's name. A misrecital of the power is not fatal. Jones v. Tarver, 19 Ga. 279. The doctrine is pretty much disregarded in Rogers v. Bracken, 15 Tex. 564; also in Avery v. Dougherty, 102 Ind. 441, 445, 2 N. E. 123, where the notion of descriptio personae is scouted, and a lease made "between R. M., agent of O. D., guardian of B.'s children," etc., signed "R. M., agent of O. D.," was held a good lease of the children's land. The New Hampshire cases, Coburn v. Ellenwood, 4 N. H. 102; Montgomery v. Dorion, 7 N. H. 483; Hale v. Woods, 10 N. H. 471; Tenney v. East Warren Lumber Co., 43 N. H. 343, 349,—take the broad ground that the deed is good if on the whole it appears to be the grant of the principal.

[317] Stark v. Starr, 94 U. S. 477, where those claiming under the deed had strong equities; Ramage v. Ramage, 27 S. C. 39, 2 S. E. 834, referring to Welsh v. Usher, 2 Hill, Eq. 167 (case of sale of a ship). See Strohecker v. Farmers' Bank, 8 Watts, 190 (assignment of bond). But where the attorney has himself an estate in the thing, and conveys only in his own name, he is supposed to convey that estate only. Pease v. Pilot Knob Iron Co., 49 Mo. 124. When the attorney makes an executory sale in his own name, equity will enforce it specifically, Vanada's Heirs v. Hopkins' Adm'r, 1 J. J. Marsh. (Ky.) 285, 295; a power of attorney being a common-law power, the defective execution of which is aided in equity; referring to Sugd. Powers, p. 1. The deed in attorney's name is not within the statute of frauds, and binds the principal as a contract to sell. McCaleb v. Pradat, 25 Miss. 257.

[318] Wilkinson v. Getty, 13 Iowa, 157. Attorney of husband and wife conveyed in husband's name only. Equity could not reform the deed.

either to authorize or cure deeds made in the attorney's name, or to furnish a form which will satisfy the law.[319]

When either a letter of attorney or the statute confers a power on two or more persons, it is understood, unless otherwise expressed, that all of them must join in the act.[320] In such cases, the death of any of the persons named will prevent the execution of the power.[321]

Among public officers, we must distinguish between those who act under the order or process of a court and those whose action is executive or ministerial. We shall treat of deeds made by the former, under decrees for the conveyance of land, or in transferring lands sold under execution, or in pursuance of a judgment or decree, as part of the larger subject of the transfer of lands in the enforcement of judgments. Otherwise, officers act on behalf of the government, state or federal, in conveying its title. We shall, in another chapter, treat of the forms that are prescribed by the laws of the United States and by the laws of some of the states for the first disposition of the soil. We have already referred to the distinctions that grants by the sovereign are effective as soon as they pass the seals, without any manual delivery.[322]

[319] Pennsylvania, Brightly's Purd. Dig. "Attorneys in Fact," 8; Ohio, St. § 4110; Virginia, Code, § 2416; Maine, Rev. St. 1841, c. 91, § 14, referred to in Porter v. Androscoggin & K. R. Co., 37 Me. 349, but seems not to be in the present revision; Citizens' Fire Insurance Security & Land Co. v. Doll, 35 Md. 89, 103, referring to Maryland statute, now article 21, § 27. Attorney executing deed "shall describe himself, and sign the deed as agent or attorney," seems to enforce the old rule. Mississippi, Code, § 194 (need not be formally in principal's name).

[320] Hartford Fire Ins. Co. v. Wilcox, 57 Ill. 180; Town of Middletown v. Town of Berlin, 18 Conn. 197; Patterson v. Leavitt, 4 Conn. 53. But where a power is given to a firm, one member of the firm, it is held in Texas, can execute the deed in the firm name, Frost v. Erath Cattle Co., 81 Tex. 505, 17 S. W. 52; but, one member dying, the power is gone, Martine v. International Life Ins. Co., 53 N. Y. 339, 343; and where a power is given to two "as my attorney or attorneys," it seems that either one may execute it, Greenleaf's Lessee v. Birth, 5 Pet. 132. Several attorneys may, however, execute the deed at several times. Crosby v. Huston, 1 Tex. 226.

[321] Boone v. Clarke, 3 Cranch, C. C. 389. Fed. Cas. No. 1,641.

[322] See section 51 of this chapter, subfine.

There remain the deeds by which ministerial officers may divest the land of the private owner out of him, and vest it either in the commonwealth or a municipality or another private person. These deeds are always made under the revenue laws; land on which the tax is overdue or any lands belonging to the delinquent taxpayer, being forfeited, or sold by a nonjudicial procedure, and this forfeiture or sale being followed up and declared by a deed. When such a deed is made in favor of a private buyer at the tax sale, it must be delivered, like a deed between man and man.[323] And it may be further stated that the forms prescribed for such a deed must be closely followed, as the purchaser under a tax sale has no equities by which the lacking form might be supplied.[324] Thus, where the auditor of state, or register, or controller, or treasurer, or some other officer, is authorized to give the deed (sometimes called the certificate), no other officer can take his place.[325] If the statute requires a public seal to be affixed, the instrument, without such seal, or having only a scrawl or private seal, has no force whatever; and it is of no avail to show that the proper public seal had not yet been made or contrived.[326]

Although the deed of a public officer must be made with all the prescribed formalities, yet omissions may be supplied, at least in all but deeds on sales for taxes. Thus, it has been held, where the sheriff's deed on an execution sale was void for want of a seal, the new sheriff could make a new deed which would relate back to the date of the first.[327]

A seal has also been held indispensable to grants or patents by the commonwealth. The payment of the government price, and full compliance with all the terms of the land law, may confer an equity; but an unsealed deed can add nothing to it, and we are not

323 Doe v. Hileman, 2 Ill. 323; Atkins v. Kinnan, 20 Wend. 241, 247.

324 See hereafter in "Note on Tax Titles."

325 Graves v. Hayden, 2 Litt. (Ky.) 64. Under an old Kentucky statute, the register who made the sale must make the deed, though he had left office; getting the new incumbent to affix the seal. If the owner had died, this must be ignored in the deed. "Sic lex scripta est." Curry v. Fowler, 3 A. K. Marsh. 504.

326 Doty v. Beasley, 2 Bibb, 14; Shortridge v. Catlett, 1 A. K. Marsh. 587.

327 Kruse v. Wilson, 79 Ill. 233.

aware that any of the states dispense with the seal of the commonwealth.[328]

In New England the early informal habits took such deep root that the men appointed by a vote of the legislature or of a town meeting to convey land on behalf of the commonwealth or of a town, would usually execute the deed in their own names; and, to prevent a general unsettling of land titles, the courts felt compelled to give force to deeds made in this form.[329] Generally speaking, a conveyance which an attorney in fact or a public officer makes to himself is void, not so much on technical grounds as from reasons of good morals and public policy.[330] And for this reason the conveyance will be set aside as fraudulent or illegal, if made to another in name, if it is really made in trust for the attorney or public officer, or with the expectation that the grantee will convey to him.[331] A late statute in New Jersey, made for the quieting of titles, provides that when a deed by attorney, which recites the power given him by the principal, has been recorded for 10 years, it is prima facie proof of the fact.[332]

§ 58. Deeds of Infants and the Insane.

In most of the states, full age is yet, as at common law, the first moment of the day preceding the twenty-first birthday;[333] but the statute has, in the states named in the note, reduced the age

[328] Carter's Heirs v. Edwards, 88 Va. 205, 13 S. E. 352 (conceded); Garrett v. Stevens, 36 W. Va. 445, 15 S. E. 177; Doe v. Winn, 11 Wheat. 380; Alexander v. Greenup, 1 Munf. 134; Bledsoe v. Wills, 4 Bibb, 329.

[329] Cofran v. Cockran, 5 N. H. 458; Thompson v. Carr, Id. 510; Ward v. Bartholomew, 6 Pick. 409.

[330] E. g. A release of mortgage from attorney to principal. Hutchings v. Clark, 64 Cal. 228, 30 Pac. 805.

[331] Graves v. Ward, 2 Duv. (Ky.) 301.

[332] Act N. J. May 14, 1894 (Sess. Laws).

[333] Chitty's note 12 to 1 Bl. Comm. 12, says: "If he is born on the 16th of February, 1608, he is of age to do any legal act on the morning of the 15th of February 1629, though he may not have lived 21 years by nearly 48 hours. The reason assigned is that in law there is no fraction of a day," etc. He cites 1 Sid. 162; 1 Keb. 580; 1 Salk. 44; Ld. Raym. 84. See Ross v. Morrow, 85 Tex. 172, 19 S. W. 1090 (born April 17, 1860, of age April 16, 1881).

for women from 21 to 18, or has put an end to minority, either for women only or for men and women alike, at marriage, or at marriage with parental consent.[334] In Missouri, Arkansas, Texas, and some other states, the probate court or judge is authorized by statute to grant, upon application, to persons of less than full age the power "to do business" as if of full age. This authority has been held, in Arkansas, not to extend to children under 14. In Texas, it is thought not to be judicial in its nature, so that the proceedings do not enjoy the presumption of regularity.[335]

Conveyances of land by those under the lawful age are not binding upon them; and the law governing conveyances by persons of unsound mind is very much the same, now, as that which governs conveyances by infants. The old distinction that a lunatic cannot disaffirm his own conveyance, that he cannot stultify himself, but must wait for his heir or devisee to do so, has long since been abandoned, both in England and America.[336]

The conveyance made by an infant or person of unsound mind, generally speaking, is not void, but voidable; for it might, if the

[334] The following states fix the majority of women at a lesser age than 21; Vermont, § 2421; Ohio, § 3136; Illinois, c. 64, § 1; Iowa, § 2237; Minnesota, c. 59, § 2; Kansas, par. 3868; Nebraska, § 1465; Maryland, art. 93, § 144; California, Civ. Code, § 25; the Dakotas, Ter. Civ. Code, § 10; Oregon, § 2951; Nevada, § 4943; Idaho, § 2405; Missouri, § 5278; Arkansas, § 3463, at 18. In Maryland, ubi supra (by inference only); Texas, art. 2858; Oregon, § 2951,—a woman acquires all the power of an adult by marriage; and in Nebraska a woman over 16, who marries; in Iowa, ubi supra, and Texas, art. 4857, all persons, boys or girls, become of age when lawfully married. In Washington, a woman is of age at 18, or when married with consent of parent or guardian (section 1134). The Maryland law was amended in 1890 (Laws, c. 210, p. 240) so that an unmarried woman between 18 and 21 cannot put a deed of trust on her lands without being first, upon petition, authorized to do so by a court of equity. The petition must show residence in the county, or the order is void. Hindman v. O'Connor, 54 Ark. 627, 16 S. W. 1052. In Maine, a married woman of any age has the same power over her lands. St. c. 61, § 1. In Minnesota, by act of April 20, 1891, a minor wife can convey her land, her husband joining. Daley v. Minnesota Loan & Inv. Co., 43 Minn. 517, 45 N. W. 1100.

[335] Doles v. Hilton, 48 Ark. 305, 3 S. W. 193, under what is now Ark. Dig. § 1362; Brown v. Wheelock, 75 Tex. 385, 12 S. W. 111.

[336] 2 Kent, Comm. 450; Thompson v. Leach, 3 Mod. 310; Key v. Davis, 1 Md. 32.

consideration was full and adequate, and had not been wasted, be for the infant's benefit that the conveyance should stand.[337] But a letter of attorney or other deed made by an infant, by which he only confers power to another to deal with his estate, has always been held entirely void;[338] and so has a deed which shows upon its face, that it cannot result in any benefit to the grantor,—as a quitclaim without consideration, or a deed by which the infant's land is pledged for the debts of another,—even if it be the land of an infant wife for the debt of her husband.[339]

The distinction between void and voidable has these consequences: First, the party buying from the infant, or who is to advance money upon his mortgage, is bound by his contract, if himself of full age and otherwise capable of contracting; second, parties not claiming under the infant cannot impeach the conveyance (for instance, if the infant's grantee brings ejectment against an intruder, the

337 Zouch v. Parsons, 3 Burrows, 1794, is the leading case. It shows by old precedents that a feoffment by an infant is valid till disaffirmed. Distinction between void, voidable, and valid set out by Eyre, C. J., in Keane v. Boycott, 2 H. Bl. 511. The rule is thus stated by Perkins, an early law writer: "All such gifts, grants, or deeds as do not take effect by delivery of his hand (such as we would now call 'executory') are void. But all gifts made by an infant by matter in deed (i. e. livery of seisin or its equivalent), or in writing, which take effect by delivery of his own hand (i. e. executed conveyances), are voidable by him and his heirs and by those who have his estate." Philips v. Green, 3 A. K. Marsh. (Ky.) 12; Logan v. Gardner, 136 Pa. St. 588, 20 Atl. 625; Tucker v. Moreland, 10 Pet. 58, and authorities there quoted; McGan v. Marshall, 7 Humph. (Tenn.) 121; U. S. v. Bainbridge, 1 Mason, 82, Fed. Cas. No. 14,497 (treating this matter incidentally only),—follow the leading case. See, also, 2 Kent, Comm. lect. 31.

338 Stated in Bool v. Mix, 17 Wend, 119. This would apply to the power of sale in a "deed of trust." Cooper v. State, 37 Ark. 424, does not prove the contrary. And see above, in section on "Letters of Attorney."

339 Robinson v. Coulter, 90 Tenn. 705, 18 S. W. 250 (covenant of seisin broken by void deed from infant), following Swafford v. Ferguson, 3 Lea, 292. See contra, deed of gift to children. Slaughter v. Cunningham, 24 Ala. 260; Chandler v. McKinney, 6 Mich. 217. Here a decree obtained during the mortgagor's infancy to sell her land was held void. The decision is perhaps unsound as an unwarranted disregard of a judgment rendered by a competent court. A release of dower by an infant wife was held void in Sherman v. Garfield, 1 Denio, 329, but not on the ground of being a voluntary conveyance. See case of dower in note 341.

latter cannot plead an outstanding title in the infant grantor).[340] Third, and what is most important, the infant, after he comes of age, may, by acts not amounting to a new conveyance, affirm that made during minority, or estop himself from impeaching or disaffirming it. He may thus estop himself by standing by, after he becomes of age, while the purchaser improves the premises, or makes considerable outlays in building and rebuilding, or while third parties buy from or advance money to his grantee on the faith of these lands; and these acts, when combined with long acquiescence, for a less time than that fixed by the statute of limitations, may bar him from setting up his rights of disaffirmance.[341]

And this right can often be exercised only on terms, such as the restoring of the consideration received; which would be otherwise if the conveyance was void, and the grantee under the infant's deed was a mere intruder. In fact, the conveyance of an infant or person of unsound mind (at least, one not found judicially to be such) stands good until disaffirmed. No formal act to that end is necessary, or usual. The infant, when he comes of age, or, when he dies, his heir or devisee, may, without previous notice or demand, bring his ejectment suit, which is a disaffirmance in itself, while a plea of infancy is the shortest way of disaffirming a mortgage, which it seems a court would be compelled to enforce, if the plea is not set up.[342] Or he may give a written notice of disaffirmance, which

340 The first point, which hardly concerns us at all, is stated in many opinions as the great element of difference between void and voidable. In the leading case (note 336) the second point arose. The naked legal title in land, having fallen on an infant, was by him, at the request of those in interest, conveyed to the lessor of the plaintiff; and the defendant was not heard to object on account of infancy. In Oldham v. Sale, 1 B. Mon. (Ky.) 76, a widow claiming dower was not allowed to object to her husband's complying with contract of sale made before marriage, while an infant.

341 Wallace's Lessee v. Lewis, 4 Har. (Del.) 75 (four years deemed unreasonable where the purchaser was seen making improvements); Hartman v. Kendall, 4 Ind. 404 (17 years' acquiescence in release of dower by an infant wife); Kline v. Beebe, 6 Comm. 494 (acquiescence for an unreasonable time, though by a married woman, an affirmance); Irvine v. Irvine, 9 Wall. 617 (four years after full age, and seeing expensive improvements go on).

342 Mustard v. Wohlford's Heirs, 15 Grat. 329; Bedinger v. Wharton, 27 Grat. 857; Jackson v. Carpenter, 11 Johns. 539,—where the ancient mode of avoiding a feoffment made by an infant with livery of seisiu is said to have

is operative either with or without re-entry; and, while anciently a re-entry was thought to be the only way to avoid a feoffment with livery of seisin, it is still a good disaffirmance of conveyance by deed.[343] Or, the infant, when he comes of age, may convey the same estate to another grantee, the new deed being incompatible with that executed during infancy, and thus disaffirm the first grant; and the second grantee will recover.[344] No length of time, short of the bar of limitations, takes from one who has conveyed his land during infancy the right to disaffirm by either of these methods; and this right, on his death, goes to his heir or devisee, to be exerted within the like period. In other words, silence alone does not estop the grantor or his heirs, etc., from disaffirming, and the rule is sometimes stated in this form.[345]

If the consideration received is still, in some tangible form, in the hands of the grantor or his heirs, who come to disaffirm, it ought to be tendered back;[346] but, if it has been wasted or lost,

been a re-entry on the land, but that an action is now sufficient. Tucker v. Moreland, 10 Pet. 58, shows that entry cannot be necessary where the infant is not out of possession. A remainder-man may disaffirm. Ihley v. Padgett, 27 S. C. 300, 3 S. E. 468 (arguendo). No solemnity of any kind required. Drakes' Lessee v. Ramsay, 5 Ohio, 251; Singer Manuf'g Co. v. Lamb, 81 Mo. 221. And see cases in next note.

343 Green v. Green, 69 N. Y. 553; White v. Flora, 2 Overt. (Tenn.) 426; (re-entry); Roberts v. Wiggins, 1 N. H. 73; Long v. Williams, 74 Ind. 115.

344 Jackson v. Carpenter, 11 Johns. 539; Jackson v. Burchin, 14 Johns. 124; Bool v. Mix, 17 Wend. 119; Peterson v. Laik, 24 Mo. 341 (it is a matter of law, not a question for the jury); Langdon v. Clayson, 75 Mich. 204, 42 N. W. 805 (a quitclaim deed).

345 Wilson v. Branch, 77 Va. 68 (suit by married woman after 32 years, she having lately become discovert); Richardson v. Pate, 93 Ind. 423 (21 years); Birch v. Linton, 78 Va. 584; Youse v. Norcum, 12 Mo. 549 (second deed, by husband and wife, made 30 years after first); Peterson v. Laik, supra (21 years); Harris v. Ross, 86 Mo. 89 (where the heir of infant wife brought suit after coming of age); Harvey v. Briggs (Miss.) 8 South. 274. In Indiana, a woman still under coverture, though she cannot convey her land, can by suit disaffirm her deed made during infancy. Buchanan v. Hubbard, 96 Ind. 1, and a number of Indiana cases there cited. Also Sims v. Everhardt, 102 U. S. 300, 310; Irvine v. Irvine, 9 Wall. 627; Wallace v. Latham, 52 Miss. 293; Stull v. Harris, 51 Ark. 294, 11 S. W. 104.

346 So in all cases of exchange of land. See below. Also Hill v. Anderson, 5 Smedes. & M. 216.

it need not be restored or tendered back; for the inability of infants to take care of the proceeds of their lands, and the likelihood of their being cheated out of their money, is one of the main reasons for the law which disables them from a binding disposition of their lands.[347]

Where the land of an infant is disposed of in the way of an exchange for other lands, or where such other lands are bought by or for him (or her) with the price, the retention of these lands for a considerable time after the infant comes of age and is sui juris [348] —and, still more, the sale and conveyance of the land taken in exchange—is deemed a ratification. The latter would be conclusive, if anything near the whole proceeds of the lands sold was invested in those newly acquired.[349]

[347] Cresinger v. Welch, 15 Ohio, 156; Craig v. Van Bebber, 100 Mo. 584, 13 S. W. 906, to which case the editor has appended a note of over 150 pages on the conveyances and contracts of infants, bringing the authorities down to 1890; Clark v. Tate (Mont.) 14 Pac. 761; Vogelsang v. Null, 67 Tex. 465, 3 S. W. 451 (where infant's agent had withheld her money); Vallandingham v. Johnson, 85 Ky. 288, 3 S. W. 173 (no return of consideration necessary where suit is brought by second grantee); Gibson v. Soper, 6 Gray, 279; Boody v. McKenney, 23 Me. 517 (the other party need not be put in statu quo); Tucker v. Moreland, supra; Shaw v. Boyd, 5 Serg. & R. 309. In Chandler v. Simmons, 97 Mass. 508, it is said: "We do not understand that such a condition [return of the consideration] is ever attached to the right of a minor to avoid his deed. If it were so, the privilege would fail to protect him when most needed." In Walsh v. Young, 110 Mass. 396, an infant wife, having joined with her husband in selling land held in common, was allowed to recover her half, without offering to return anything, as it did not appear that, when coming of age, any part of the price was left in her hands. Green v. Green, 69 N. Y. 553 (where a son sold to his father, and spent the money before coming of age).

[348] Statutory in Georgia, Code, § 2731. See McKamy v. Cooper, 81 Ga. 679, 8 S. E. 312. Ellis v. Alford, 64 Miss. 8, 11 South. 155 (5 years after discoverture). But retention for only seven months after majority not an estoppel. Cardwell v. Rogers, 76 Tex. 37, 12 S. W. 1006 (not a case of plaintiff's own conveyance).

[349] Buchanan v. Hubbard, 119 Ind. 187, 21 N. E. 538 (though $400 of the price was in money); Ihley v. Padgett, 27 S. C. 300, 3 S. E. 468 (plaintiff had mortgaged the new land). But infant wife not estopped by taking dower in lands bought by husband with proceeds of hers (Richardson v. Pate, 93 Ind. 423), nor by offering to convey again upon full payment of purchase money (Craig v. Van Bebber, supra).

A recital in a deed to a third party, e. g. of a first mortgage given during infancy, in a second mortgage given after majority, or of a conveyance for one parcel of a lot in a subsequent deed conveying another part of the tract, is sufficient as a ratification.[350] When an infant buys land, and takes a conveyance, he cannot, while still under age, disaffirm the purchase on the mere ground of infancy, and reclaim the purchase money, though he might do so on the ground of fraud; for to disaffirm the purchase is to divest himself of the title to land. He must wait till he comes of age. But, after a conveyance by the infant, when it is voidable, he or the guardian may, during minority, enter and claim the profits. He may plead infancy, while an infant, to a bill to foreclose or otherwise enforce a mortgage; but he cannot finally disaffirm a sale or conveyance of land (it is otherwise with chattels) until he comes of age; for disaffirmance may require as much discretion as the original act of sale.[351] When he has bought land, and has given his mortgage on the land bought for the purchase money, he cannot avoid this mortgage without returning the land,—of course reclaiming at the same time the part of the price paid by him, for which he has a lien on the land.[352]

The right of an infant or person of unsound mind to recover

[350] Breckenridge v. Ormsby, supra; Ward v. Anderson, 111 N. C. 115, 15 S. E. 933,—where it is put partly on the ground that the recital itself creates a charge (as to mortgages); Boston Bank v. Chamberlin, 15 Mass. 220 (as to parcel). See, also, Losey v. Bond, 94 Ind. 67; Ward v. Anderson, 111 N. C. 115, 15 S. E. 933.

[351] Cummings v. Powell, 8 Tex. 80 (giving the reasons in an actual case). In many other cases of sales of chattels the distinction between these and dispositions of land is given. See Stafford v. Roof, 9 Cow. 626; Towle v. Dresser, 73 Me. 252. See, also, North Western Ry. Co. v. McMichael, 5 Exch. 127; Newry & E. Ry. Co. v. Coombe, 3 Exch. 565 (disaffirming the disaffirmance); Wheaton v. East, 5 Yerg. (Tenn.) 41; Scott v. Buchanan, 11 Humph. 467 (arguendo); Mathewson v. Johnson, Hoff. Ch. (N. Y.) 560; Doe v. Leggett, 8 Jones (N. C.) 425; Kilgore v. Jordan, 17 Tex. 341; Chapman v. Chapman, 13 Ind. 396. The guardian cannot disaffirm during infancy. Oliver v. Houdlet, 13 Mass. 237. The doctrine is upon the authority of Edgerton v. Wolf, 6 Gray, 453, drawn into doubt in Chandler v. Simmons, 97 Mass. 508, where it is held that if, after arriving at full age, he is declared a "spendthrift," his guardian, under that declaration, may disaffirm for him.

[352] Roberts v. Wiggin, 1 N. H. 73; Lynde v. Budd, 2 Paige, 191; Uecker

land granted during disability is not a mere equity, and may be enforced against purchasers in good faith near or remote from the grantee, as well as against him.[353] Most of the sales by infants that have led to litigation were made by infant married women, and generally under the dominion of laws which restricted the power of married women over their lands by requiring the assent of the husband and a privy examination. It has been said that each of the two disabilities, infancy and coverture, was independent of the other; and, if the forms required for a married woman's deed had been observed, her disabilities are removed from further consideration. But, if the statute enables "adult married women," and these only, to convey their lands, it would seem that, under such a statute, the deed of an infant married woman must be void.[354] When the deed of husband and wife of the land owned by the latter is avoided by reason of her infancy, it will, under the modern laws, which do not allow the husband to grant away his marital right without the wife's consent, be void as to him.[355]

v. Koehn, 21 Neb. 559, 32 N. W. 583 (land bought assuming mortgage, and resold).

[353] Mustard v. Wohlford's Heirs, 15 Grat. 329; Harrod v. Myers, 21 Ark. 592; Jenkins v. Jenkins, 12 Iowa, 195; Sims v. Smith, 86 Ind. 579; McMorris v. Webb, 17 S. C. 558; Hovey v. Hobson, 53 Me. 451 (deed by lunatic); Adams v. Ross, 30 N. J. Law, 505; Myers v. Sanders' Heirs, 7 Dana, 524, where T. A. Marshall, J., says: "The right of an infant to avoid his deed is an absolute privilege, founded upon incapacity conclusively fixed by the law." "Infancy is not, like fraud, a circumstance wholly extraneous from the title." In short, he who buys land takes the chance that all the grantors in the chain had at the time of their respective grants capacity to convey.

[354] See several of the above cases from Missouri. Also Bull v. Sevier, 88 Ky. 515, 11 S. W. 506. In Schmitheimer v. Eiseman, 7 Bush, 298, the deed of an infant wife was sustained, because she had, at the purchaser's request, made affidavit to her full age; which seems to the writer utterly wrong in principle, as the statute provided for the sale of infants' lands otherwise than "by affidavit," and as the very fact of asking for her oath showed that the purchaser strongly suspected that she was under age. The early Pennsylvania case of Schrader v. Decker, 9 Pa. St. 14, that an infant married woman's deed is void, is overruled in Logan v. Gardner, supra (note 337). But it is here admitted that, while under coverture, the infant grantor having become adult, cannot affirm otherwise than by reacknowledgment or new conveyance, such as would pass the estate of a married woman.

[355] Craig v. Van Bebber, supra.

The acts by which the infant grantor ratifies his or her deed must occur after arrival at majority; and very little force has been given to the infant's representation, at the time, of being of full age then. In fact, in many instances these representations, when made, are known, or strongly suspected to be false by the purchaser.[356]

[356] Dibble v. Jones, 5 Eq. 389, shows the oppression to which infants may be exposed by holding them bound by misrepresentation of age. In Carpenter v. Carpenter, 45 Ind. 142, and Norris v. Vance, 3 Rich. Law, 164 (at law), even the sale of a chattel was not helped out. See, also, Vogelsang v. Null, 67 Tex. 465, 3 S. W. 451; Rundle v. Spencer, 67 Mich. 189, 34 N. W. 548 (where the infant, while such, witnessed conveyances by his grantee, and saw improvements made). Vallandingham v. Johnson, 85 Ky. 288, 3 S. W. 173, admits that the misrepresentation cannot prejudice a bona fide purchaser from the infant. Charles v. Hastedt, 51 N. J. Eq. 171, 26 Atl. 564 ("the children were mere passive instruments in the hands of older persons"); Wieland v. Kobick, 110 Ill. 16 (recital in deed that grantor is of age immaterial); Merriam v. Cunningham, 11 Cush. (Mass.) 40; Studwell v. Shapter, 54 N. Y. 249 (not a case of land), which follows Brown v. McCune, 5 Sandf. 228, where the vice chancellor considers it clear that "the doctrine of estoppel is inapplicable to infants"; Gilson v. Spear, 38 Vt. 311; Burley v. Russell, 10 N. H. 184; Conrad v. Lane, 26 Minn. 389, 4 N. W. 695. Bradshaw v. Van Winkle, 133 Ind. 134, 32 N. E. 877, decides nothing. But courts of equity have undertaken to work out an estoppel in Schmithelmer v. Eiseman, 7 Bush, 298, and in Ferguson v. Bobo, 54 Miss. 121. Watson v. Billings, 38 Ark. 278, discusses the matter, and puts it thus very forcibly: "They cannot, by their own acts, acquire any ability to contract," and quotes from 2 Kent, Comm. 241, strong language to the same effect. In the Mississippi case a girl of 19 had conveyed her land to her father, to enable him to raise money on it. There was much falsehood in plaintiff's conduct, and the land was really bought with her father's means; but the court professed to lay these matters out of the case. It admitted that since Johnson v. Pie (in 17 Car. II.) 1 Lev. 169, 1 Keb. 905, the weight of authority had been against holding infants liable, except in tort, for misrepresentation of age, and that most American courts had refused to estop an infant on any such ground from disaffirming his deed. The court relies, however, on Whittington v. Doe, 9 Ga. 23, where an estoppel for "standing by" and letting land be sold was enforced against an infant near the age of 21 years. Hall v. Timmons, 2 Rich. Eq. 120,—a similar case of a slave owned by an infant of 15 years, and sold in his presence by a kinsman as his own. The latter case was complicated by lapse of time. The English cases referred to are: Savage v. Foster (1723) 9 Mod. 35, a dictum about an infant or feme covert being estopped by "standing by"; Evroy v. Nicholas, 2 Eq. Cas. Abr. 488, where an infant was estopped by witnessing a lease to his own lands, granted by another, who claimed authority; and In re King, 3 De Gex

Although the rule as first stated gave a provisional validity only to those acts of the infant which "take effect by the delivery of his land," i. e. to executed conveyances, it seems that title bonds, especially if accompanied with possession, stand on the same ground, and that if a man, after coming of age, wants to carry out a contract of land made during infancy, the conveyance may relate back to the contract, and no one can complain.[357]

Where the infant's land has been conveyed, not by his own deed, but by his guardian, under color of a license, but, for some reason the guardian's deed is ineffectual, the acts of ratification or of estoppel must be much clearer than when it comes in aid of his own voidable deed; for the alienation by the guardian, when it lacks legal authority, is not voidable, but void.[358]

An infant who receives, by deed or will, the fee in lands, cannot, by a power to sell given in the same grant or devise, obtain the capacity to sell or convey what thus becomes his property,—that is, a capacity to do what the law disallows; and a clause seemingly giving such capacity must be construed in a way compatible with the general law.[359]

In California and the Dakotas some of the matters here treated are governed by statute. "A minor cannot give a delegation of power," nor, while under 18, "make a contract relating to real estate," which would indicate that his conveyance while under 18, and

& J. 63, which merely overrules Johnson v. Pie, supra, so that an action in some form may be had for deceit against an infant who obtains a loan by fraudulent representation of full age. There is no American precedent quoted in the Mississippi case (1876) of land actually passing through the misrepresentation, though the only other decision—that from Kentucky—was rendered in 1870, and a strong dictum in Davidson v. Young (1865) 38 Ill. 145.

357 Oldham v. Sale, 1 B. Mon. (Ky.) 76; Vallandingham v. Johnson, 85 Ky. 288, 3 S. W. 173.

358 Dohms v. Mann, 76 Iowa, 723, 39 N. W. 823. In Aldrich v. Funk, 48 Hun, 367, 1 N. Y. Supp. 541, the decretal sale was held good; hence the affirmance was not needed. Contra, Terrell v. Weymouth, 32 Fla. 255, 13 South. 429 (which arose out of conduct of infant after a void judicial sale); Cooter v. Dearborn, 115 Ill. 509, 4 N. E. 388 (delay of 12 years excused). The guardian's deeds in these cases were void; in the last, being without license, had not even color; and there seems to be no room for either ratification or disaffirmance.

359 Sewell v. Sewell, 92 Ky. 500, 18 S. W. 162. See our chapter on "Powers."

always her conveyance (for women over 18 are adults), is void. Nothing seems to curtail the right of a young man between 18 and 21 to dispose of his lands.[360] In Iowa, also, the statute steps in. A minor is bound by all contracts "unless he disaffirms them within a reasonable time after he attains his majority, and restores * * * all money or property received by him * * * and remaining within his control at any time after his attaining majority." The "reasonable time" counts from the infant's marriage (for that makes him or her an adult), as well as from the age limit; but a disaffirmance during infancy is good. The length of time allowed after majority depends on the circumstances in which the other party is put, and six months was in one case deemed unreasonably long.[361] Another clause of the Iowa statute denies the right to disaffirm where, from "the minor's own misrepresentation as to his majority, or from his having engaged in business as an adult, the other party had good reason to believe" him an adult.[362]

We may also refer here to the statutes of Maine and Massachusetts, which provide for filing with the register of deeds a notice of any application to have a person declared a lunatic or a "spendthrift," so as to deprive him of the power of alienation, and thus warning off purchasers.[363]

While, generally speaking, the deeds of persons of unsound mind, like those of infants, when taking effect "by delivery" are not void, but voidable, and have even been held good, where the person had not been judicially declared insane, and the deed was for his benefit, the land being sold for a fair consideration, and the money aris-

[360] California, Civ. Code, §§ 33–35; Dakota, Civ. Code, §§ 15–17.

[361] Iowa, Code, § 2238; Jenkins v. Jenkins, 12 Iowa, 195 (a delay of only 18 days was, of course, reasonably short); Weaver v. Carpenter, 42 Iowa, 343; Jones v. Jones, 46 Iowa, 466 (six months from marriage too long; one judge dissents); Stout v. Merrill, 35 Iowa, 17; Green v. Wilding, 59 Iowa, 679, 13 N. W. 761 (wrong advice on the law by laymen no excuse; three years and a half too long).

[362] Iowa, Code, § 2239. The cases reported on the subject relate to personalty. Dealing as an adult in merchandise might be enough to induce a stranger to accept a deed of land from an infant so engaged. Jaques v. Sax, 39 Iowa, 367.

[363] Chandler v. Simmons, 97 Mass. 508, gives the history of the legislation on the subject. See, for the present law, Massachusetts, Pub. St. c. 139, § 9; Maine, c. 67, § 7.

ing from the sale used by him for necessaries, yet, as to mortgages by such persons, the courts have held otherwise, even in Massachusetts, where a mortgage is still looked upon as an executed conveyance. It is there said that "fairness" cannot supply the lacking power to convey, and that the mortgage may be avoided without accounting for the advances received.[364]

In conclusion, we must speak of certain deeds by infants which are neither void nor voidable, but valid and binding. Whenever an infant makes and delivers a deed of conveyance which it was his duty in law to make, he cannot disaffirm it; but it stands good, as if he was of full age. Thus, if, with money intrusted to him by another to buy land in the latter's name, he should buy it in his own name, it would be his duty to right the wrong. Hence, if, without a decree of court, he conveys to him whose funds he has misapplied, the deed binds him.[365] Or, if a court should decree him to convey land, and he does so, his deed is binding, and remains such unless the decree should be opened or reversed.[366] And where an idiot, not then declared judicially to be such, sold his land for a fair price to a purchaser in good faith, and the proceeds were used for his necessary support, it was held that the land could not be reclaimed without return of the price; the deed being treated like the contract of an infant for necessaries.[367] In one case, which goes to the verge, a mortgage made by a man out of his mind at the time of execution

364 Valpey v. Rea, 130 Mass. 384; Chandler v. Simmons, 97 Mass. 508, 515; Seaver v. Phelps, 11 Pick. 304; Brigham v. Fayerweather, 144 Mass. 48, 10 N. E. 735 (mortgage for good antecedent debt).

365 Irvine v. Irvine, 9 Wall. 617.

366 Yet the American practice is to let infants convey by commissioner,—Grier's Appeal, 101 Pa. St. 412 (where a guardian was ordered to mortgage the land of his wards; and, though he was insane at the time, the deed was held good).

367 Burnham v. Kidwell, 113 Ill. 429. Schaps v. Lehner, 54 Minn. 208, 55 N. W. 911, makes the distinction that the executed contract of an insane person, not found to be such by inquisition, is voidable only if injurious to him, but valid if fair. Eaton v. Eaton, 37 N. J. Law, 108; Lancaster County Nat. Bank v. Moore, 78 Pa. St. 407; Young v. Stevens, 48 N. H. 133; Gribben v. Maxwell, 34 Kan. 8, 7 Pac. 584; Fay v. Burditt, 81 Ind. 433. In the hands of a purchaser in good faith, to be sustained, as far as equitable. Myers v. Knabe, 51 Kan. 720, 33 Pac. 602; s. p. Sponable v. Hanson, 87 Mich. 204, 49 N. W. 644.

was sustained as valid, on the ground that he had agreed on all the particulars before he had lost his sound mind.[368]

§ 59. After-Acquired and Future Interests.

The ancient warranty inserted in deeds of feoffment was a covenant by which the warrantor and his heirs were bound to warrant the title, and might be adjudged to yield other lands to the value of those from which the feoffee or his heirs or assigns might be evicted by paramount title. The learning of "lineal and collateral warranties" is obsolete, not only because modern statutes (beginning with 4 Anne, c. 16) have abolished them, or done away with the sweeping effects which they had at common law, but because modern deeds do not contain warranties in the old sense, but covenants of title of which the covenant of warranty is one; but all these covenants are discharged in money, not by the conveyance of other lands. The other covenants which are usually inserted in deeds are that of seisin, that of the right or full power to convey, that against incumbrances (that the title hereby conveyed is free, clear, and unincumbered), that of further assurance, and that of quiet enjoyment. As far as damages may be recovered on any of these covenants, they lie beyond the scope of this work.[369] The question of the true state of the title at the date of a deed can be, and often is, determined in an action on the covenant of seisin ("that the grantor is lawfully

[368] Bevin v. Powell, 83 Mo. 365.

[369] 4 Kent's Comm. 468. Many modern statutes give a short form for the covenants of title as now used. Thus Rev. St. Ind. § 2927, directs that the words "and warrants," inserted after "conveys," shall imply a "covenant from the grantor for himself and his personal representatives that he is lawfully seised of the premises, has good right to convey the same, and guaranties the quiet possession thereof; that the same are free from all incumbrances; and that he will warrant and defend the title to the same against all lawful claims." In the Kentucky Statutes, the words "with special warranty" are also defined. And so in many other states. Probably the court would (since heirs are everywhere bound for debts of the ancestor to extent of assets by descent), without such assistance, work out these meanings. See Miller v. Texas & P. R. Co., 132 U. S. 662, 10 Sup. Ct. 206, for words in the habendum clause that were held to be a good "warranty," though not containing that word at all.

seised in fee simple of the premises herein conveyed, or meant or intended so to be"); for the covenant is, if the grantor is not fully seised, broken as soon as made, and an action to try the completeness of the title conveyed lies at once.[370] But the effect of the covenant of general warranty ("that the grantor, his heirs, executors, and administrators, will warrant and defend the premises to the grantee, his heirs and assigns, against all lawful demands"), of special warranty (that they will "warrant and defend against the lawful claims of the grantor, and of all persons claiming by or under him"), and of quiet enjoyment, is to estop the covenantor (whether he be the grantor or otherwise joined in the deed) from setting up an after-acquired title, which now means only such as may come to him thereafter by descent or purchase,[371] but which included former-

[370] In Missouri it has been lately held that the covenant of seisin runs with the land. Allen v. Kennedy, 91 Mo. 324, 2 S. W. 142. The common-law warranty, like the modern covenant of seisin, could be enforced, not only in case of eviction by the ordinary writ of warrantia chartae; but, when the feoffee found that the title was defective, by a writ of warrantia chartae quia timet, which became a lien on the defendant's land, and thus secured the judgment that would be rendered after an eviction. This is fully explained in Funk v. Voneida, 11 Serg. & R. 109. In modern English conveyances the covenant for quiet enjoyment, which is only broken upon an eviction, has taken the place which in American deeds is taken by the covenant of warranty. The covenant for further assurance is rather unusual in this country. Should it be specifically enforced, it would only produce the effect which even courts of law have given to the ordinary covenants of title of transferring after-acquired interests and estates. Kent, in his Commentaries (volume 4, p. 471, 2d Ed.), speaks of both the covenant of quiet enjoyment and of the personal covenant of warranty as running with the land; and he disapproves the then late English decision in Kingdon v. Nottle, 1 Maule & S. 355, 4 Maule & S. 53, under which the breach of the covenant of seisin is "continuous," and thus the covenant itself is made to run with the land, and to inure to heirs and assigns.

[371] A clause of the statute in many states abolishes "lineal and collateral warranties." The former are where the land and the obligation of the warranty descend on the heir from the same ancestor; the latter, where the warranty descends from one and the land from another. The former is highly just; the latter, unless assets descend along with the obligation, highly unjust; but this injustice was in the old common law lessened by the exceptions that "a warranty beginning in disseisin does not bind the heir." Such a repealing clause is found, for instance, in Gen. St. Ky. c. 63, §§ 17, 18, running back to 1797. But this repealing clause has been ignored as to lineal warranties. If an after-acquired title of the ancestor, on which he could not

ly, when contingent estates and possibilities were not assignable, these also whenever they came thereafter into possession by subsequent events. The reason for this estoppel by the covenant of warranty, general or special, as by the warranty, payable in land, of the ancient common law, is to prevent circuity of action; for, if the covenantor was allowed to recover upon the after-acquired title, he would be at once liable to restore the value of the land in an action upon the covenant; [372] and this as will be seen from the cases quoted, as well

evict his warrantee, descends to his heir, how can the latter sue? See, for rebutter by warranty of the covenantor or his heirs, Beard v. Griggs, 1 J. J. Marsh. 27; Berthelemy v. Johnson, 3 B. Mon. 93; Logan v. Steele, 7 T. B. Mon. 108 (a deed made by a commissioner, but with warranty under decree of specific performance); Nunnally v. White, 3 Metc. (Ky.) 585. The new title must be beneficial, not in trust. Dewhurst v. Wright, 29 Fla. 223, 10 South. 682. And see cases quoted below on implied warranty in Illinois and California, etc. Also Fitch v. Fitch, 8 Pick. 480; Trull v. Eastman, 3 Metc. (Mass.) 121 (mere expectancies); Fairbanks v. Williamson, 7 Greenl. (Me.) 96 (rather a covenant of further assurance, not in a conveyance); Moore v. Rake, 26 N. J. Law, 574 (heir barred); Middlebury College v. Cheney, 1 Vt. 336; Robertson v. Gaines, 2 Humph. (Tenn.) 383; Kennedy v. McCartney, 4 Port. (Ala.) 159; Bush v. Marshall, 6 How. 291; Dart v. Dart, 7 Conn. 250; Loomis v. Bedell, 11 N. H. 74 (though the grant was only of right, title, and interest); Vanderheyden v. Crandall, 2 Denio, 9; Jackson v. Murray, 12 Johns. 201; Jackson v. Stevens, 13 Johns. 316 (said not to be disputed in Moore v. Littel, 41 N. Y. 95); Barton v. Morris, 15 Ohio, 408; Dodswell v. Buchanan, 3 Leigh, 376; and many other cases quoted in American notes to Spencer's Case, in 1 Smith, Lead. Cas. 175. They are based mainly on Co. Litt. 265a. "If there be a warranty annexed to the release, then the son shall be barred; for albeit the releasor cannot have the right, etc., yet the warranty may rebut and bar him and his heirs of a future right." As to covenant of quiet enjoyment, see Shelton v. Codman, 3 Cush. 320; Savage v. Mason, Id. 505; Brown v. Manter, 21 N. H. 528. The same effect has been given in New York to a covenant against incumbrances. Coleman v. Bresnaham, 54 Hun, 619, 8 N. Y. Supp. 158. The effect of warranty in Georgia (Doe v. Ramsey, 22 Ga. 627) is now superseded by the more sweeping statute, infra. A special warranty prevents the grantor from setting up a judgment lien against the land. Bennitt v. Wilmington Star Min. Co., 119 Ill. 9, 7 N. E. 498. A warranty inserted in a voluntary deed to grantor's children works an estoppel. Frank v. Caruthers, 108 Mo. 569, 18 S. W. 927. Trevivan v. Lawrance, 1 Salk. 276, is claimed as an English precedent under the modern system of covenants of title.

[372] Pelletreau v. Jackson, 11 Wend. 111. Case on same facts, Jackson v. Varick, 7 Cow. 238; on appeal, 2 Wend. 166. The lack of a warranty was said to prevent the assignment of a "possibility" under a devise from taking effect.

when the covenantor has at the time a partial interest in the subject of the warranty or covenant of quiet enjoyment as when he has no valid title at all. The covenant of warranty thus operates as a conveyance, or, if contained in a mortgage, as a pledge, of the estate which may thereafter come to the covenantor, whether by descent or purchase; including purchase in the narrower meaning, i. e. the interest in the land which he may buy thereafter.[373] Hence, where one conveys, with warranty, land that is declared in the deed to be subject to a mortgage, unless the grantee assumes in the same deed the payment of such mortgage as part of the price, the grantor cannot, if he buys up the mortgage, enforce it against the land in the hands of the grantee or of others holding under the latter.[374]

Messrs. Hare & Wallace, in their notes on the Duchess of Kingston's Case, criticise this doctrine as not being founded on any English precedents, as the passages from Coke referred only to the old-fashioned "real covenant" of warranty, which could be pleaded by

See, also, Sinclair v. Jackson, 8 Cow. 543. In the older law it was the most important quality of contingent remainders that they could not be assigned by their possible owners, though they might be destroyed by others. However, according to Co. Litt. 352, a man is always estopped by deed indented,—i. e. having in such a deed professed to own an alienable estate, he cannot thereafter deny it. Weale v. Lower, Poll. 54, 61; Noel v. Bewley, 3 Sim. 103. And one who has in a plea to a writ of entry disclaimed is estopped by record from setting up a future contingent estate. Hamilton v. Elliot, 4 N. H. 182.

373 Sandwich Manuf'g Co. v. Zellmer, 48 Minn. 408, 51 N. W. 379, where one of the covenantors bought in the title arising under a prior mortgage, and conveyed; the title so acquired passed by the deed containing the covenant. It was the owner's wife who had joined in the deed, apparently to bar dower and homestead, and was not supposed then to have any title. McManness v. Paxson (W. D. Mo.) 37 Fed. 296 (mortgage). Secus, where a wife joining to release dower does not join in the covenants. Tyler v. Moore (Pa. Sup.) 17 Atl. 216. But where the deed of husband and wife is void on account of his nonjoinder, her covenant is void too. Naylor v. Minock, 96 Mich. 182, 55 N. W. 664.

374 Boyd v. Haseltine, 110 Mo. 203, 19 S. W. 822 (see below as to Missouri statute); Sandwich Manuf'g Co. v. Zellmer, supra; Probstfield v. Czizek, 37 Minn. 420, 34 N. W. 896; Brundred v. Walker, 12 N. J. Eq. 140 (covenants against incumbrances relied on); Tefft v. Munson, 57 N. Y. 97. Estate will subserve mortgage with warranty, though the debt be barred by bankruptcy. Ayer v. Philadelphia & B. Face Brick Co., 159 Mass. 84, 34 N. E. 177.

way of "rebutter," if the warrantor or his heir should become demandant in a real action against one holding the land, under the common-law conveyance accompanied by the warranty. They quote the supreme court of North Carolina for the position that what in the United States is called a "warranty" is only a covenant of quiet enjoyment, unknown to the days in which the learning of warranties grew up. Yet, whenever the covenantor himself, or an heir, who inherits the very land in question from the covenantor, seeks to recover on the newly-acquired title, the estoppel by the covenant is so plainly just that it does not need old precedents for its support.[375] At common law there was, besides the express warranty, an implied warranty, in the words "dedi et concessi" ("have given and granted"), of a deed of a freehold, good during the life of the grantor, i. e. if the eviction took place before his death; and from the word "dimisi" ("have demised") a covenant of quiet enjoyment was implied. These implications have been done away with by statute in the states of New York, Michigan, Wisconsin, Minnesota, California, Oregon, Wyoming, and Texas as likely to run counter to the intention of the parties; and the former, at least, would probably not be enforced in other states which have not legislated on the subject.[376]

On the other hand, the colony of Pennsylvania enacted a law as early as 1715, which is still in force in its original form, under which the words "bargain, sell, and convey" in any conveyance (other than a lease at a rack rent, or a lease in possession for less than 21 years) imply two covenants: First, that the grantor is seised of an estate in fee, free from any incumbrance done or suffered by himself; second, for quiet enjoyment against himself, his heirs and assigns. In this state, though, it seems these implied covenants have not in any reported case been used to transfer the after-acquired title; yet no difficulty could arise when the grantee's title has passed from him, by death or conveyance, as the restricted covenant for quiet enjoyment, at least, runs with the land, though the restricted covenant of

[375] Gilliam v. Jacocks, 4 Hawks (N. C.) 310 (former ejectment between them in 3 Murph. [N. C.] 47). See, also, Flynn v. Williams, 1 Ired. (N. C.) 509.

[376] New York Rev. St. pt. 2, c. 1, tit. 2, § 140 (whether the deed contains covenants or not); Michigan, § 5655; Wisconsin, § 2204; Minnesota, c. 40, § 6; Texas, § 557; Oregon, § 3007; Wyoming, § 5; California, Civ. Code, § 1113 (but see below).

seisin and against incumbrances does not.[377] This law has been copied substantially in Illinois. Here a number of cases have come before the supreme court, in all of which the words "grant, bargain, and sell" have been held equivalent to a special warranty in passing an after-acquired estate to the covenantee; and, if the deed containing these words be a mortgage, it carries such new estate of the grantor as far as needed to pay the debt.[378] The California Civil Code, followed by that of Dakota, Idaho, and Montana, implies the same covenants from the word "grant" alone, but has been construed as giving the same force to the words "bargain and sell."[379] The Pennsylvania provision has also been transferred to the statutes of Missouri (where its effect is enlarged so as to raise a full covenant of seisin), Arkansas, Alabama (where each of the three words has the full effect of the three words "grant, bargain, sell"), and Mississippi; and is or may be applied in all of these states to work out the estoppel of warranty from the words of conveyance most usually employed.[380] At common law there was also an implied general warranty in the conveyance by "exchange," if made in its technical form, and in deeds of partition, which are a kind of exchange of land.

[377] Pennsylvania, Dig. "Deeds," § 93; Act 1715; discussed in Welser v. Weiser, 5 Watts, 279; Funk v. Voneida, 11 Serg. & R. 109. See other Pennsylvania cases infra, the statute being so old and so universal in its application to deeds that it is hardly referred to.

[378] Illinois, c. 30, § 8; D'Wolf v. Haydn, 24 Ill. 525 (covenant in mortgage); King v. Gilson, 32 Ill. 348; Gochenour v. Mowry, 33 Ill. 331; Wadhams v. Gay, 73 Ill. 415; Pratt v. Pratt, 96 Ill. 184, 197 (covenant in mortgage). The present statute puts each of three words—"grant,"—"bargain,"—"sell,"—in separate quotation marks, as if each singly was to have the full effect. In Jones v. King, 25 Ill. 383, the express covenants are relied on, the deed antedating the statute.

[379] California, Civ. Code, § 1113; Dakota, Civ. Code, § 628; Montana, Gen. Laws, § 285; Idaho, § 2935; Touchard v. Crow, 20 Cal. 150; Muller v. Boggs, 25 Cal. 186. See below as to other clauses of California statute.

[380] Missouri, Rev. St. § 2402. These covenants run with the land. Allen v. Kennedy, 91 Mo. 324, 2 S. W. 142. Arkansas, Dig. § 639. See Brodie v. Watkins, 31 Ark. 319; Alabama, Code, § 1839. The word "quitclaim," or "right, title, and interest," when added, destroy the warranty. Derrick v. Brown, 66 Ala. 162; Chambers v. Ringstaff, 69 Ala. 140, holding that the husband joining with his wife, when her deed is void, may thus bar his marital rights. Mississippi, § 2440; but see infra as to that state.

While deeds of exchange are probably no longer in use, and the warranty incident to them obsolete, the warranty implied in a partition is grounded on such a clear equity that it may be deemed still to prevail, and to bar each of the parties to the division of lands against setting up an after-acquired title to the share allotted to his companions. This doctrine seems, however, to be wholly ignored in Massachusetts.[381] Some courts (including the supreme court of the United States and that of Texas) have, however, gone further, maintaining that if the deed shows that the grantor intended to convey, and the grantee to receive, an estate of particular quality (especially when it purports to pass a fee simple), then, though the deed "may not contain any covenants of title, still the legal operation of the instrument will be as binding upon the grantor and those claiming under him as if a formal covenant had been inserted, at least so far as to estop them from ever afterwards denying that he was seised of that particular estate at the time of the conveyance."[382] But in most of the states the distinction is kept up that only a covenant running with the land, either express or implied, can bar an estate,

[381] Venable v. Beauchamp, 3 Dana (Ky.) 325; contra, Doane v. Willcutt, 5 Gray, 328. Deed of partition implies no warranty, and, without covenants, does not pass after-acquired estate. So, also, Pendill v. Agricultural Soc., 95 Mich. 491, 55 N. W. 384, where the deeds conveyed "right, title, and interest."

[382] Van Rensselaer v. Kearney, 11 How. 297, 301; French's Lessee v. Spencer, 21 How. 228, approved in Hannon v. Christopher, 34 N. J. Eq. 459, 464, followed in Lindsay v. Freeman, 83 Tex. 259, 18 S. W. 727. Recitals in the deed are relied on for an estoppel in Fitzhugh's Heirs v. Tyler, 9 B. Mon. 559; but there is also a special warranty. Griffith v. Huston, 7 J. J. Marsh. 385, has a short remark in the same direction, but the writing referred to may have contained a covenant. Moreover, the sale was made of state lands after entry or survey, the inchoate title being assignable; so in Irvine v. Irvine, 9 Wall. 617, like inchoate title under United States land laws; Ward v. Dougherty, 75 Cal. 240, 17 Pac. 193, quitclaim deed by bidder at execution sale good enough to carry the title afterwards given by sheriff's deed. These cases are not in fact of after-acquired estates. The Pennsylvania cases, Brown v. McCormick, 6 Watts, 60; Tyson v. Passmore, 2 Pa. St. 122, Clark v. Martin, 49 Pa. St. 299,—speak generally of estoppel by deed. But all these deeds, under the act of 1715, contained covenants of quiet enjoyment. But the doctrine is again enforced in Ryan v. U. S., 136 U. S. 68, 10 Sup. Ct. 913 (where the deed was, however, made in pursuance of a contract), quoting Smith v. Williams, 44 Mich. 240, 6 N. W. 662, and Case v. Green, 53 Mich. 615, 19 N. W. 554; Lee v. Lee, 83 Iowa, 565, 50 N. W. 33 (lease).

thereafter acquired; that words operating as a grant only cannot do so.[383]

Before the covenant can operate as a grant of future estates, it must be effective as a contract. Hence, where a married woman has no capacity to bind herself by contract, her conveyance which is authorized by statute can only operate on the present estate. Her covenants no more bind her after-acquired estate in the land conveyed than any other estate: a rule, however, which has not been followed in all the states.[384] The covenant of warranty or quiet enjoyment is co-extensive only with the grant. Where the granting clause (which may be modified by the habendum) conveys only the "right, title, and interest," only the estate held at the time is under-

[383] Jackson v. Wright, 14 Johns. 193 (warranty is necessary); House v. McCormick, 57 N. Y. 510. New York Rev. St. pt. 2, c. 1, tit. 2, §§ 143, 144, do not refer to after-acquired estates, to contingent estates, or to possibilities of reverter, yet a clear intent was held equivalent to a covenant in the peculiar case of Kingsland v. Mayor, etc., of New York, 35 Hun, 458. See, also, People v. Miller, 79 Mich. 93, 44 N. W. 172, following Frost v. Missionary Soc., 56 Mich. 69, 22 N. W. 189; McClure v. Raben, 125 Ind. 139, 25 N. E. 179; Id., 133 Ind. 507, 33 N. E. 275; Cuthrell v. Hawkins, 98 N. C. 203, 3 S. E. 672; Holman v. Dukes, 110 Ind. 195, 10 N. E. 629.

[384] So in New York before act of 1862, c. 172; Jackson v. Vanderheyden, 17 Johns. 167; Martin v. Dwelly, 6 Wend. 9; Dominick v. Michael, 4 Sandf. (N. Y.) 374, 425, where it is said, on the authority of Co. Litt. 302, and cases in Cro. Eliz. pp. 39, 700, that a married woman cannot estop herself by deed. So in Kentucky, before 1894. Hobbs v. King, 2 Metc. (Ky.) 141; Nunnally v. White's Ex'rs, 3 Metc. (Ky.) 593 (overruling what is said to the contrary in Massie v. Sebastian, 4 Bibb [Ky.] 433). Den v. Demarest, 21 N. J. Law, 541; Gonzales v. Hukil, 49 Ala. 260, approved also in Wilson v. King, 23 N. J. Eq. 155, and in Tyler v. Moore, 17 Atl. 216 (not reported in Pa. St. Reports); (bound where disabilities abolished. Guertin v. Mombleau, 144 Ill. 32, 33 N. E. 49; Dobbin v. Cordiner, 41 Minn. 165, 42 N. W. 870). Contra, Hill v. West, 8 Ohio, 222; Nelson v. Harwood, 3 Call (Va.) 394 (covenant of further assurance specifically enforced); Colcord v. Swan, 7 Mass. 291, which is practically overruled by Wight v. Shaw, 5 Cush. 66. In Florida, by section 1966 of the last Revision, a married woman is bound by her covenants of title to estoppel, but not personally. By Virginia Code, § 2502, the wife's covenants can operate only on her "separate estate." In Nevada, by statute, section 2589, the wife is bound on her covenants with her after-acquired estate, but no further. The view binding the feme covert by her covenants claims to rest on the analogy of the English law as to the fine and the deed accompanying it "to lead the uses."

stood to be conveyed, and nothing more is warranted.[385] Where a covenant against incumbrances excepts some mortgage or lien, by name and amount, but the covenant of warranty is general, and the grantee does not assume the accepted incumbrance, as part of the price, the covenantor, or one claiming under him, cannot, when he takes it in, enforce it against the grantee, or those holding under the latter.[386]

In California, and other states of the far West (the Dakotas, Idaho, Montana, and Nevada), the necessity for covenants has been so far abrogated that "when a person purports, by proper instrument, to grant real property in fee simple, and subsequently acquires any title or claim thereto, the same passes by operation of law to the grantee or his successors." This clause has been enforced on mortgages, as well as on absolute deeds, but not to deeds of release or quitclaim, even where the habendum showed an intent to carry future acquisitions.[387] The statute of Mississippi and that of Georgia, as construed, go even further, and estop the grantor in a quitclaim deed, "and his heirs, from asserting a subsequently acquired adverse title to the lands conveyed." The words "quitclaim and release" have been held not incompatible with the intent to convey the fee simple.[388] Laws of this kind were enacted in many of the older West-

[385] Gill v. Grand Tower Mining, Manufacturing & Transportation Co., 92 Ill. 249; Grand Tower Mining, Manufacturing & Transportation Co. v. Gill, 111 Ill. 556 (20 acres excepted from warranty; acquired estate in them will not pass); Merritt v. Byers, 46 Minn. 74, 48 N. W. 417 (matter for construction what is warranted); Miller v. Ewing, 6 Cush. 34 (habendum excludes future acquisitions). Contra, Loomis v. Bedell, supra, note 311.

[386] Sandwich Manuf'g Co. v. Zellmer, 48 Minn. 408, 51 N. W. 379; Kimball v. Semple, 25 Cal. 440; Stanford v. Broadway Savings & Loan Ass'n, 122 Ind. 422, 24 N. E. 154.

[387] California, Civ. Code, § 1106 (section 33 of the old conveyance act); Clark v. Baker, 14 Cal. 630; Dalton v. Hamilton, 50 Cal. 422; San Francisco v. Lawton, 18 Cal. 477; Montgomery v. Sturdivant, 41 Cal. 290; and Morrison v. Wilson, 30 Cal. 347 (does not apply to quitclaim deeds); Kirkaldie v. Larrabee, 31 Cal. 457; Green v. Clark, Id. 593; Cadiz v. Majors, 33 Cal. 289; Anderson v. Yoakum, 94 Cal. 227, 29 Pac. 500 (habendum in quitclaim deed ineffectual). Dakota, Civ. Code, § 633; Idaho, § 2928; Montana, Gen. Laws, § 267 (worded like that of Illinois, infra). Nevada, § 2602.

[388] Mississippi, Code, § 2438 (old Code, § 1195); Bramlett v. Roberts, 68

ern states, with a view to the common habit of dealing in lands still belonging to the United States, as part of the public domain, on which the vendor had settled and made improvements, or set aside to himself in some method recognized by public opinion, but to which he had no title, or at least not the legal title. If he had paid the purchase money, and thus gained a good equity, the patent subsequently taken would, at least in the eyes of a court of equity, if not of a court of law, inure to his grantee; and the statutory clauses in some of these states (as in Illinois and Colorado) seem intended simply to convert this equity into a legal title, but have been applied more broadly, where the settler's or pre-emptor's or squatter's claims had not matured even into an equity.[389] In Iowa, "where the deed purports to convey a greater interest than the grantor was at the time possessed of, any after-acquired title of the grantor, to the extent," etc., "inures to the grantee," subject to the mortgage for the purchase money which the grantor may have to give on his new purchase. The after-acquired title of a wife, who only joins as such, is not affected.[390] In Kansas the clause is very broad, but its effect is destroyed by the introduction of the words "quitclaim and release," along with the ordinary "grant, bargain, and sell," into the granting clause, on the ground that by introducing these words the grantor showed an unwillingness to denote the quantity of estate which he meant to convey.[391] There is a similar provision

Miss. 325, 10 South. 56. Georgia, Code, § 2699; disposing of the contrary law in Bivins v. Vinzant's Lessee, 15 Ga. 521, and Way v. Arnold, 18 Ga. 181, where a subsequent purchaser from the same grantor was held not to be barred by his warranty. The statute is enforced in Parker v. Jones, 57 Ga. 204, where the older Georgia cases are quoted and distinguished.

389 Illinois, Rev. St. c. 30, § 7; Colorado, § 201; but title acquired from grantee does not inure to him. Miller v. McMannis, 104 Ill. 421. As, only under a grant purporting a fee, the after-acquired title inures to the grantee, mortgages have been helped out under the covenants, written or implied. See note 378. When the grantor has the equitable title, his later-acquired legal estate will follow, even under a quitclaim. Welch v. Dutton, 79 Ill. 465.

390 Iowa, § 1931, enforced in Rogers v. Hussey, 36 Iowa, 664; Bellows v. Todd, 39 Iowa, 209. Wives joining to bar dower not estopped. Childs v. McChesney, 20 Iowa, 431; O'Neil v. Vanderburg, 25 Iowa, 104.

391 Kansas, Gen. St. par. 1114 (old par. 1089). Does not apply to quitclaims. Bruce v. Luke, 9 Kan. 201; Ott v. Sprague, 27 Kan, 624; Sutphen v. Sutphen, 30 Kan. 510, 2 Pac. 100 (deed of homestead entry). The estoppel runs with

in Nebraska, and in Arkansas, and was in Missouri under the Revision of 1879. Here, as in Illinois, the force given to the words "grant, bargain, and sell" rendered such a provision almost needless. While some of the states, as Illinois and Colorado, give this effect only to deeds purporting to convey the fee simple, and others speak of a deed purporting to convey a greater estate than the grantor has, the difference is unimportant in the application of the law.[392]

We have dealt so far with the simple case where the covenantor acquires a new estate, and thereafter either he or his heir or devisee sues, when the justice of the estoppel is self-evident. But it may happen that on the covenantor's death his heirs, bound by his general warranty, acquire the estate by inheritance from another source, or by purchase. Thus, when husband and wife convey the latter's lands, and her grant is void or voidable, and her warranty void, the children become heirs to the father's liability and to the wife's right of entry. The harsh doctrine of "collateral warranty," which bars them, regardless of assets, is no longer known; but if they have received from the warranting ancestor assets, in lands or chattels, by intestacy or by will, they ought, to that extent, pay this, like any other liability of the ancestor. A few states have, by statute, worked out an estoppel known as "warranty and assets" (these are Kentucky, Virginia, and West Virginia),[393] while the New York statute, in

the land to the holder of a quitclaim deed. Scoffin v. Grandstaff, 12 Kan. 467. Statute enforced also in Gray v. Ulrich, 8 Kan. 112; Simpson v. Greeley, Id. 586.

[392] Nebraska, Consol. St. § 4376. Arkansas, Dig. § 642 (fee simple or other estate; any legal or equitable estate passes to the grantee). Enforced in Cocke v. Brogan, 5 Ark. 693; Holland v. Rogers, 33 Ark. 251; Watkins v. Wassell, 15 Ark. 73 (momentary seisin in grantor, not subject to his debts); Jones v. Green, 41 Ark. 363 (deed by corporation). The Nebraska act, by amendment made in 1875, excepts quitclaim and special warranty deeds from its operation.

[393] Kentucky, Acts 1891–1893, c. 150, § 16. It bars any claimant who has received anything from the vendor with general warranty by gift, advancement, descent, devise, or distribution, to the extent in value of the thing received (the statute says "devised"). Enforced in Proctor v. Smith, 8 Bush, 81. The writer had occasion to save a remote purchaser from the wife, whose deed was void for informality, by showing that the warranting husband had advanced land in another state to his daughter, the claimant, fraudulently pretending to sell it to her husband. Dancey v. Schoening, Louisville Ch. Ct.

words, and those of other states, by silence, declare that the heirs are liable to the extent of assets received, but put the covenantee to his action on the covenant of the ancestor, as he would have to sue on any other obligation.[394]

So much as to after-acquired estates, properly so-called; that is, those which arise from a descent cast, devise taking effect, public or private grant, or judicial or ministerial sale (in short, by descent or purchase) after the deed. As to such future estates, which the grantor in a deed was already entitled to by a preceding grant or devise in his favor, but only by way of contingent remainder, executory devise, or possibility of reverter, it may be stated that all such interests pass at the present time without the aid of any warranty or like covenant, by the simple effect of the granting clause, whenever it purports to convey a fee, or such quantity of estate as will embrace such future interest. It is not necessary again to state the law of Mississippi and Georgia, which make even new acquisitions pass, or of California, where they pass under any but a quitclaim deed, by the aid of statute; or of Texas, where they so pass by judicial decision.[395] In New York a long and obstinate litigation over a release without warranty, of a "survivorship" devised to the grantor, resulting in the annulment of the release as ineffectual, probably gave rise to the direction of the Revised Statutes, in force since 1830, that "every grant shall be conclusive as against the grantor, and his heirs claiming from him by descent, also * * * as against subsequent purchasers from such grantor, or from his heirs claiming as such," with a proviso to conform to the registry laws.[396] Other states have by similar clauses, or by more direct words, made contingent estates and so-called possibilities assignable by grant;[397] and such

1875. The Virginia and West Virginia Statutes (Code Va. § 2419; Code W. Va. c. 71, § 7) are not so broad, but bar the heirs only to the value of estate descended.

394 New York, Rev. St. pt. 2, c. 1, tit. 2, § 141, the same that abolishes lineal and collateral warranties.

395 See, supra, notes 382, 385, 386.

396 New York, Rev. St. pt. 2, c. 1, tit. 2, §§ 143, 144. See cases named in note 372.

397 Kentucky, Gen. St. c. 63, art. 1, § 6: "Any interest in or claim to real estate may be disposed of by deed or will in writing." Virginia, Code, § 2418, and West Virginia, Code, c. 71, § 5,—nearly the same. Maryland, Pub. Gen.

interests will pass by the general words of an assignment for the benefit of creditors.[398]

Wherever the grantor has an inchoate title,—for instance, such as a pre-emptor or actual settler has under the United States land laws, or the owner of an "entry" or survey under the land laws of some of the states, or the purchaser at an execution or decretal sale, or at a tax sale,—the statute which governs the disposition of public lands, or the sale of lands for debt or in the enforcement of the tax lien, determines whether the inchoate rights thus acquired are assignable. If they are, a conveyance in the ordinary form would take effect as such assignment; and the patent, or sheriff's, commissioner's, or

Laws, art. 21, § 12 (the words "grant or bargain and sell" carry any interest the grantor has); Indiana, § 2919 ("of land or any interest therein"); Washington, § 1422 (Id.); Missouri, Rev. St. § 2395 (Id.); Nebraska, Consol. St. § 4375. There is no such clause in the New Jersey statute; hence in Apgar v. Christophers, 33 Fed. 201, the United States circuit court for the New Jersey district put the binding effect of the grant of a survivorship—i. e. of a possibility—on the ground of estoppel by deed, rather than on its being assignable (a distinction with little difference), though the deed was without warranty, following the supreme court cases quoted in note 382; Hannon v. Christopher, 34 N. J. Eq. 459; Jolly v. Arbuthnot, 4 De Gex & J. 224; and Morton v. Woods, L. R. 4 Q. B. 293. It is said that a deed of bargain and sale passes only vested interests. The expectancy of the heir in tail does not pass by his deed. Davis v. Hayden, 9 Mass. 514. Only in Maine and Massachusetts the power to alien contingent estates is seemingly limited, as the only statutory change of the common law runs thus: "When a contingent remainder, executory devise," etc., is so granted or limited to a person that in case of his death before the happening of the contingency the estate would descend to his heirs," etc., "[he] may before the happening," etc., "sell, assign or devise the premises subject to the contingency." Massachusetts, Pub. St. c. 126, § 2; Maine, c. 73, § 3. Nevertheless, grants of expectant estates, which would not so pass to the heirs, have been sustained. At least it is said in Daniels v. Eldredge, 125 Mass. 356, 359: "But, if such estate of the son was in the nature of a contingent remainder, his interest in that contingent estate was vested and capable of being alienated by him, and of passing by assignment in insolvency," etc. Still stronger is Belcher v. Burnett, 126 Mass. 230. In Read v. Hilton, 68 Me. 139, the statute was confessedly extended to a case not falling within its letter, as being "within its spirit and within the mischief it was designed to remedy."

[398] White's Trustee v. White, 86 Ky. 602, 7 S. W. 26 (share in land to be divided among children who may then live). Also Belcher v. Burnett, supra, and many other cases.

treasurer's deed, afterwards made, must in some form inure to the benefit of the grantee.[399]

§ 60. Champerty.

"There is one check to the power of alienation of a right or interest in land, taken from the statute of 32 Hen. VIII. c. 9, against selling pretended titles; and a pretended title, within the purview of the common law, is where one person lays claim to land of which another is in possession, holding adversely to the claim." Of course, a release by the claimant to the tenant in possession is not within the prohibitory rule.[400]

This rule, upon the whole salutary, has sometimes led to strange and unexpected results. It would, if fully carried out, prevent the buyer of a farm or house from obtaining a correction of the boundary fence, if the strip in dispute had, for even a short time, been held adversely to his vendor.[401] But, instead of seeking to correct the workings of the rule in detail, about half of the American states have repealed it by statute, viz.: Maine, Vermont (since 1884), Illinois (since 1845), Michigan, Wisconsin, Iowa, Minnesota, Kansas, Nebraska, Missouri, Arkansas, California, Oregon, Nevada, Colorado, Idaho, Montana, Wyoming, Utah, Arizona, Georgia, and Mississippi; Massachusetts only in 1891. New York has in her Revised Statutes re-enacted the common-law rule, but without the forfeiture of the

[399] Indiana, Rev. St. § 3000, validates contracts made in lands of the United States. Such contracts, as to lands bought and paid for, but not patented, are valid. Stone v. Young, 5 Kan. 229. See, also, cases on this point in note 382.

[400] 4 Kent, Comm. 446. Chancellor Kent, further on, shows the deep-seated reasons of the rule in the common law, and quotes older statutes for enforcing it. Some of the older American statutes forfeited the right of entry, unlawfully assigned, the forfeiture to inure to the disseisor or party in possession,—e. g. a Kentucky act of 1824; but such a forfeiture is unconstitutional. More effective were the acts giving a penal action against grantor and grantee, in which a sum equal to the value of the land might be recovered.

[401] But held not applicable to a boundary question about which there had been no previous dispute. Danziger v. Boyd, 120 N. Y. 628, 24 N. E. 482. Also Smith v. Faulkner, 48 Hun, 186; Clark v. Davis (Super. N. Y.) 19 N. Y. Supp. 191. In Kentucky such cases are supposed to be within the law.

pretended title which is declared by the statute of Henry VIII.[402] The alienation of pretended titles, known as champerty, has also been declared void by the statutes of Kentucky, Rhode Island, the Dakotas, and, with great severity, by those of North Carolina and Tennessee.[403] In the other states the courts deal with the question according to their best lights under the common law, as modified by English statutes, generally ignoring the doctrine altogether.

The New York Revised Statutes declare that "every grant of land shall be absolutely void if, at the time of the delivery thereof, the land shall be in the actual possession of a person claiming under a title adverse to that of the grantor"; but they allow the claimant, by the very next section, to mortgage his "just title"; and from the time when the mortgagor or his representative recovers possession of the lands the mortgage shall bind them, and so will a judgment lien. This concession is against the spirit of the old law, of which the leading object was to let every claimant of land fight his legal battles with his own means alone, without the assistance which others might give in hope of sharing the prize.[404]

[402] Maine, c. 73, § 1 (see Hovey v. Hobson, 51 Me. 62); Vermont, Acts 1884, c. 146; Illinois, c. 30, § 4; Michigan, § 5657; Wisconsin, § 2205; Iowa, § 1932; Minnesota, c. 40, § 6; Kansas, par. 1115; Nebraska, § 4355; Missouri, § 2400; Arkansas, § 644; California, Civ. Code, § 1047; Colorado, § 202; Oregon, § 3009; Nevada, § 2603; Idaho, § 2902; Montana, Gen. Laws, § 268; Wyoming, § 7; Georgia, § 2695; Mississippi, § 2433. See, for Massachusetts, Sess. Acts 1891 (Act May 21st). But, notwithstanding such repeal, the assignment of a right to set a deed aside for fraud may be deemed void as against public policy. Illinois Land & Loan Co. v. Speyer, 138 Ill. 137, 27 N. E. 931, quoting similar cases from Michigan and Wisconsin.

[403] New York, Rev. St. pt. 2, c. 1, tit. 2, §§ 147, 148; Connecticut, § 2966; Kentucky, Gen. St. c. 11, § 6; North Carolina, Code, § 1333; Tennessee, Code, §§ 2445–2449, etc.; Rhode Island, c. 173, § 2 (only implied from the word "possession" in providing for conveyances; but that the principles of the champerty law are in force in Rhode Island, is admitted in the two cases of Hall v. Westcott, 15 R. I. 373, 5 Atl. 629, and Doyle v. Mellen, 15 R. I. 523, 8 Atl. 709); Dakota, Civ. Code, § 681; Connecticut, § 2966 (one who is "ousted" cannot grant or lease lands). In Kentucky, besides the champerty act, the first section of the law on conveyances allows the owner to convey all estates in land "not in adverse possession." Dakota, Civ. Code, § 681, enforced by Code Civ. Proc. §§ 45–48; sales by the territory (now state) and judicial sales excepted.

[404] The criminal and penal clauses, formerly directed against buyer and

The Kentucky statute makes another concession: The possession, as between mortgagor and mortgagee, lessor and lessee, vendor and vendee (embracing also the seller and buyer of land by executory contract or title bond), and trustee and cestui que trust, is declared not to be adverse; so that a mortgagor, for instance, may sell the land of which the mortgagee is in actual possession. Three other exceptions have been ingrafted, in this state, upon the statute—First, where the right of entry belongs to several persons as joint owners, one or more of them may sell out to their companions, no new parties being thus introduced into the dispute; second, where the claimant has recovered a judgment for the possession of the land, his title is no longer deemed a "pretended title" within the meaning of the champerty act (though the judgment might still be appealed from), and a sale is valid; third, that a contract of sale made before adverse possession has been taken of the land may be carried out by a conveyance thereafter. But a mortgage of land adversely held is void.[405]

The Tennessee act (and that of North Carolina is very much like it) forbids the buying and selling of pretended titles, and declares

seller, are not in the New York Revision of 1889. The defendant in an ejectment suit, while in possession, can sell. The common law and British statutes are all superseded by the statute of New York. Sedgwick v. Stanton, 14 N. Y. 289. An amendment to the Code of Procedure of 1862, by authorizing grantees of a right of entry to sue in their grantor's name, for a while practically repealed the champerty law; but the act of 1862 was soon repealed, and is not embodied in the Code of Civil Procedure. See Towle v. Smith, 2 Rob. (N. Y.) 489. Part owners, it seems, may sell out to each other. Requa v. Holmes, 26 N. Y. 338; same in Kentucky, see next note.

[405] The exception of vendor and vendee, etc., is construed in Kinsolving v. Pierce, 18 B. Mon. 782, and is based on older cases. Batterton v. Chiles, 12 B. Mon. 348; Swager v. Crutchfield, 9 Bush, 411 (when judgment against defendants is superseded, and they not ousted, they can sell); Cummins v. Latham, 4 T. B. Mon. 105. By analogy, a defendant, whom the sheriff mistakenly dispossessed altogether, instead of as to half, may sell. Barret v. Coburn, 3 Metc. (Ky.) 510; Greer v. Wintersmuth, 85 Ky. 516, 4 S. W. 232 (as to carrying out a contract). As to vendor and vendee, see Craig v. Austin, 1 Dana, 518; Griffith v. Dicken, 4 Dana, 563. The exception was carried too far in Chrisman v. Gregory, 4 B. Mon. 480. A gift is as void as a sale. Clay v. Wyatt, 6 J. J. Marsh. 584. Joint owners may sell out to each other. Russell v. Doyle, 84 Ky. 386, 1 S. W. 604. Mortgage is void. Redman v. Sanders, 2 Dana, 69.

utterly void any "agreement, bargain, sale, covenant or grant, where the seller has not by himself, agent, tenant or ancestor been in actual possession of the lands, or of the reversion or remainder, or taken the rents," etc., "for one year," etc. This forbids the sale of the future estates under one title while the land is possessed under another which ignores such future estate. The act proceeds to allow the sale or mortgage, and especially the sale by execution, of lands of which no person at the time holds adverse possession; but, if the seller is not in possession, the presumption is against the purchaser. When the land of nonresidents is in the possession of others, this must be claimed under deed, devise, or descent, to prevent a sale. The possession of a third person is presumed to be adverse; but the purchaser may show good faith. On this proviso an exception has been built, as in Kentucky, sustaining a conveyance in pursuance of a contract made before any adverse possession had been taken.[406]

The Connecticut statute has also been often brought before the courts, and has been construed very much like those of New York, Tennessee, and Kentucky. Mortgages are not deemed "alienations" of land, within its meaning.[407] It has been generally held that a conveyance made after an ouster or intrusion, in pursuance of a condition inserted in a previous deed, or of a contract of sale,—and in

[406] The awkward and contradictory wording of the Tennessee act, first enacted in 1821, arises from its being drawn in part from the act of Hen. VIII. The clause in favor of nonresident owners was drawn because large tracts belonging to them were occupied by squatters without pretense of title. All the exceptions are explained in Whiteside v. Martin, 7 Yerg. (Tenn.) 384, 396; the rights of nonresidents in McCoy's Lessee v. Williford, 2 Swan (Tenn.) 642 (no champerty); Saylor v. Stewart's Heirs, 2 Heisk. 510, and Bleidorn v. Pilot Mountain Coal & Min. Co., 89 Tenn. 166, 204, 15 S. W. 737 (decree of court or grant by state give color to occupant); a deed void on its face does not, Hardwick v. Beard's Heirs, 10 Heisk. (Tenn.) 659; judicial sales on previous contracts not within the statute, Sims' Lessee v. Cross, 10 Yerg. (Tenn.) 460. The Tennessee law is severest in dealing with the employment of lawyers on a contingent fee. The North Carolina law on this subject, from the lack of reported cases under it, seems to be a dead letter.

[407] The older statutes gave a penalty recoverable by the party in possession; and the rightfulness of alienations is determined in some cases in suits for the penalty. Leonard v. Bosworth, 4 Conn. 421 (mortgage not within law). Releases within it. Hinman v. Hinman, Id. 575; Sherwood v. Barlow, 19 Conn. 471.

Kentucky it has been said, even in pursuance of an oral contract,—is not within the mischief provided against, of trading in pretended titles, and therefore not within the statute, and so whenever there was a legal or moral duty to convey and to accept the land.[408]

Generally speaking, the first question to be determined on a plea of champerty is this: Was the possession adverse? Though it has been often said that this is a question of fact for the jury, yet, as a matter of law, it may be stated that, whenever the real occupant recognizes the owner's title, or from the circumstances may be supposed to recognize it, the sale is good. Thus, aside from the exceptions made, as above shown, in the Kentucky statute, a defendant in execution who remains in possession after a sale will be regarded as the purchaser's tenant at will, the possession of a dowress will be considered amicable to the heir, and an occupant who assents to the sale cannot be said to hold adversely.[409] The owner of wood lands

[408] Gunn v. Scovil, 4 Day, 234 (reconveyance in conformity to condition); Townsend v. Chenault (Ky.) 17 S. W. 185 (commissioner's deed on old title); Harral v. Leverty, 50 Conn. 46 (pursuant to contract). Compare notes 404–406. Cardwell v. Sprigg, 1 B. Mon. 372 (oral sale); Hopkins v. Paxton, 4 Dana, 36 (deed made to correct a mistake); Simon v. Gouge, 12 B. Mon. 164; Saunders v. Groves, 2 J. J. Marsh. 408 (reconveyance by vendee when ousted on return of price).

[409] Mitchell v. Lipe, 8 Yerg. (Tenn.) 181; Hoyt v. Thompson, 5 N. Y. 320; Snowden v. McKinney, 7 B. Mon. 258; Little v. Bishop, 9 B. Mon. 240 (quaere, whether possession of grantee in deed to defraud creditors is adverse to purchaser under execution); Wilson v. Nance, 11 Humph. 189; Driskell v. Hanks, 18 B. Mon. 864; and Chairs v. Hobson, 10 Humph. 354 (dowress; see, also, about character of her possession, Vance's Heirs v. Johnson, 10 Humph. 214); McIntire v. Patton, 9 Humph. 447; Sanford v. Washburn, 2 Root, 499 (possession of mortgagee). Land occupied by mistake coming from common source. Harris v. Oakley, 54 Hun, 635, 7 N. Y. Supp. 232; Doyle v. Mellen, 15 R. I. 523, 8 Atl. 709 (grantee of mortgagor does not hold adversely to trustee in mortgage so as to prevent sale by him); Moore v. Brown, 62 Hun, 618, 16 N. Y. Supp. 592 (holding mine under contract for products not adverse to title). See, for peculiar case where possession was deemed adverse, Gately v. Weldon (Ky.) 14 S. W. 680. It is often remarked, especially in the Kentucky cases, that possession, though sufficiently adverse to set the statute of limitations to run, may not be sufficient to stamp a sale of the outstanding title as champertous. In Indiana, one tenant in common, though ousted by his companion, may convey. Patterson v. Nixon, 79 Ind. 251. Holding under unrecorded deed may be adverse. Hinman v. Hinman, 4 Conn. 575.

is not ousted by persistent trespasses on his timber.[410] Where the vendor remains in possession after a sale, and might be supposed to hold on behalf of the vendee, yet it is not champerty in him to sell the land to another. Nor is any mere right of possession deemed adverse, so as to prevent a deed by the true owner.[411]

On the other hand, land may be in adverse possession within the meaning of the champerty law, without being inclosed; and, even in the days when land suits in the Southwest grew mainly out of conflicting patents, it was admitted that a holding under the same patent might be adverse and come within the champerty laws.[412] A tenant's possession becomes adverse when he attorns to a stranger, and his landlord has notice thereof, or when the landlord abandons his position as such.[413] But the grantee from the life tenant does not hold adversely to the remainder-man during the life.[414] The "one year" clause, copied by the Tennessee statute from that of Henry VIII., has not come up for enforcement in any reported case. Otherwise, the length of time which the adverse possession has lasted is immaterial.[415] The covenants of title fall to the ground with the deed.[416] But it seems that one who mortgages his land by deed with full covenants is estopped, at least in equity, from setting up the fact (unknown to the other party) that at the time of giving the mortgage there was an adverse possession.[417]

[410] Wickliffe v. Wilson, 2 B. Mon. 43.

[411] Bledsoe v. Rogers, 3 Sneed (Tenn.) 467; Dawley v. Brown, 79 N. Y. 390; Cardwell v. Sprigg, 1 B. Mon. 370. The pedis possessio must concur with a distinct claim of title, hostile to the grantor's. Crary v. Goodman, 22 N. Y. 170. But the possession of a school lot by a school district, though it cannot own land generally, is enough. Sherwood v. Barlow, 19 Conn. 471.

[412] Moss v. Scott, 2 Dana, 271; Lillard v. McGee, 3 J. J. Marsh. 551.

[413] Ross v. Blair, Meigs (Tenn.) 545; Becker v. Church, 115 N. Y. 562, 22 N. E. 748; Church v. Schoonmaker, 115 N. Y. 570, 22 N. E. 575.

[414] Christie v. Gage, 71 N. Y. 189.

[415] Whiteside v. Martin, 7 Yerg. (Tenn.) 384, discusses the one-year clause. Kincaid v. Meadows, 3 Head, 192; quoting Bullard v. Copps, 2 Humph. (Tenn.) 409 (where a tenant disavowed his lease), which speaks of "the moment after it [the adverse possession] commences," and stating that having received the rent for a year would not improve the case.

[416] Graves v. Leathers, 17 B. Mon. 668; the only remedy of the buyer, who is ignorant of his grantor's lack of possession, being for fraud. Williams v. Hogan, Meigs (Tenn.) 189.

[417] Ruffin v. Johnson, 5 Heisk. (Tenn.) 604. (A weak case in which to rely

An executor cannot, under the powers of a will, sell a tract in adverse possession, any more than one who holds in his own right; nor can the trustee in a so-called deed of trust (mortgage with power of sale).[418] The unlawful character of the sale is not purged away because it has been ordered by a court on an ex parte application, such as the sale of church property under the laws of New York.[419] Where a deed comprises land which is, and other land which is not, in adverse possession, it is void only as to the latter.[420] To sell a share in an executory contract for the purchase of land, which contract was lawfully made before any adverse possession, is not champerty.[421]

When the conveyance falls within the champerty law, and is void, the grantee can, of course, not sustain any action at law or in equity, as owner of the estate granted to him; and, in most of the cases quoted, the question arose in an action by the grantee against the party in adverse possession. But, if the sale of the pretended title is thoroughly void, even between the parties to it, it cannot hinder the grantor from prosecuting his right of entry as he could have done before the champertous grant,—and so it has really been held in New York, Connecticut, and Tennessee; that is, a plea of the champertous deed is not a good defense to the grantor's action.[422] Here, the Kentucky law is more severe. While the clause copied from the champerty act of 1824, which denounces a forfeiture to the commonwealth, to inure to the benefit of those in possession, against a claimant contracting to have his action managed on shares, is clearly un-

on the champerty law. The adverse title had already been defeated, and the injunction against the "deed of trust" was evidently taken for delay.)

418 Peck v. Peck, 9 Yerg. (Tenn.) 301; Whiteside v. Martin, supra.

419 Christie v. Gage, 71 N. Y. 189. Such sale is not a judicial sale.

420 Goodman v. Newell, 13 Conn. 75; Smith v. Railway Co., 88 Tenn. 611, 13 S. W. 128; s. p., Hyde v. Morgan, 14 Conn. 104.

421 Bradford v. Foster, 87 Tenn. 4, 9 S. W. 195.

422 Wilson v. Nance, 11 Humph. 189, followed up in Fowler v. Nixon, 7 Heisk. 729; Key v. Snow, 90 Tenn. 663, 18 S. W. 251; Chamberlain v. Taylor, 92 N. Y. 349 (Hamilton v. Wright, 37 N. Y. 502, decided under the amendment of 1862 to Code Proc. § 111, practically repeals the champerty law, and is no longer in force). But a joint bill in equity by vendor and buyer, setting up the deed and seeking recovery, is bad on demurrer. Lenoir v. Mining Co., 88 Tenn. 168, 14 S. W. 378; Phelps v. Sage, 2 Day, 151; Isham v. Avery, 1 Root, 100. Compare Freeman v. Thompson, 1 Root, 402, where grantee sued.

constitutional,[423] and openly disregarded, and while no forfeiture is denounced against the parties engaged in a champertous sale, still, before bringing his suit, the champertous vendor must "rescind and abandon" the sale; otherwise the suit fails.[424] The grantor may, before suit brought, elect against the grantee to hold his title; but, under the maxim of "in pari delicto," he cannot invoke the active aid of a court of equity.[425]

The grantee in a champertous deed can no more defend a suit upon the title arising therefrom than he can institute a suit upon it.[426] It goes without saying that the commonwealth is not bound by the champerty acts. The possession of the citizen is never taken to be adverse to the sovereign. Deeds made in the name of the state, whether of the public domain, of escheats, forfeited lands, etc., are never held void for champerty.[427] We have seen, in a preceding section, that an infant, upon coming of age, can avoid his deed made during minority by conveying the same land to another. Now, though the first grantee be in actual possession, it has been held in Kentucky, where it is otherwise rigidly enforced, that the law against champerty will not defeat such a conveyance.[428]

A few words as to the states which have not either affirmed or abolished the law against selling pretended titles by statute. We find in their Reports many decisions on contingent fees, and otherwise on "champerty and maintenance" in the management of lawsuits, some even as to the sale of chattels, held adversely, but very few on the conveyance of land in adverse possession. However, Florida has clearly recognized that such a conveyance is void, sub-

[423] Self-inflicting forfeiture laws void. See Redman v. Sanders, 2 Dana, 68; Crowley v. Vaughan, 11 Bush, 518; and Kentucky cases under other statutes gathered in Marshall v. McDaniel, 12 Bush, 378.

[424] Harman v. Brewster, 7 Bush, 355; Luen v. Wilson, 85 Ky. 503, 3 S. W. 911. These two cases put the grantor in a bad plight, very near a forfeiture of his right of entry. In Adkins v. Whalin, 87 Ky. 153, 7 S. W. 912, the court seems to have punished a champertous grantor by taking from him a small portion of his share which he had omitted to convey.

[425] Laevison v. Baird, 91 Ky. 204, 15 S. W. 252.

[426] Pearce v. Moore, 114 N. Y. 256, 21 N. E. 419.

[427] Allen v. Hoyt, Kirby (Conn.) 221; White v. White, 2 Metc. (Ky.) 192 (escheated land).

[428] Moore v. Baker, 92 Ky. 518, 18 S. W. 363.

ject to the exception which in Kentucky is made by statute; i. e. the vendee by parol, still awaiting his deed, does not hold adversely.[429] In Indiana, the rule is fully recognized, but not favored. When the purchaser acts in good faith, without notice of the outstanding possession being adverse, his title will be sustained, even against the occupant. In all cases the deed is good between the parties; and the doctrine of champerty does not apply to judicial or official sales.[430] In Ohio, it would seem from the reported cases that, while an arrangement, by which the claimant is to receive from an assignee a share of the fruits of litigation, free of risk, is void, a straight-out sale of the claim might be valid.[431] In Massachusetts, this seems still plainer, the retention of an interest by the grantor to be realized at the end of litigation being deemed the only objectionable feature; and the assurance given to Chancellor Kent, when he wrote his Commentaries, that the sale of pretended titles in Massachusetts was unlawful is not yet sustained by a reported case.[432] In Alabama, chattels in adverse possession cannot be sold or assigned, but no allusion is made to land.[433] In Texas, the law against the purchase of land in adverse possession seems never to have been in force; the contrary rule is an "admitted principle."[434] In Pennsylvania, the rule against the sale of rights of entry or pretended titles has always been unknown, and no attempt to have them declared illegal seems ever to have been made before the supreme court.[435]

[429] Nelson v. Brush, 22 Fla. 374; Coogler v. Rogers, 25 Fla. 853, 7 South. 391. Contra, Gamble v. Hamilton, 31 Fla. 401, 12 South. 229; Levy v. Cox, 22 Fla. 547.

[430] Fite v. Doe, 1 Blackf. 127; Martin v. Pace, 6 Blackf. 99; Galbreath v. Doe, 8 Blackf. 366; Michael v. Doe, 1 Ind. 481; German Mut. Ins. Co. v. Grim, 32 Ind. 249; Steeple v. Downing, 60 Ind. 478. Contra, McGill v. Doe, 9 Ind. 306; Webb v. Thompson, 23 Ind. 428; Vannoy v. Blessing, 36 Ind. 349; also, Patterson v. Nixon, supra, note 409. The doctrine is subjected to a query in Winstandley v. Stipp, 132 Ind. 548, 32 N. E. 302. Stotsenburg v. Marks, 79 Ind. 193, did not affect lands in Indiana.

[431] Stewart v. Welch, 41 Ohio St. 483; Key v. Vattier, 1 Ohio, 132.

[432] Pub. St. c. 160, § 6; Ackert v. Barker, 131 Mass. 436; Williams v. Fowle, 132 Mass. 385; Belding v. Smythe, 138 Mass. 530. The common-law doctrine seems to be fully recognized in Brinley v. Whiting, 5 Pick. 348.

[433] Foy v. Cochran, 88 Ala. 353, 6 South. 385.

[434] Campbell v. Everts, 47 Tex. 102.

[435] See 4 Kent, Comm. 448; Stoever v. Whitman, 6 Bin. 420, followed in 1893 in Re Murray's Estate, 13 Pa. Co. Ct. R. 70.

In New Jersey, it is believed that the laws against buying and selling of pretended titles stand repealed, having been omitted, as inapplicable, in the compilation of laws made under the act of November 24, 1792.[436] In Virginia, the act of Hen. VIII. was held to be in force, was even re-enacted in 1819, and only left out in the Code of 1850 and later Revisions. But the court of appeals construed it as only punishing the sale and purchase of pretended titles, not as annulling them. Thus, in Virginia, and, by consequence, in West Virginia, such sales were always valid.[437] In Georgia, the law against the sale of pretended titles has been generally enforced, but so as to allow the grantor to carry on his action as if he had not made the forbidden grant.[438] In the District of Columbia, conveyances of land in adverse possession were in an early case said to be void, as a matter of course; and such must still be the law, as congress has never changed it.[439]

§ 61. Executory Contracts.

The deed of bargain and sale, which the statute of uses turned into a conveyance, was in its origin nothing more than a "bargain"; that is, an agreement upon the price at which land was sold, the conveyance to follow thereafter, in the way of livery of seisin, that is, formal delivery of possession. When the statute dispensed with this delivery, a need was felt for a new method of dealing with land, which should not, in the first instance, amount to a conveyance. The principal motive was an unwillingness of the seller to part with the legal title before the consideration was paid in full. But

[436] Schomp v. Schenck, 40 N. J. Law, 193, 204, quoting Mr. Griffith.

[437] Duval v. Bibb, 3 Call, 362, and other cases down to Cline's Heirs v. Catron, 22 Grat. 393. The doctrine is strongly defended by Judge Moncure in Middleton v. Arnolds, 13 Grat. 491.

[438] Way v. Arnold, 18 Ga. 183 (deed under previous bond good); Doe v. Roe, 20 Ga. 180. No late cases. The Code, § 2750, forbids champertous contracts, but means evidently those between attorney and client.

[439] Bank of U. S. v. Benning, 4 Cranch, C. C. 81, Fed. Cas. No. 908. Among executory contracts in the early West, the most frequent were those made by holders of land warrants with professional "locators," wherein one-third, or sometimes one-half, of the land was agreed to be conveyed to the locator. Many cases arising out of these contracts are reported in Kentucky and Tennessee, and in Texas.

in the United States a great many other motives led to the same end. The seller, especially in the old West (i. e. Kentucky and Tennessee), had only entered his land, and held no title yet from the commonwealth,—nay, his boundaries had not been surveyed,—hence, he had no title to convey, and could give no full or clear description; or he held himself only by a contract for a deed to be given at some future time; or the parties were too far from a county seat, where a deed must have been recorded (at one time all of Kentucky was a part of Fincastle county, Va.); or the parties were unable or unwilling to lay out the dollar needed for recording fees. Hence, contracts were contrived by which land was sold, to be conveyed to the buyer at a later time, generally upon his making the stipulated payments. These contracts might be sued upon at law,—the vendor suing for the agreed price, or, if he chose, for damages, measured by the excess of the agreed price over the market price at the time when the deed was to be made; the buyer in like manner suing for damages in case of refusal, just as he would upon the breach of a contract for the sale of a chattel. If this had been the only remedy, the executory contract in the hands of the vendee would not have vested him with any estate, or interest in the land. But, at an early day, courts of equity took cognizance of these contracts, compelling the vendor to convey whenever the purchaser complied with his side of the bargain, and compelling the latter to accept a deed, and to pay, whenever the vendor was ready and willing to convey to him a good title by a deed or deeds sufficient in form and effect.

The "title bond" is a common form for executory sales of land, beginning with a penal bond in which the seller binds himself; the obligation to be void if, upon payment by the buyer of certain notes or certain installments, he should convey the lands sold and described or, sometimes, more distinctly, if he should make a good and valid warranty deed, with release of dower.[440] In most cases, a contract

[440] The equitable estate which a contract for the sale or conveyance of land vests in the obligee rests entirely on the power of a court of equity to decree specific performance. This power and the mode of its exercise are fully discussed in Story, Eq. Jur. §§ 712–793, beginning, as to contracts for the sale of land, with section 746. Originally the jurisdiction was personal only; "aequitas agit in personam," as is said in Toller v. Carteret, 2 Vern, 495. In the United States the jurisdiction is in the nature of proceedings in rem; that is, the conveyance which the defendant ought to have executed is, upon his fail-

of this sort, one side giving a bond for title, the other his notes, is specifically enforced; but courts of equity have always insisted on having some discretion in the matter, and have, in its exercise, often refused to enforce the contract (leaving the parties to the remedy at law for damages), where a literal enforcement would lead to injustice or hardship.[441] Often a simple covenant serves as a so-called "title bond," the seller agreeing to sell at a named price, and upon stated terms. But, as an obligor cannot in equity relieve himself by paying the penalty, there is no substantial difference between the bond and the covenant.[442] Not seldom, though the whole purchase money is paid, the purchaser has nothing but a bond or covenant for the title; either in the case stated above, where the seller does not yet hold a good and lawful title, or because the parties wish to avoid publicity. And, when a part of the price is still unpaid, a deed is often withheld, because the seller deems this course a better security for the unpaid purchase money.[443] Possession of the land is gener-

ure to do, made by the master or commissioner of the court; and thus the title arising upon an executory contract is as secure of enforcement as if there had been a conveyance. For a very full treatment of specific performance, the reader is further referred to the notes on Seton v. Slade, 2 White & T. Lead. Cas. Eq. 513 (especially the American notes), though the principal case is one of the vendor against the vendee, the latter being compelled to take and pay for the land, though the title had not been perfected in time. For the position that in equity the contract raises an estate attended by most, if not all, the incidents of ownership,—a position which has long been free from doubt,—Messrs. Hare & Wallace, in their notes to the leading case, cite Siter's Appeal, 26 Pa. St. 178; Russell's Appeal, 15 Pa. St. 319; Bowie v. Berry, 3 Md. Ch. 359. Judge Duncan in Richter v. Selin, 8 Serg. & R. 425, 440, puts the equitable title on the ground that equity considers that to have been done which ought to have been done.

441 As in King v. Hamilton, 4 Pet. 311, where the vendee would, under the contract, have gotten title to a great deal of surplus land without paying for it; s. p., Smith v. Smith, 4 Bibb, 81.

442 Dooley v. Watson, 1 Gray, 414; Hopson v. Trevor, 1 Strange, 533, is quoted in support. Sometimes a sum is expressly inserted, by the payment whereof either vendor or vendee may escape; and when this is clearly so meant it is carried out. Cathcart v. Robinson, 5 Pet. 264.

443 A mortgage or lien for the purchase money, as will be shown in chapter on Incumbrances, can (except in few states) be only enforced by a decree of sale, and actual sale under it; while in some of the other states, at least, the buyer by title bond, though in possession, may lose his right by delay without sale.

ally given with the title bond, without waiting for the time set for paying the purchase price and executing the deed. Now, in a court of law, the title bond is a mere chose in action, which can be assigned like any other bond, where the local law renders bonds assignable; and it passes, on the death of the obligee or other holder, to his executor or administrator. But in equity the bond represents the land; the interest in the land passes to the indorsee of the bond. And upon the death of the obligee or indorsee this equitable interest or estate, subject to a lien for the still unpaid purchase money, if any, goes at once to the heirs or devisees of the holder.[444] As the equitable estate flows from the power of the court of equity to decree and to enforce specific performance of a bond or covenant, and as this cannot be decreed against a person not capable to convey lawfully, such as a married woman in many of the states, where she cannot thus act without the husband's consent—it seems that, even when the husband has joined in the contract she cannot be forced to convey, where the law required the deed of a married woman to be acknowledged as her voluntary act.[445] Under the older state of the law, when married women could only convey lands in a prescribed manner, but could not bind themselves by personal contract, the title bond to a married woman's land was, as against her, wholly void, and as against the husband, if he joined therein, it was enforceable only by an assessment of damages at law; and so it could in no wise confer an equitable estate. A title bond made to a married woman, or assigned to her by the obligee, is in equity treated as her real estate, and this estate can be passed out of her only in the manner in which she can dispose of her own land.[446]

As long as the description is sufficient to identify the land, no particular form in the written instrument is necessary to give the equitable ownership to the buyer. Thus a mere receipt of the money and notes "for" such a lot is good enough. Words of inheritance are not required, for to sell a tract of land means to sell the fee sim-

444 "When the purchaser goes into possession, the vendor is his trustee for the title, and his cestui que trust for the purchase money." Boone v. Chiles, 10 Pet. 177, where both trusts were enforced after more than 20 years.

445 Banbury v. Arnold, 91 Cal. 606, 27 Pac. 934,—referring to Cooper v. Pena, 21 Cal. 412; Vassault v. Edwards, 43 Cal. 466.

446 Sproule v. Winant, 7 T. B. Mon. 195, 197.

ple. To "make a deed" means one in the usual form, and with such covenants as are commonly made in the community.[447]

A consideration must be given to make an executory instrument binding, which is generally either payment of the price in cash or its equivalent, or the buyer's notes for the purchase money, or partly the one and partly the other. The bond or covenant to convey is generally made dependent on the payment of the deferred installments of the purchase money; but through the well-known maxim of courts of equity, that, in the sale of land, "time is not of the essence of the contract" (a maxim which has been carried to the most extravagant length), the seller can hardly ever get rid of his executory contract after a default of the purchaser in making his payments, except by some judicial proceeding, to be explained hereafter, in connection with mortgages, and other incumbrances.[448]

Where a written memorandum is made on a sale of real estate, in order to bind the bargain till the title can be examined and perfected, this unlimited latitude is not given to the purchaser for complying with the terms of sale, as the whole business is still in expectation, and he has not yet acquired even an equitable ownership in the land,—only a right in rem, not in re; and a limit of time in the memorandum, within which both parties must be ready, is generally enforced.[449] But here, on the contrary, the odd conceit that time is not of the essence of the contract comes into play in its most mischievous form. If the vendor has possession, and some sort of a

[447] Gordon v. Collett, 102 N. C. 532, 9 S. E. 486 (a description, and a receipt on the same side of a half sheet not connecting with the description by any reference). An extreme case, and perhaps incompatible with Boydell v. Drummond, 11 East, 142, the leading case on this feature of the statute of frauds.

[448] An extreme case is Honore v. Hutchings, 8 Bush, 687, where plaintiff and defendant joined in a speculation in town lots, and plaintiff had failed to make his payments, but was allowed to insist on his profits after a resale. But the line drawn by the same court at an option. Stembridge v. Stembridge's Adm'r, 87 Ky. 91, 7 S. W. 611. The general rule excusing delay in either vendor or purchaser is laid down in Brashier v. Gratz, 6 Wheat. 528, with a citation of English authorities. Hepburn v. Auld, 5 Cranch, 262.

[449] Gale v. Archer, 42 Barb. 320; Shuffleton v. Jenkins, 1 Morris (Iowa) 427; Jones v. Noble, 3 Bush (Ky.) 694; Nageli v. Lenimer (N. J. Ch.) 16 Atl. 205. Even options given on real estate have been held good. Perkins v. Hadsell, 50 Ill. 216. But see, for the great delays allowed in the absence of a time limit in the contract, Bell v. City of Boston, 101 Mass. 506.

title (that is, an ownership broken only by some outstanding claim, like inchoate dower, or an old, possibly discharged, lien or mortgage, or by a boundary dispute, or a like blemish), equity has nearly always compelled the buyer to comply with his agreement, and to pay for the land accordingly, if the flaw in the title was removed at any time before the suit for either the enforcement or the rescission of the contract of sale came to a final decision, and courts have even delayed the decision, in order to give to the seller an opportunity "to mend his hold."[450] This has sometimes been done where the seller had, strictly speaking, no title at all at the time when the bargain was closed. We call the doctrine mischievous, because, in our times, and in this country, prices of land fluctuate so rapidly that "time is of the essence" almost as much in the sale of houses, lots, or farms as in the sale of wheat or stocks; because the blemish in the title may disable the buyer of the land to resell it, or to borrow money on its security, and the enforcement of the bargain against him by a seller, himself in default, may thus ruin a buyer who is wholly without fault.[451]

[450] Woodson v. Scott, 1 Dana, 470. In the earlier case of Cotton v. Ward, 3 T. B. Mon. 313, a distinction is made between delay arising from the fault of the seller and such as arises from the state of the title; the latter not being deemed the seller's fault. In Smith v. Cansler, 83 Ky. 367, the building on the lot sold burned down during the delay, and the vendee was excused. Moser v. Cochrane, 107 N. Y. 35, 13 N. E. 442, where it was held no excuse that during the delay the vendee was unable to raise a loan on the land. This relies on the older New York cases of Spring v. Sandford, 7 Paige, 550; Schermerhorn v. Niblo, 2 Bosw. 161. So in Massachusetts, whenever time is not of the essence, the vendor is allowed a reasonable opportunity while the suit for performance is pending. Dresel v. Jordan, 104 Mass. 407; National Webster Bank v. Eldridge, 115 Mass. 424. Decisions similar to those in these states will be found in all others in which the question has arisen; the rule being derived from the English precedents. Langford v. Pitt, 2 P. Wms. 632; Wynn v. Morgan, 7 Ves. 202; Bennet College v. Carey, 3 Brown, Ch. 390; and, more recently, Hoggart v. Scott, 1 Russ. & M. 293. But the purchaser is not bound to accept a title from a third party where the owner himself has none. Tendring v. London, 2 Eq. Cas. Abr. 680.

[451] Bell v. Sternberg, 53 Kan. 571, 36 Pac. 1058 (the title may be perfected, even after suit brought, at any time before the trial), following Story, Eq. Jur. § 777: "Courts of equity also relieve the party vendor by decreeing a specific performance where he has been unable to comply with his contract according to the terms of it from the state of his title at the time, if he comes within

When the vendor of land seeks to get rid of his contract of sale because the vendee has been remiss in making his payments at the times agreed upon in the contract, he must, in the first place, show that he was himself without fault, which means, not only that he has offered to make a conveyance good in form (with release of dower, where such is requisite, and the ordinary covenants of title), but also good in effect. That is, he must have, when the contract is silent on the kind of title, a perfect title in fee simple to convey; otherwise, such title as the contract calls for. In popular speech, he must be ready to make "a good deed."[452] When the vendor is thus ready, tenders his deed, and makes his demand, he must, if he desires to put an end to the contract, also offer to return such parts of the purchase money as he may have received. A clause in the agreement that he may keep such advance payments as a forfeit will be allowed to stand in equity only when, by reason of a fall in price, the failure of the vendee to comply causes a loss to the vendor, or, it would seem, as far as this "forfeit" covers the vendor's outlays for brokerage and law expenses.[453] In several states, however (among them, in Kan-

a reasonable time, and the defect is cured; * * * if he is in a condition to make a good title at or before decree." So, also, Hepburn v. Dunlop, 1 Wheat. 179; Dresel v. Jordan, 104 Mass. 407; Cook v. Bean, 17 Ind. 504; Christian v. Cabell, 22 Grat. 82; Wood v. Machu, 5 Hare, 158. In Vorwerk v. Nolte, 87 Cal. 236, 25 Pac. 412, the clause "time of the essence" was disregarded, being evidently a part of the printed blank, not applicable to the special contract and the delay in that case. It would often be advisable for those who enter into a contract for the purchase of land before the title has been examined, intending to close when such examination is completed, to insert a clause somewhat to this effect: "It may be the wish of the buyer to raise money upon the land herein agreed to be sold, at any time after the —— day of ——, by sale or mortgage; and unless he receives a perfect title, clear, upon record, to every part of the premises, free from all incumbrance, by that day, he shall not be held to his purchase."

[452] Knott v. Stephens, 5 Or. 235; Frink v. Thomas, 20 Or. 265, 25 Pac. 717. Both parties being in default, neither can insist on cancellation. Rummington v. Kelley, 7 Ohio, 103. This point arises, of course, much oftener when the vendee proposes to set aside the contract of sale; see infra.

[453] Drew v. Pedlar, 87 Cal. 443, 25 Pac. 749 (it was decided under the provision of the California Civil Code that liquidated damages can only be recovered where an ascertainment is impossible; but this is only a declaration of the common law as understood in other states); Johnson v. Jackson, 27 Miss. 498; Thomas v. Beaton, 25 Tex. 318; Frink v. Thomas, supra.

sas), such a forfeiture clause is more widely sustained; at least, when the first or cash payment is so small a proportion of the whole price that the loss of interest and the cost of foreclosure would eat it up, —such, even, as one-sixth. The forfeiture can only be demanded by the seller. The buyer, being himself in default, cannot claim, in consequence of his own wrong, to rid himself of his purchase.[454] Having tendered a conveyance and a return of advance payments, the vendor can, of course, hasten payment by treating the vendee as owner, and suing him for the overdue parts of the agreed price, as he would on a vendor's lien, or on a mortgage for the purchase money. But he may prefer to regain his land without this delay and expense, and he is then met by the plea that in equity time is not of the essence of the contract, as shown above. This maxim is but a part of the abhorrence of equity for all forfeitures. Hence there was for a long time a great repugnance among courts of equity to recognize as valid an express clause that time should be of essence in that particular contract for the sale of land, as being an attempt to avoid a great doctrine of equity by the insertion of a few words in a written agreement.[455] But the validity of plain words to this effect—either this very phrase, or a clause that upon failure of a tender, either of the deed or of the money, the contract shall be null and void—is now pretty fully established in the United States, and in some states, as in California, recognized rather than created by statute.[456] And

[454] Miexsell v. Walton, 49 Kan. 255, 30 Pac. 410 (called here a "conditional sale," a word which we shall meet hereafter in a somewhat different sense). Here a court of equity enforced this forfeiture against a party who had succeeded in getting the estates of seller and buyer into his hands. The seller can, by allowing the debt to remain at interest for a long term, turn it into an investment, and debar himself of the right to treat time as of the essence. Robinson v. Trufant, 97 Mich. 410, 56 N. W. 769.

[455] Lord Thurlow intimated in Gregson v. Riddle, cited in Seton v. Slade, 7 Ves. 268, that the parties could not thus abrogate a principle of equity; but the contrary is conceded in the principal case. The matter was fully discussed in Wells v. Smith, 7 Paige, 23, and the result was this: If a vendor, after he has received the greater portion of the purchase money, should make an attempt to enforce a forfeiture, equity would not allow it; otherwise, parties may by contract make time of the essence. However, when possession is given, the vendee is practically the owner, and the vendor little more than a mortgagee. See, also, Benedict v. Lynch, 1 Johns. Ch. 370; Hatch v. Cobb, 4 Johns. Ch. 559.

[456] In Taylor v. Longworth, 14 Pet. 172, it is said arguendo that time may

considering that specific performance is not decreed ex debito justitiae, but in the sound discretion of the chancellor, he will always deny it to either vendor or vendee when to enforce it would work unfairness or hardship, and remit him to the remedy at law, if there can be such in favor of a party who is himself in default.[457] Thus, even where time is not of the essence of the contract, a specific performance is refused where the buyer seeks it after a great delay, during which the land bargained for has greatly risen in its market price or value; and it is, for the like reason, refused to the seller when it has greatly fallen. The complainant will in such cases, or wherever the condition of the parties has changed, be thrown out of court, for laches, the length of which may, according to circumstances, be sometimes measured by days, sometimes by years.[458] And the ven-

be of the essence and may be made such by the express stipulation of the parties. California Civ. Code, § 1492, excuses delay when it is "capable of exact and entire compensation," and has not been made of the essence by the express agreement of the parties. Enforced in Martin v. Morgan, 87 Cal. 203, 25 Pac. 350 ("this contract to be void," etc.). In Sowles v. Hall, 62 Vt. 247, 20 Atl. 816, time was held of the essence against a purchaser under similar words, though she had at one time had an interest in the land, and though the vendor had not yet laid out the money which she was to reimburse by a given day. There is a distinction between contracts which are executory only in form, but which are intended really as sales of the equitable title,—the legal estate not being conveyed, either because the seller has not then got it himself, or because he wishes to retain it as best security for payment,—and contracts which are truly executory; that is, where the seller means to retain, not only the title, but also the possession and enjoyment, but agrees to sell and convey in the future, upon the happening of conditions which may or may not take place. In these cases nothing, or at least, no more than earnest money, has been paid; the buyer has often not bound himself for the price, but has with the earnest money bought an option. In such cases, payment at the exact time is a condition precedent, and there need not be very explicit words to make time of the essence. This is well illustrated by Jones v. Noble, 3 Bush (Ky.) 694. Where the lessor in a building lease has the option to pay for the improvements at the end of the time, or to renew the lease, time is of the essence, and he must make his option not later than on the last day. Bullock v. Grinstead, 95 Ky. 261, 24 S. W. 867.

457 Clarke v. Rochester, L. & N. F. R. Co., 18 Barb. 350; Day v. Hunt, 112 N. Y. 191, 19 N. E. 114; Conger v. New York, W. S. & B. R. Co., 120 N. Y. 32, 23 N. E. 983.

458 Holt v. Rogers, 8 Pet. 420 (value of property had changed, and new interests intervened). McCable v. Matthews, 155 U. S. 550, 553, 15 Sup. Ct.

dee's right to specific performance is lost when a proper deed is tendered him, and he refuses to accept and comply.[459] Considerable delay has, however, been excused where the vendor's title was clouded by adverse litigation, and payment was tendered as soon as such

190: "A decree for the specific performance of a contract for the sale of real estate does not go as a matter of course, but is granted or withheld, according as equity and justice seem to demand, in view of all the circumstances of the case. Pratt v. Carroll, 8 Cranch, 471; Holt v. Rogers, 8 Pet. 420; Willard v. Tayloe, 8 Wall. 557; Hennessey v. Woolworth, 128 U. S. 438, 9 Sup. Ct. 109. There is no averment in the bill of a tender of any money by the plaintiff, and while it may be that the stipulations of conveyance and payment are independent, etc., yet the omission of a tender is significant." Further on, Mr. Justice Brewer says: "Great has been the change in the value of the premises! The half interest was worth at the date of the contract, as shown by the stipulated price, but $150, while at the time he brings his suit it is worth $7,500. It seems to us a purely speculative contract on the part of the plaintiff. Doing nothing himself, he waits many years to see what the outcome of the purchase by the defendant shall be." See, also, Eshleman v. Henrietta Vineyard Co. (Cal.) 36 Pac. 779 (four years after conveyance could have been demanded); Mathews v. Davis, 102 Cal. 202, 36 Pac. 358 (vendor has spent money on improvements); Wenham v. Switzer, 8 C. C. A. 404, 59 Fed. 942 (here a delay of ten months, though part payment had been made, was fatal); McClure v. Fairfield, 153 Pa. St. 411, 26 Atl. 446 (twenty months not too long where the plaintiff had acquired a substantial interest, and was in possession); Hatch v. Kizer, 140 Ill. 583, 30 N. E. 605 (eight years, it seems, too long a delay, under all circumstances; and a previous suit, brought, but abandoned, no excuse), approving a similar decision in Hough v. Coughlan, 41 Ill. 134; Meidling v. Trefz, 48 N. J. Eq. 638, 23 Atl. 824 (suit brought two years after defendant had returned deposit to plaintiff's agent, too late); Riley v. McNamara, 83 Tex. 11, 18 S. W. 141 (no demand made by vendor, time less than that of limitation having expired, a plea of laches must state some facts dehors); Bowen v. McCarthy, 85 Mich. 27, 48 N. W. 155 (under the circumstances, thirty days was unreasonably long); Lambert v. Weber, 83 Mich. 395, 47 N. W. 251 (a very short delay, caused by vendor's efforts to remove a flaw in the title, no defense to performance); Knox v. Spratt, 23 Fla. 64, 6 South. 924 (a court of equity will not allow of a delay which would allow a purchaser to take advantage of a turn in the market). And so a vendor cannot, after a year's delay, prices having fallen, sue for performance, Rison v. Newberry (Va.) 18 S. E. 916; nor after two years' delay, where he could have kept the deposit as a forfeit, Hogan v. Kyle, 7 Wash. 596, 35 Pac. 399. It will be shown under the head of "Laches and Limitations in Equity" that, generally speaking, time does not run against a vendee in possession under claim of right.

459 Emrich v. White, 102 N. Y. 457, 6 N. E. 575; Lyman v. Gedney, 114 Ill.

litigation came to an end.[460] On the other hand, the vendor has been given time, in those courts which follow the English precedents, to the very moment when, in a chancery suit for the enforcement or vacation of the contract, the master is ready to report on the title, with no other comfort to the delayed and disgusted buyer than "compensation" for his costs and lawyer's fees and like expenses.

In conclusion, we must remind the reader that the elements of all other executory agreements must concur, to make that contract for the sale or conveyance of land which a court of equity will turn into an estate. There must be that meeting of minds between buyer and seller, on exactly the same proposition, and at one time, which the reader will find discussed at the very outset of all the leading works on Contracts.[461]

Before the disabilities of married women were removed, a feme covert could dispose of her estate in land only by a deed, operating in praesenti, by pursuing the prescribed form, and joining with her husband, while all her executory agreements, including her covenants of title, were void. The matter is now very much reversed. With the exception of becoming surety for her husband, or for any one, a married woman may now, in almost every state, bind herself like any one else for the performance of an act in the future, while in many states she still cannot convey her land, except in a prescribed form, and with the husband's consent.[462] Some states, e. g. Indiana, well considering that, between the original parties, a bond or covenant for a conveyance has practically the same effect as the conveyance itself, have provided that she cannot enter into any executory contract to sell, convey, or mortgage her real estate.[463]

395, 29 N. E. 282. See the converse, where the seller avows his inability to convey, Van Benthuysen v. Crapser, 8 Johns. 257.

[460] In Taylor v. Longworth, 14 Pet. 172, the litigation was going on pari passu with the vendee's bill for specific performance, and the supreme court noted as an important point that the litigation was meant seriously, and had some ground to stand on, Galloway v. Barr, 12 Ohio, 354.

[461] Kennedy v. Gramling, 33 S. C. 367, 11 S. E. 1081 (proposition to sell for $3,800; accepted "free of expenses for title,"—no contract). Similar slight variances were held to prevent an agreement in Bentz v. Eubanks, 41 Kan. 28, 20 Pac. 505; Greenawalt v. Este, 40 Kan. 418, 19 Pac. 803.

[462] Rev. St. Ind. § 5117. See, also, Hodge v. Powell, 96 N. C. 64, 2 S. E. 182.

[463] Rev. St. Ind. § 5117. Where a feme covert cannot convey, her deed can-

The question, which for a long time troubled the English courts, whether a husband, agreeing that his wife should levy a fine, could be subjected to process of contempt on account of her refusal, and his own inability to make her do so, has been speedily answered in the negative in this country. To put a man in jail because he will not compel his wife to do a thing which she most solemnly assures the judge she does freely and without compulsion seems so thoroughly wrong and absurd that the proposition should never have been entertained for an instant.[464]

In dealing with executory contracts, we have looked rather at the interest of the vendee than at his obligation to pay and take the deed. What kind of title must be tendered him? Must it be such as to exclude all possibility of loss? of outstanding interests or liens? It has been said that mere possibilities cannot be regarded,—the court and the vendee must be satisfied with moral certainty,—for in the nature of things there can be no mathematical certainty of a good title.[465]

not be construed into a title bond. Townsley v. Chapin, 12 Allen, 476. The power to contract for conveyance depends on the power to convey. Baker v. Hathaway, 5 Allen, 103.

[464] Young v. Paul, 10 N. J. Eq. 402; Clarke v. Reins, 12 Grat. (Va.) 98.

[465] Middleton v. Findla, 25 Cal. 76, 80, citing Lyddall v. Weston, 2 Atk. 19; Sperling v. Trevor, 7 Ves. 498; Hillary v. Waller, 12 Ves. 239. Other modern cases on what is considered a "marketable title" are Linn v. McLean, 80 Ala. 366; Close v. Stuyvesant, 132 Ill. 607, 24 N. E. 868; Conley v. Dibber, 91 Ind. 413; Stevenson v. Polk, 71 Iowa, 278, 32 N. W. 340; Chesman v. Cummings, 142 Mass. 65, 7 N. E. 13; Powell v. Conant, 33 Mich. 396; Townshend v. Goodfellow, 40 Minn. 312, 41 N. W. 1056; Taylor v. Williams, 45 Mo. 80; Cornell v. Andrews, 35 N. J. Eq. 7; Ludlow v. O'Neil, 29 Ohio St. 181; Mullins v. Aiken, 2 Heisk. (Tenn.) 535; Herzberg v. Irwin, 92 Pa. St. 48; Newbold v. Peabody Heights Co., 70 Md. 493, 17 Atl. 372; Cambrelleng v. Purton, 125 N. Y. 610, 26 N. E. 907; Welfley v. Shenandoah, I., L., M. & M. Co., 83 Va. 768, 3 S. E. 376; Gober v. Hart, 36 Tex. 141; Kennedy v. Gramling, 33 S. C. 367, 11 S. E. 1081. Among the most recent cases are: Hunting v. Damon, 160 Mass. 441, 35 N. E. 1064 (construction of will too doubtful); Warner v. Will, 5 Misc. Rep. 329, 25 N. Y. Supp. 749 (adverse possession not clear enough); Flood v. Thomasson (Ky.) 25 S. W. 108. In the case of Moser v. Cochrane, supra (note 450), it was held that the opinion of conveyancers against the title was immaterial.

NOTE. Rescission, which is closely connected with executory contracts for land, belongs rather to treatises on equity. It is in most cases sought on the ground, either of mistake or of fraud and misrepresentation, rarely by

§ 62. Contracts for Land and the Statute of Frauds.

We have in the foregoing section assumed that the contract under which land is held, or by which its sale is agreed upon, has been drawn up and signed by the vendor in such a manner as to satisfy the statute of frauds. The clause of the English act referring to executory sales of land runs thus: "No action shall be brought, whereby to charge any person on any contract or sale of lands, tenements or hereditaments, or any interest in or concerning them, unless the agreement on which such action is brought, or some note or memorandum thereof, is in writing and signed by the party to be charged therewith, or by some other person, thereunto by him lawfully authorized." We assume for the present that there is a writing purporting to contain a contract of sale, and bearing some kind of signature, and will consider whether such writing and signature come up to the requirements of the statute, or of its counterparts in the several American states. It having been held in England, under the statute of frauds, that the promisor's, grantor's, or testator's name, written in any part of an instrument, would stand for a signature, many American states have either substituted the word "Subscribed" in this clause of the law, or have generally declared that signing always means setting down a signature at the end of the document.

the seller, who is acquainted with the quantity and quality of his land, and with his title; very often by the purchaser. There are, however, a few cases standing by themselves in which a deed of land has been set aside, or a reconveyance ordered, because the purpose for which the former conveyance was made had wholly failed. The most instructive of these cases is Barker v. Smith, 92 Mich. 336, 52 N. W. 723, where a husband conveyed a tract to his wife, upon an oral understanding that she should in her will devise it to a named college. She did so, and furnished in a recital of the will the needful memorandum in writing. But, the will being rejected for want of full proof by the witnesses, in a suit by the husband's heirs against those of the wife a reconveyance was ordered. In an older Michigan case,—Jacox v. Clark, Walk. Ch. 508,—a conveyance had been made of a water right. The grantee diverting the water to grantor's injury, a reconveyance was ordered. Thorn v. Thorn, 51 Mich. 167, 16 N. W. 324, also sustains this view. In an older New York case,—Quick v. Stuyvesant, 2 Paige, 84,—a strip of land having been conveyed, which the grantee was to dedicate for a street, but either did not or could not, there was a decree to reconvey.

This has been done in New York, Michigan, Wisconsin, Minnesota, California, Colorado, Oregon, Kentucky, Alabama, the Dakotas, Montana, Nevada, and Wyoming.[466]

Some states, in their anxiety that interests in land shall not depend upon the proof of spoken words, have gone further, and have, in the clause which refers to executory contracts, as in that which refers to conveyances, required that the agent whose signature is to bind the party must himself be appointed by a writing subscribed by such principal. This has been done in New Hampshire, Vermont, Delaware, Illinois, Missouri, the Dakotas, California, and Oregon, while Nebraska, Nevada, Montana, and Wyoming seem to require a signature or subscription by the party in all cases.[467] The question having been raised in England, upon another clause of the statute, whether the consideration of the promise must also be expressed in the writing which the statute demands, and having been there decided in the affirmative, many of the American states have amended their statutes so as to declare, one way or the other, whether the consideration must be expressed. The statutes of Virginia, West Virginia, Kentucky, Maine, Massachusetts, New Jersey, Indiana, Illinois, and Michigan say plainly that the consideration need not be expressed in writing;[468] those of New York, Wisconsin, Minnesota,

[466] New York, Rev. St. pt. 2, c. 7, tit. 1, § 8; Michigan, §§ 6181–6183; Wisconsin, §§ 2304, 2305; Minnesota, c. 41, § 12; California, Civ. Code § 1624; Colorado, § 1517; Oregon, §§ 785, 786; Kentucky, St. 1894, § 470 (Statute of Frauds) § 468 (construction of "signing"); Alabama, Civ. Code, § 1732; Montana, Gen. Laws, § 219; Nevada, § 2626; Wyoming, § 1249.

[467] New Hampshire, c. 215, § 1; Vermont, § 981; Delaware Rev. Code, c. 63, § 7, as amended by Sess. Laws, vol. 13, c. 451; Illinois, Rev. St. c. 59, § 2 (see Hughes v. Carne, 135 Ill. 519, 26 N. E. 517); Nebraska, § 1787; Missouri, Rev. St. § 5186; other states as above. Where the statute requires a writing by the party, it would undoubtedly be satisfied by one executed by attorney, under a letter of attorney duly subscribed. In other states authority need not be in writing. Kennedy v. Ehlen, 31 W. Va. 340, 8 S. E. 398; Dodge v. Hopkins, 14 Wis. 630. Thus an auctioneer can sign a memorandum binding both seller and buyer, if he does so immediately at the sale. Bamber v. Savage, 52 Wis. 110, 8 N. W. 609; McBrayer v. Cohen, 92 Ky. 479, 18 S. W. 123. See infra as to contents of such a memorandum.

[468] Virginia, Code, § 2840; West Virginia, c. 98, § 1; Maine, c. 111, § 1; Kentucky, as above; Massachusetts, c. 78, § 2; Indiana, Rev. St. § 4905; Illinois, c. 59, § 3; New Jersey, "Frauds and Perjuries," § 9; Michigan, § 6182.

the Dakotas, Alabama, Colorado, and Oregon, that it must be expressed.[469] In those states which require the consideration to be expressed, but which recognize the distinction between sealed and unsealed instruments, the old common-law rule, it seems, would come in, under which a seal imports a consideration; and a sealed covenant to convey land at some future day answers all requirements.[470]

Where the statute is silent, the tendency of the American courts is not to require the consideration to be expressed in the written agreement or memorandum. The matter seems of little importance where the contract relates to an interest in land, as the vendor is very likely always to name the price received or to be received in any written memorandum of sale; but, in a late decision, a court of high standing has, under a law which dispenses with a written statement of the consideration, enforced an agreement to sell, and, upon parol testimony, changed the price which the memorandum, rightly construed, named.[471] While the English statute only forbids the bringing of an action, many of the American acts go further, and declare that the contract, lease, or sale shall be void, or invalid, or of no effect, unless in writing, etc.; this is the language of the statute in New York, Michigan, Wisconsin, Minnesota, the Dakotas, California, Oregon, Alabama, Georgia ("to make binding"), North Caro-

[469] See same states above, notes 466, 467.

[470] Johnson v. Wadsworth, 24 Or. 494, 34 Pac. 13. Indeed, a promise or covenant to convey land upon the payment of a named sum does not express the consideration at all, unless it shows either that the buyer has bound himself to pay the price, or has paid some part of it in advance.

[471] There is a full array of the authorities on both sides in the American notes to Wain v. Warlters, 2 Smith, Lead. Cas. 245, mainly as to agreements to answer for the debt, default, or miscarriage of another. In England the consideration need no longer be stated in the written memorandum. 19 & 20 Vict. c. 97, § 3. Thornburg v. Masten, 88 N. C. 293 (consideration need not be stated). To express consideration, the words "for value received" are enough. Cheney v. Cook, 7 Wis. 413. So is a reference to some extrinsic fact. Washburn v. Fletcher, 42 Wis. 152. In Hayes v. Jackson, 159 Mass. 451, 34 N. E. 683, there was a receipt "on account of $14,140, subject to a mortgage of $8,000," which would, of course, mean $22,140; but the mortgage was really meant as part of the price. A majority of the supreme court compelled the vendor to sell at $14,140, overruling Grace v. Denison, 114 Mass. 16.

lina, Nebraska, Wyoming, Nevada, and Montana.[472] But since the courts of equity, both in England and in those states which have followed the older wording, no longer treat the statute of frauds as simply governing the evidence at the trial, but allow a defendant to admit the parol agreement, and at the same time to "plead the statute" against its enforcement,[473] the change from forbidding an action on the contract to denouncing it as void is not very important; especially as this word has by judicial decisions been toned down into "voidable." [474]

We find, on the other hand, three states in which the English law against the enforcement of unsigned contracts for the sale of land has not been re-enacted at all, or at last in a much weakened form. Iowa only forbids any other evidence of the contract than a written instrument, note, or memorandum. Hence, when the defendant is too conscientious to deny the verbal agreement, it must be enforced, aside of large exceptions, which will be discussed hereafter.[475] Pennsylvania and Washington omit the clause altogether. But the former state has worked out something very much like the law in other states from the clause which requires a deed in order to create or transfer any estate in land, in law or in equity;

[472] Georgia, Code, § 1950; North Carolina, Code, § 1554. For other states, see above, notes 466, 467.

[473] See Story, Eq. Jur. §§ 756, 757. It is here shown that Lord Macclesfield would disregard a plea of the statute where the defendant at the same time in a sworn answer admitted the oral contract as laid in the bill (Child v. Godolphin, 1 Dickens, 39); how Lord Hardwicke at least intimated the same views in Cottington v. Fletcher, 2 Atk. 155, but it was soon thereafter abandoned; Walters v. Morgan, 2 Cox, Ch. 369, being the first English fully reported case for the modern position of faithfully enforcing the statute; while Thompson v. Tod, 1 Pet. C. C. 380, Fed. Cas. No. 13,978, is the first American case. Gammon v. Butler, 48 Me. 344 (the unwritten contract is morally binding, and may be ratified).

[474] Davis v. Inscoe, 84 N. C. 396 (parol vender complying with contract, third party cannot complain); Oldham v. Sale, 1 B. Mon. 78. Generally the statute had to be pleaded under the old practice. The bill was not demurrable for failing to allege a writing. See Lawrence v. Chase, 54 Me. 196.

[475] Such, at least, is the wording of the statute. But it was said in Westheimer v. Peacock, 2 Iowa, 528,—action on a promise to pay the debt of another where an issue was made and tried,—that the effect of the statute was the same as of that of 29 Car. II.; and Berryhill v. Jones, 35 Iowa, 335, again glances at the question, but neither case brings it up squarely.

and Washington must either pursue the same course, or supply the lacking enactment.[476] The laws of the other states and territories agree substantially with the clause set out in the opening of the section; and those of the states named in all but the details pointed out above.[477]

The sale of growing timber is within the statute of frauds. So is a contract for the planting of fruit trees on the land of another, and sharing the produce of the trees; contracts for the sale of minerals in the ground, or of rock in the quarry,[478]—but sales of the growing crop are not, nor contracts for making brick from another's surface soil for one season.[479] On the question whether an agreement to waive a lien on land, without giving up the demand itself, is within the statute, the authorities are not quite in harmony. When the lien has not yet arisen, and especially when it has not been spread on the records, a parol waiver would seem less objectionable than where it rests upon a mortgage already recorded; while the promise to remove a lien by paying it off cannot be called a contract for an interest in land, in any just sense of the word.[480]

A promise to leave an estate to any person by will, if made upon a good consideration,—for instance, that of services rendered to

[476] Irvine v. Bull, 4 Watts, 287; Wilson v. Clarke, 1 Watts & S. 554; Ellet v. Paxson, 2 Watts & S. 418; Dumars v. Miller, 34 Pa. St. 319.

[477] Massachusetts, Pub. St. c. 78, § 1; Connecticut, Gen. St. § 1366; Rhode Island, c. 204, § 7; New Jersey, "Frauds and Perjuries," 5; South Carolina, Rev. St. § 2019; Florida, § 1995; Ohio, § 4199; Indiana, § 4904; Tennessee, Code, § 2423; Mississippi Code, § 1225; Texas, Rev. St. art. 2543; Kansas, § 3166; Arkansas, § 3371; Arizona, § 2030. In Maryland and the District of Columbia the act of 29 Car. II. is still in force.

[478] Terrell v. Frazier, 79 Ind. 473; Robbins v. McKnight, 5 N. J. Eq. 643; Henrici v. Davidson, 149 Pa. St. 323, 24 Atl. 334 (subject to "part performance" as in next section); Hirth v. Graham, 50 Ohio St. 57, 33 N. E. 90 (even for immediate removal).

[479] An easement is within the statute. Foss v. Newbury, 20 Or. 257, 25 Pac. 669; Bloom v. Welsh, 27 N. J. Law, 180; Brown v. Morris, 83 N. C. 251.

[480] McElroy v. Braden, 152 Pa. St. 78, 25 Atl. 235 (contract by builder to waive mechanic's lien good); McCraith v. National Mohawk Val. Bank, 104 N. Y. 414, 10 N. E. 862 (an agreement to get a mortgage released is not a contract for interest in land); Parker v. Barker, 2 Metc. (Mass.) 423 (promise not to enforce mortgage is within the statute); Leavitt v. Pratt, 53 Me. 147 (agreement to release mortgage within statute).

the testator,—is binding in law, and can be enforced against the decedent's estate. But if the estate consists, in whole or in part, of land, the contract falls within the statute of frauds. So far from the personal estate carrying the lands with it, it seems that the contract, if not in writing, is bad as to both.[481]

An express trust in land, under another section of the statute of frauds, can be created only by writing, which must be signed by the party himself. Several of the states have either re-enacted this section, or combined its main features with that of the first section, which refers to the conveyance of leases, estates, or interests in land. This was done in Pennsylvania.[482] But even in states where the section on trusts has been wholly omitted the creation of an express trust has been held impliedly forbidden by the two other clauses, one of which forbids the alienation of lands, or any interest therein, unless by writing, and the other of which is directed against contracts for the sale of land; and the latter, a fortiori, embraces gifts, as the law will not favor a volunteer above a purchaser for value.[483]

Coming now to the form and contents of the instrument, we are struck with the words of the statute: First, the agreement; next,

[481] Shahan v. Swan, 48 Ohio St. 25, 26 N. E. 222; Johnson v. Hubbell, 10 N. J. Eq. 332; Grant v. Grant, 63 Conn. 530, 29 Atl. 15.

[482] 29 Car. II., c. 3, § 1, reads: "All leases, estates, interests of freehold or terms of years, or any uncertain interest of, in, to, or out of any messuage, manors, lands, tenements, or hereditaments, created by livery of seisin only, or by parol, and not put in writing, and signed by the parties creating the same, or their agents thereto lawfully authorized in writing, shall have the force and effect of leases or estates at will only, and shall not either at law or equity be taken to be of greater force or effect, any consideration for making any such parol leases or estates or further usage to the contrary notwithstanding." Section 2 excepts short leases at rack rent. Section 7 reads: "All declarations or creations of trust or confidence, of any lands, etc., shall be manifested and proved by some writing signed by the party who is by law enabled to declare such trust, or else by his last will in writing, or else shall be utterly void." Section 8 excepts trusts resulting by operation of law.

[483] Morton v. Nelson, 145 Ill. 586, 32 N. E. 916 (one buying lands in his own name, on account of himself and others); Johnston v. Johnston, 138 Ill. 385, 27 N. E. 930 (husband conveying to wife in trust for reconveyance); Champlin v. Champlin, 136 Ill. 309, 26 N. E. 526 (sons to mother on like trust). It is premised that no trust "results" in these cases by operation of law.

as its substitute, a "note or memorandum thereof." Hence the writing need not have been written with a view of binding the subscriber, it may be a letter, or a series of letters, addressed, not to the party interested, but to others; or entries made by the party to be charged on his own books. One of the commonest, perhaps the most usual, form of memorandum, is a receipt for part payment, stating the whole sum to be paid, and designating the tract sold.[484] There was a time when the statute of frauds was held to affect the evidence only, and when a defendant admitting in his answer the existence of an unwritten agreement could not resist its enforcement, but under the modern view it is otherwise. Moreover, as shown above, many states, in their laws, call the contract void when no written memorandum has been signed. Hence an answer which the defendant is compelled to make cannot serve as the written memorandum either in the same suit, or in another which may thereafter be brought on the same agreement. But it has been held that, when he answers without pleading the statute, the answer, signed and sworn to, may be used as a written memorandum of the contract which is set forth in it.[485] A telegram is a writing, within the meaning of the statute, and it is expressly declared in some states that it is such.[486] A deed or formal writing executed by the vendor, but not delivered, cannot be read as a memorandum, under the statute,—at least, not for the contract which it contains, though it might, perhaps, as to a recital of previous agreements; for to allow

[484] Kopp v. Reiter, 146 Ill. 437, 34 N. E. 942; Roehl v. Haumesser, 114 Ind. 311, 15 N. E. 345 (contract to devise estate extracted from letters, some of them lost); Gordon v. Collett, 102 N. C. 532, 9 S. E. 486 (receipt of part payment). Entries on grantor's books. In re Farmer, 18 N. B. R. 210, Fed. Cas. No. 4,650. Declaration by purchaser of his purchase, signed below him by the seller, enough. Winn v. Henry, 84 Ky. 48. Many of the cases cited in other notes turn on receipts on account of lot sold; and no objection is made to this form.

[485] Jones v. Lloyd, 117 Ill. 597, 7 N. E. 119; Renz v. Stoll, 94 Mich. 377, 54 N. W. 276 (arguendo, answer in chancery admissible); Champlin v. Champlin, 136 Ill. 309, 26 N. E. 526 (recital of facts in will); Barker v. Smith, 92 Mich. 336, 52 N. W. 723 (in will which is rejected for lack of form; dictum); Barrett v. McAllister, 35 W. Va. 103, 12 S. E. 1106 (answer admitting contract, and not insisting on statute, cannot be withdrawn after reversal of decree).

[486] Butler v. Iron Cliffs Co., 96 Mich. 70, 55 N. W. 670; Rev. St. Ind. § 4180.

it such a force would destroy the rule, both of positive law and of common sense, by which no deed or other contract has any binding force until the grantor or maker parts with its possession.[487]

The written agreement, note, or memorandum must be complete in itself. It must show what the subscriber has bound himself to do, either on its face, or by reference to other writings. A reference to "what was said," or to verbal instructions, cannot be helped out by proof of spoken words; and, if the contract cannot be fully understood without such proof, it cannot be enforced.[488]

Where the contract has to be made out from several papers, they must refer to each other. The connection must depend on "internal evidence."[489] In like manner, where a written authority is required for the agent who signs the agreement or memorandum, this must be sufficient in itself to support whatever instrument the agent has signed. If he has departed from, or gone beyond, the authority given, the departure or excess cannot be made good by a verbal ratification.[490]

As to the particular contents, these are—First, the description of the land, and designation of the interest therein; second, the

[487] Kopp v. Reiter, supra; Chick v. Sisson, 95 Mich. 412, 54 N. W. 895 (left for examination, but not delivered). A deed left in escrow was held a memorandum in writing in Campbell v. Thomas, 42 Wis. 437; shaken by Bamber v. Savage, 52 Wis. 110, 8 N. W. 609, and still more by Popp v. Swanke, 68 Wis. 364, 31 N. W. 916.

[488] McElroy v. Buck, 35 Mich. 434. See what auctioneer's memorandum must contain. Horton v. McCarty, 53 Me. 394. An extreme case is Gault v. Stormont, 51 Mich. 636, 17 N. W. 214. A receipt for $75, as part of principal of $1,050, held insufficient for not indicating the time of payment. It would seem to mean payment in cash, nothing else being said. Wright v. Weeks, 25 N. Y. 153 ("upon terms specified" bad); Pulse v. Miller, 81 Ind. 190 (sale of lands in township A.; parol proof which land was meant inadmissible); Pittsburg, etc., R. Co. v. Wright, 80 Ind. 182 (contract cannot be half written, half verbal). But in Loud v. Campbell, 26 Mich. 239, the rule was departed from, and in Butler v. Iron Cliffs Co., 96 Mich. 70, 55 N. W. 670, a reservation of the "usual mining rights" was held to let in proof of conversations regarding these rights. Jones, Com. & Trade Cont. § 134, is relied on; also, Bailey v. Cornell, 66 Mich. 107, 33 N. W. 50.

[489] Mayer v. Adrian, 77 N. C. 83; Andrew v. Babcock, 63 Conn. 109, 26 Atl. 715 (a signed letter, promising to come and bring the written agreement, insufficient); Tice v. Freeman, 30 Minn. 389, 15 N. W. 674.

[490] Kozel v. Dearlove, 144 Ill. 23, 32 N. E. 542.

names of vendor and vendee; third, the price and the terms of sale.[491] As to the description, it may be briefly said that whatever is sufficiently certain in a grant is sufficient in a contract.[492] The name of the vendor must appear. Where the writing is drawn and signed by an agent (such as an auctioneer making his note of the accepted bid), it may happen that the name is omitted, in which case the writing is worthless, under the statute.[493] The vendee's name is not made to appear, where a written authority to a broker, to sell at a named price and stated terms, is accepted by a buyer, as if it were a proposition addressed to him. Such a written authority can only become binding upon him who gave it by another writing signed by the broker.[494]

The clause of the statute of frauds on contracts not to be performed within one year has been sometimes invoked where a lease short enough not to fall within the clause on contracts for the sale of lands is agreed upon by parol, not to begin immediately, but

[491] But the time of payment may be left to future agreement. Camp v. Moreman, 84 Ky. 635, 2 S. W. 179. The court must judge of the effect of such a writing.

[492] Ryan v. U. S., 136 U. S. 68, 10 Sup. Ct. 913 (extrinsic evidence to locate from description); Eggleston v. Wagner, 46 Mich. 610, 10 N. W. 37 (same); Andrew v. Babcock, supra (an insufficient description); Murray v. Mayo, 157 Mass. 248, 31 N. E. 1063 (house and lot by street and number). The reader is referred to chapter II ("Boundary and Description"), §§ 6, 7. Whenever parol testimony is admissible to identify the land granted, it is admissible to identify land contracted to be sold. Indeed, there is no reason why a court of equity should not (while no rights of third persons have interfered) enforce a covenant to sell and convey a smaller quantity out of a larger tract. But see Falls of Neuse Manuf'g Co. v. Hendricks, 106 N. C. 485, 11 S. E. 568, on this point, and on what words may be explained by parol; and Baxter v. Wilson, 95 N. C. 137, as to effect of contemporaneous survey. Compare chapter II, § 6, of this work. Kennedy v. Gramling, 33 S. C. 367, 11 S. E. 1081, is an extreme case of scanty description deemed good, but the contract was held not completed on other grounds.

[493] Mentz v. Newwitter, 122 N. Y. 491, 25 N. E. 1044. So, where the vendee's agent signed only his own name, his principal was not bound for the price. Briggs v. Partridge, 64 N. Y. 357. But see, contra, Hargrove v. Adcock, 111 N. C. 166, 16 S. E. 16.

[494] Haydock v. Stow, 40 N. Y. 363. Contra, Alford v. Wilson, 95 Ky. 506, 26 S. W. 539, which was a suit against the proposed purchaser, but would have been decided in the same way if the authority had been signed by the seller.

within a year, and to come to an end after the year. It is enough here to say that the decisions of the various states are by no means in unison.[495] A land contract, though under seal, may be barred by an accord and satisfaction, like any other; and this may be proved by parol, if there is a consideration which has actually passed between the parties.[498]

There is some little conflict of opinion on the question whether a contract for the sale of land (or other contract which falls within the statute of frauds) can be "reformed" in equity by showing that it did not express the true intention of the parties, and then enforced as amended; but the great weight of opinion is against such a course, though there is no doubt that parol evidence may be used to set aside the contract, or to defeat its operation, because, through fraud or mistake, it fails to set forth correctly the intention of the parties. The English chancery courts are unwilling to enforce a written contract that has first been reformed upon unwritten testimony, even when it does not fall within the statute of frauds.[497] When on a bill for specific performance, the variation is set up by way of defense, the court will, in its discretion, and with the plaintiff's consent, reform the contract to what it should be according to the defendant's answer, and then enforce it against the latter.[498] And many of the American courts, like the English chancery, refuse to go any further; that is, they will not reform an executory contract for land, and then enforce it.[499] The correction of a

[495] Bateman v. Maddox, 86 Tex. 546, 554, 26 S. W. 51 (lease good); Becar v. Flues, 64 N. Y. 518; Railsback v. Walke, 81 Ind. 412; Sobey v. Brisbee, 20 Iowa, 105. Such a lease is held bad in Greenwood v. Strother, 91 Ky. 483, 16 S. W. 183, relying on Kentucky authorities only.

[496] Nicholas v. Austin, 82 Va. 817, 1 S. E. 132, citing Fleming v. Gilbert, 3 Johns. 528; U. S. v. Howell, 4 Wash. C. C. 620, Fed. Cas. No. 15,405. And so the time for performance may be extended by parol, Bullis v. Presidio Min. Co., 75 Tex. 540, 12 S. W. 397.

[497] Woollam v. Hearn, 7 Ves. 211, 2 White & T. Lead. Cas. Eq. 484; Rich v. Jackson, 6 Ves. 335, note; Clinan v. Cooke, 1 Schoales & L. 22; Attorney General v. Sitwell, 1 Younge & C. Exch. 559; other cases down to Manser v. Back, 6 Hare, 443, and none to the contrary.

[498] Lindsay v. Lynch, 2 Schoales & L. 1, 9; Story, Eq. Jur. § 770a; and see Quinn v. Roath, 37 Conn. 29.

[499] Elder v. Elder, 10 Me. 80; Osborn v. Phelps, 19 Conn. 63; Climer v.

deed, an executed conveyance, which, through accident or mistake, conveys other land, or another estate therein, than the parties contemplate, rests on entirely different grounds; and the courts wielding chancery powers, in any state of the Union, never hesitate to correct such a deed, on these grounds, wherever opportunity offers.[500] There are only a few cases in which an executory contract for land (or any other contract falling within the statute of frauds) has in any American court been reformed and enforced, at the instance of the party which sought its reformation, on unwritten evidence. Almost every one of them seeks its justification on special grounds. Indeed, to allow such reformation, and enforcement of the contract as reformed, would be almost equivalent to a repeal of the statute.[501]

The statute of frauds, either under the contract or the trust clause, does not reach trusts arising or "resulting" by force of law from the payment of purchase money by a third party in the states in which a trust results therefrom, perhaps a necessary exception, but one fraught with much danger of perjury.[502] The laws by which the sheriff holding an execution, or the master or commissioner of

Hovey, 15 Mich. 18, 22; Glass v. Hulbert, 102 Mass. 24; Macomber v. Peckham, 16 R. I. 485, 17 Atl. 910.

[500] Gillespie v. Moon, 2 Johns. Ch. 585; Metcalf v. Putnam, 9 Allen, 97; Gates v. Green, 4 Paige, 355. In Keisselbrack v. Livingston, 4 Johns. Ch. 144, a covenant had been erased from a deed of conveyance, which Chancellor Kent decreed to be restored. Noel's Ex'r v. Gill, 84 Ky. 241, 1 S. W. 428 (numbers of lots in description corrected). And hundreds of similar cases in almost all the states. Mortgages have so far been deemed conveyances that they have been corrected for mistakes, and then enforced, e. g. Tichenor v. Yankey, 89 Ky. 508, 12 S. W. 947, a very strong case.

[501] McCurdy v. Breathitt, 5 T. B. Mon. 232; Barlow v. Scott, 24 N. Y. 40; Murphy v. Rooney, 45 Cal. 78; Webster v. Harris, 16 Ohio, 490; Gower v. Sterner, 2 Whart. 75; Bradford v. Union Bank, 13 How. 57 (here the vendor had lost part of the land he agreed to sell, through a tax sale, without the knowledge of either party, at the time of the contract. He was decreed, upon payment of a proportionate price, to make a deed of the residue).

[502] Nelson v. Worrall, 20 Iowa, 469; Sullivan v. McLenans, 2 Iowa, 437. See, also, section on "Uses and Trusts" in former chapter, and cases there quoted. The "trust clause" of the statute usually excepts trusts resulting by law. In fact, the exception is inherent; for there can be no written contract when there is none of any kind. The mistake is in the law which raises the resulting trust except where one party's money is taken without his consent, i. e. fraudulently, and invested in land in another's name.

a court decreeing a sale, puts lands up at public vendue, repeal, as far as they go, the statute of frauds. The bidder's right, though inchoate or incomplete on other grounds, is enforceable as soon as the officer has "knocked down" the land to him, and before the officer has made any written report or return; and the best bidder is bound in like manner, though he has not signed any memorandum. This is a necessary exception to the statute of frauds, and one which can do but little if any harm.[503]

§ 63. Part Performance.

A section of the statute of frauds, which is embodied as the first section of the chapter on conveyances, in almost every American Revision, directs that no estate in fee or for life in land, and no term for more than three years, can be conveyed or created, except by deed in writing, signed, etc. Another section is also copied in the statutes of every state, that no action shall be brought upon any contract for the sale of land, unless the contract, or a note or memorandum thereof, be in writing, and signed by the party to be charged therewith. And yet another section, which has been copied into many, but not into all, the American Revisions, says that no trust in land shall be created except by writing properly signed. Courts of equity admit that they are bound by the clause which forbids the bringing of an action for the sale of land to the extent that they may not entertain a suit for specific performance, unless a contract or a note or memorandum thereof has been duly signed by the seller or his lawful agent. Yet there is a large class of cases in which land may lawfully be held in fee, for life or on a long lease, in pursuance, and as part performance, of a contract not reduced to writing, or not signed by the owner of the land, or in which the buyer may at least enforce against the land a lien for his outlays, where the courts of his state will not allow the more glaring inroad to be made on the words and on the avowed policy of the statute of frauds.[504]

503 Stearns v. Edson, 63 Vt. 259, 22 Atl. 420. From time to time the point is raised, and as often overruled. This is probably the latest case. See, also, Nichol v. Ridley, 5 Yerg. 63; Hyskill v. Givin, 7 Serg. & R. 369.

504 The case of Lester v. Foxcroft, decided in 1701 by the house of lords

This course of excepting part performance out of the statute has been followed in New Hampshire, Rhode Island, Connecticut, New Jersey, Pennsylvania (which really lacks a clause speaking plainly of executory sales of land), Delaware, Maryland, Virginia, South Carolina, Ohio, Indiana, Illinois, Missouri, Mississippi, Kansas; also more lately in Massachusetts,[505] and in a number of states the exception, as established by the course of courts of equity, is now recognized in the body of the statute. These are New York, where the rule had prevailed before being thus declared; Michigan, Wisconsin, Minnesota, the Dakotas, Nebraska, West Virginia, and

(1 Colles, 108, 1 White & T. Lead. Cas. Eq. 768), is the groundwork of the doctrine that part performance takes a verbal contract out of the statute of frauds. The appellant had verbally agreed with the testator to tear down a number of old buildings, and to put up 14 new houses, on the testator's land, at his own expense, for which he was to be reimbursed by a 99-years lease at a named rent. He put up the houses at a great expense, of which he paid £2,000, besides other sums which he borrowed from the testator. The latter, while on his deathbed, caused a building lease to be drawn, but through accident, or through the machinations of his devisees, failed to sign it. It was decreed that the devisees should execute the promised lease, and the builder should remain in possession. The case would have been very hard on the appellant if relief had not been given. See the English and American notes in Leading Cases in Equity for authorities.

[505] Welsh v. Bayaud, 21 N. J. Eq. 186; Hall v. Hall, 1 Gill (Md.) 383; Billington's Lessee v. Welsh, 5 Bin. (Pa.) 129; Eaton v. Whitaker, 18 Conn. 222; Newton v. Swazey, 8 N. H. 9; Farrar v. Patton, 20 Mo. 81; Peckham v. Barker, 8 R. I. 17; Grant v. Ramsey, 7 Ohio St. 157; Heth's Ex'r v. Wooldridge's Ex'rs, 6 Rand. (Va.) 605; Carlisle v. Fleming, 1 Har. (Del.) 421; Anderson v. Chick, 1 Bailey, Eq. 118; Gilmore v. Johnston, 14 Ga. 683; Shirley v. Spencer, 4 Gilm. (Ill.) 583; Finucane v. Kearney, 1 Freem. Ch. (Miss.) 65; Barnard v. Flinn, 8 Ind. 204; Edwards v. Fry, 9 Kan. 417. In Massachusetts, since the enlargement of equity powers, Metcalf v. Putnam, 9 Allen, 97; Glass v. Hulbert, 102 Mass. 25; contra, under the former limited equity powers, Brooks v. Wheelock, 11 Pick. 439. In Parkhurst v. Van Cortland, 14 Johns. 15, 31, Chancellor Kent rests this exercise of equity power on the ground that it would be fraud to permit the parol agreement to be partly executed, and to lead a party to expend money in the melioration of the estate, and then to withdraw from the contract. He adds, whenever damages will answer the purpose of indemnity, this remedy is to be preferred, thus bowing to the statute. In Watson v. Erb, 33 Ohio St. 35, relief was refused by reason of the lack of this element of fraud. For West Virginia, see Gallagher v. Gallagher, 31 W. Va. 9, 5 S. E. 297.

California.[506] Alabama and Iowa have gone much further in their legislation, the former taking the case out of the statute of frauds when the purchase price has been paid in whole or in part, and possession been given; the latter, when one or the other has happened, or when the case lies outside of the statute by common usage.[507]

The rule as to part performance has been wholly rejected in Maine and Tennessee, a return of payments and outlays being the only relief which a court will give in any case to the buyer of land by parol.[508] And such is also the law in Kentucky, though the same result was for a long time attained in that state by taking hold of the words of the statute which only forbid an action on a contract for land, when there is no writing signed by the party to be charged; while nothing is said about no defense being based on such a contract, which came to the same result, as the part performance needed under the rule always embraces a delivery of possession to the buyer. But this untenable position has been abandoned.[509]

[506] See clauses of statute of frauds cited in notes to preceding section, or those closely following upon them. In California, also, Code Civ. Proc. § 1972. Freeman v. Freeman, 43 N. Y. 34. These statutes leave the equity doctrine unchanged (Smith v. Finch, 8 Wis. 245); yet it is variously understood in the several states.

[507] Alabama, Civ. Code, § 1732, enforced in McLure v. Tennille, 89 Ala. 572, 8 South. 60. See Powell v. Higley, 90 Ala. 103, 7 South. 440, where land was exchanged for a piano; but in this case the common rule would have worked the same result. Iowa, Code, § 3665 ("when the purchase money or any part thereof has been received by the vendor, or when the vendee, with the actual or implied consent of the vendor, has taken and held possession thereof, under and by virtue of the contract, or," etc.). The "purchase money" means whatever consideration has been agreed on, e. g. a deed for other land, upon an exchange. Devin v. Himer, 29 Iowa, 297, where possession had not been given to the plaintiff. In Chamberlin v. Robertson, 31 Iowa, 408, there was possession and payment.

[508] Wilton v. Harwood, 23 Me. 131 (no jurisdiction to award performance of parol contract); Ridley v. McNairy, 2 Humph. (Tenn.) 174.

[509] The English rule is rejected in Grant v. Craigmiles, 1 Bibb. 203, and other early cases, and again in Blackburn v. Blackburn (Ky.) 11 S. W. 712. The clause of the statute of frauds which forbids a trust in land to be raised by parol is not in force in Kentucky. The opinions allowing a defense of the possession on words of mouth in Nichols v. Nichols, 1 A. K. Marsh. 167; Ford v. Ellingwood, 3 Metc. (Ky.) 359; and Cornellison v. Cornellison, 1 Bush, 149, are not quite direct; but in Caldwell v. Caldwell, 7 Bush, 515, the party in

In North Carolina no relief can be given when the defendant denies the parol contract. When he admits it, there can be only compensation; while in Mississippi relief was steadily denied from the first.[510]

In those states which do not enforce the verbal agreement, or in cases in which the vendee has an equity, but the conditions for taking the case out of the statute do not concur, compensation is generally given in damages, without regard to the method by which the contract has been established,—whether by the admission of the defendant in his answer under a plea of the statute, or by proof after his denial.[511] When compensation is awarded to the vendee in possession, the court of equity which decrees it generally makes the payment thereof a condition precedent, without the fulfillment of which the vendor is not allowed to recover the possession upon his title at law.[512]

The courts have so far felt a kind of uneasiness about setting

possession was even allowed to sustain a bill to quiet the title on a mere oral understanding in the family, without having paid or laid out any money. The court of appeals went even further in Faris v. Dunn, 7 Bush, 276, and Williams v. Williams, 8 Bush, 241; the latter a case where the owner of a large tract, being in trouble with his wife, conveyed it to his cousin, remaining in possession, and the latter was compelled to reconvey, on proof of which the only written piece was a letter advising the plaintiff to sell part of his land, without describing it. But in Usher's Ex'r v. Flood, 83 Ky. 552, the court of appeals, bethinking itself of the clause of the statute of frauds which is made the first section of the chapter on "Conveyances," took from the donee by parol, after a possession of nearly 14 years, a house which he had earned in great part by services to the donor, notwithstanding a letter in which the latter had promised him "a house," not saying which.

[510] McGuire v. Stevens, 42 Miss. 724, and cases there quoted. Ellis v. Ellis, 1 Dev. Eq. 341, on review, reverses a former decision, which followed the English doctrine. Barnes v. Teague, 1 Jones, Eq. 277 (defendant can admit parol agreement and plead the statute); Plummer v. Owens, Busbee, Eq. 254 (a memorandum which does not identify the lot will not sustain a decree for performance, but one for compensation); Dunn v. Moore, 3 Ired. Eq. 364 (contract admitted, but plea of statute: compensation); Allen v. Chambers, 4 Ired. Eq. 125 (contract denied, proof cannot be heard); Albea v. Griffin, 2 Dev. & B. Eq. 9 (account of payments and improvements, less rent).

[511] See North Carolina cases in note 510; Parkhurst v. Van Cortland, 14 Johns. 15.

[512] See the leading case of Seton & Slade, 2 White & T. Lead. Cas. Eq. 529, for the doctrine of "damages and compensation." Except for the lien which

aside the plain words or the beneficent policy of the statute of frauds that they have laid down the rule never to decree a conveyance unless the proof of the parol agreement is clear and conclusive,[513] and unless it is, moreover, definite as to all the particulars of the contract,—such as the boundaries of the land, the interest to be conveyed, the price and the terms of payment.[514] Nothing short of giving and taking possession of the land is considered a good part performance for this purpose. Payment of the price is not enough, though it might give rise to an equitable lien, to which reference will be made hereafter.[515]

the vendee may claim for such compensation, of which hereafter, it lies beyond the scope of our work.

[513] Blum v. Robertson, 24 Cal. 142 (before the statute allowing the parol proof); Truman v. Truman, 79 Iowa, 506, 44 N. W. 721 (case of parol gift to child); Eckert v. Eckert, 3 Pen. & W. 332; Tiernan v. Gibney, 24 Wis. 190. Gallagher v. Gallagher, 31 W. Va. 9, 5 S. E. 297, contra. If clearly proved, and a refusal would aid a fraud, performance must be decreed. Barrett v. Forney, 82 Va. 269.

[514] Cox v. Cox, 26 Pa. St. 378 (a variance between allegation and proof shows that the complainant cannot give the true terms). So as to boundaries; Robertson v. Robertson, 9 Watts, 32; Woods v. Farmere, 10 Watts, 195; Camden & A. R. Co. v. Stewart, 18 N. J. Eq. 489; Wiseman v. Lucksinger, 84 N. Y. 31 (as to consideration and terms). For cases of sufficient clearness in proof, see Neale v. Neale, 9 Wall. 1; Hooper v. Laney, 39 Ala. 338. See, however, Lobdell v. Lobdell, 36 N. Y. 327. We shall find a like strictness wherever an equity in land is made to depend on parol.

[515] Gallagher v. Gallagher, supra (payment alone not enough); Foster v. Maginnis, 89 Cal. 264, 26 Pac. 828 (possession must be taken with vendor's knowledge); Bigler v. Baker, 40 Neb. 325, 58 N. W. 1026 (must be under contract of sale, not under lease); Wiseman v. Lucksinger, 84 N. Y. 31 (must be referable to contract); Clark v. Clark, 122 Ill. 391, 13 N. E. 553 (not to tenancy); Koch v. National Union Building Ass'n, 137 Ill. 497, 27 N. E. 530 (holding over by tenant not enough); Eckert v. Eckert, supra (must follow contract); Sweeney v. O'Hora, 43 Iowa, 34 (may be connected with it by parol proof); Carrolls v. Cox, 15 Iowa, 455 (under contract); Williams v. Landman, 8 Watts, & S. 60 (possession by attornment of old tenant enough); Miller v. Ball, 64 N. Y. 86 (possession of wild land by making road, cutting underbrush, etc.). Yet costly improvements made by a tenant near the end of his term, were deemed part performance in Morrison v. Herrick, 130 Ill. 631, 22 N. E. 537; Gorham v. Dodge, 122 Ill. 530, 14 N. E. 44 (possession indispensable); Shahan v. Swan, 48 Ohio St. 25, 26 N. E. 222 (referable to contract). But possession of one tract is not part performance as to an-

As far as payment by the vendee is required, it may be made effectually by his accepting the land in satisfaction of a previous demand against the vendor.[516] The vendee must, according to the weight of authority, besides having been put in possession, and besides having made payments on the land, have been put in such a position that he would be the loser by a breach of the contract of sale; e. g. he may have spent money and labor in making lasting and valuable improvements on the land, as in the case which gave rise to the doctrine.[517]

Land is often given by the owner to a railroad company with the understanding that tracks should be laid over it; and when this is done, a costly and lasting improvement has been made, which the vendee cannot remove without great loss; especially when the main line has been run over the land. The land is not always sold for money. Often the desire to have the railroad, switch or a "spur road" run over or into the vendor's land is the consideration, and is undoubtedly sufficient to support a contract of sale. In all these cases, the railroad company can, after complying with its side of the contract, taking possession, and laying the track, call for a deed.[518]

other, Myers v. Croswell, 45 Ohio St. 543, 15 N. E. 866; Bullis v. Mining Co., 75 Tex. 540, 12 S. W. 397 (improvements made after a renewal of contract do not aid the old one). In Morse v. Inhabitants of Wellesley, 156 Mass. 95, 30 N. E. 77, a promise by parol to reconvey interest in land conveyed, could not be sustained, not being followed by possession. Everett v. Dilley, 39 Kan. 73, 17 Pac. 661 (though interest on deferred payments and payment of tax by vendee had not been agreed on distinctly).

[516] Cooper v. Monroe, 77 Hun, 1, 28 N. Y. Supp. 222 (where the demand was barred by limitation, but morally still binding). See a consideration worked out in Holmden v. Janes, 42 Kan. 758, 21 Pac. 591.

[517] Glass v. Hulbert, 102 Mass. 25; Moore v. Small, 19 Pa. St. 461, 470 (contract enforced only where compensation in money not feasible); Foster v. Maginnis, supra; Eshleman v. Henrietta Vineyard Co. (Cal.) 36 Pac. 775 (suffering no loss, no case); Bradley v. Owsley (Tex. Sup.) 19 S. W. 340 (purchase price and taxes paid, but no improvements, not enough); Forrester v. Flores, 64 Cal. 24, 28 Pac. 107 (possession and price paid not enough), approved in Moulton v. Harris, 94 Cal. 420, 29 Pac. 706. All the requisites fulfilled, Winchell v. Winchell, 100 N. Y. 159, 2 N. E. 897; Calanchini v. Branstetter, 84 Cal. 253, 24 Pac. 149 (where a strip surrendered in a boundary settlement, to be paid for upon a future ascertainment of the true line, had been improved).

[518] East Tennessee, V. & G. Ry. Co. v. Davis, 91 Ala. 615, 8 South. 349;

But, besides Iowa and Alabama, which have by statute enlarged the scope of parol contracts, Wisconsin and South Carolina seem always, and West Virginia and Maryland in some cases, at least, to be satisfied with possession alone; and Illinois, when land is exchanged, requires nothing further than delivery of possession by both parties, and of a deed by the party who seeks to enforce the contract.[519]

We have shown, under the head of "Deeds," that a partition by parol followed by possession, has been recognized in many of the older cases. In Pennsylvania, not only a partition between tenants in common but an exchange of separate tracts, when made by parol, and performed by actual possession, is held good; and either party, when in possession, can retain, and probably can have his title quieted.[520]

It has been shown that the Iowa statute differs widely from its English prototype, in not forbidding the action, for lack of a writing, but only excluding unwritten evidence. Hence when the plaintiff's allegation of an unwritten contract is not denied, in pleading,

Chicago, B. & Q. R. Co. v. Boyd, 118 Ill. 74, 7 N. E. 487; Hall v. Peoria & E. Ry. Co., 143 Ill. 163, 32 N. E. 598. Secus, where only a license to lay the track was given. St. Louis Nat. Stock Yard v. Wiggins Ferry Co., 112 Ill. 385.

[519] Watts v. Witt, 39 S. C. 356, 17 S. E. 822; Rapley v. Klugh, 40 S. C. 134, 18 S. E. 680; McClure v. Otrich, 118 Ill. 321, 8 N. E. 784 (parol exchange of lands); Bechtel v. Cone, 52 Md. 698 (everything done on both sides, except delivery of deed, seller becomes trustee for buyer); Gallagher v. Gallagher, supra (possession enough in some cases); Blanchard v. McDougal, 6 Wis. 167; Cameron v. Austin, 65 Wis. 652, 27 N. W. 622. But in Seaman v. Ashchermann, 51 Wis. 678, 8 N. W. 818, the relief is based on the fraud implied in its refusal.

[520] Johnston v. Johnston, 6 Watts, 370: "It is undoubtedly true that an agreement for the exchange of land is within the statute of frauds, and must be in writing. But the specific execution of a parol agreement will be decreed in equity, when the agreement has been carried into effect in whole or in part. A partition is in some respects analogous to an exchange, and in Ebert v. Wood, 1 Bin. 216, it is held that a parol partition between tenants in common, made by marking a line of division on the ground, and followed by a corresponding separate possession, is good, notwithstanding the statute." S. P. Wolf v. Wolf, 158 Pa. St. 621, 28 Atl. 164. A parol exchange of lands must be made good by delivery of possession. Reynolds v. Hewett, 27 Pa. St. 176. All approved in Brown v. Bailey, 159 Pa. St. 129, 28 Atl. 245.

and no issue of fact is made, the statute does not come in at all.[521]

Merely putting building material on the ground, with a view to the erection of improvements, is not the same as improving the ground, and is not even such a taking of possession as is necessary under the rule.[522]

Part performance, by which, if disregarded, irreparable loss would result to one party, has been held sufficient to enforce an oral contract to release that party's land from a mortgage or lien, though the loss in such a case would not arise from outlay on improvements. And, in like manner, performance of an agreement to give a lien for the cost of improvements made has been enforced.[523]

The most frequent case of a parol transfer of land happens between parent and child, or between the father and his proposed son-in-law. The child or son-in-law may, in accepting a farm or lot given to him, taking possession, improving, building, or cultivating, have changed the whole course of his life, in full reliance on the permanence of the gift,—risking more than if he had paid the money price of the land. Where the farm or lot is given in contemplation of the son's or daughter's marriage, there is, in law, a "valuable consideration," if the marriage takes place accordingly,—as much as if there had been payment in money.[524] But even where marriage does not enter as a consideration, but the son or daughter simply enters into possession on the faith of the gift, and makes valuable and permanent improvements, he or she may, according to a number of

[521] Hotchkiss v. Cox, 47 Iowa, 555 (an antecedent indebtedness makes a sufficient payment, if released or surrendered).

[522] Poland v. O'Connor, 1 Neb. 50; Hunt v. Lipp, 30 Neb. 469, 487, 46 N. W. 632; Erringdale v. Riggs, 148 Ill. 403, 36 N. E. 93 (slight improvements); Cloud v. Greasley, 125 Ill. 316, 17 N. E. 826 (same).

[523] Gould v. Elgin City Banking Co., 136 Ill. 60, 26 N. E. 497, where the debtor's wife had released her inchoate right of dower in other tracts, on the promise of a release of the homestead from mortgage; Smith v. Smith, 125 N. Y. 224, 26 N. E. 259. An easement is "an interest in land," but may be gained by parol and part performance. Robinson v. Thrailkill, 110 Ind. 117, 10 N. E. 647.

[524] White v. Ingram, 110 Mo. 474, 19 S. W. 827. But services by a child or stepchild are not part performance when made the consideration for a promised devise, no possession being given. Ellis v. Carey, 74 Wis. 176, 42 N. W. 252.

authorities, claim a specific performance, if the parol gift be "clearly, definitely, and conclusively established."[525]

There is nothing in the doctrine of part performance which confines it to the claim to a fee. In fact, the "leading case" was that of a long lease. And a life estate has been decreed on parol evidence.[526]

As part performance must almost if not quite always embrace possession by the vendee, as one of its elements, it naturally works out a notice to all the world of such equitable rights as the vendee may have; and it will therefore be enforced as much against purchasers from the vendor as against him, for the purchasers will not be free from notice.[527]

§ 64. Curative Acts.

While the estate or inchoate right of dower of married women could only be passed or released by fine or common recovery,—that is, by the solemn judgment of a superior court,—no question could arise upon the details of the examination or acknowledgment preceding that judgment. The colonial act of Virginia of 1748 perhaps intended the same result, when the county court, under its provisions, ordered a deed to record. But it was adjudged otherwise,[528] and when single judges or justices, mayors, recorders, clerks, and notaries

[525] Truman v. Truman, 79 Iowa, 506, 44 N. W. 721; Moore v. Pierson, 6 Iowa, 279, 298, which extracts the position of the text from Syler v. Eckhart, 1 Bin. 378 (Tilghman, C. J.); Stewart v. Stewart, 3 Watts, 253; Young v. Glendenning, 5 Watts, 509; Lobdell v. Lobdell, 36 N. Y. 327; Lloyd v. Hollenbach, 98 Mich. 203, 57 N. W. 110 (daughter and husband moving into other city, besides making improvements); Griggsby v. Osborn, 82 Va. 371 (gift certain and clearly proved, etc.).

[526] St. Louis, A. & T. Ry. Co. v. Graham, 55 Ark. 294, 18 S. W. 56; Redfield v. Holland P. Ins. Co., 56 N. Y. 354 (between husband and wife).

[527] Holmden v. Janes, 42 Kan. 758, 21 Pac. 591; District No. 3 v. Macloon, 4 Wis. 79.

[528] Virginia act of 1748, § 5 (5 Hen. St. at Large, p. 408 et seq.), copied in Morehead & B. St. Ky. p. 431. In Philips v. Green, 3 A. K. Marsh. 10, the analogy between the proceedings in the county court and a fine is left undetermined. In Prewitt v. Graves, 5 J. J. Marsh. 120, the former are called "ministerial."

were, by later acts, authorized to take and certify acknowledgments, the certificate, even though called "judicial," no longer concluded the granting feme covert at the utmost any further than as to the truth of the facts therein recited. Many of the magistrates being almost illiterate, nearly all of them not learned in the law, and the statutes differing from state to state, deeds being often acknowledged where the laws governing them were inaccessible, mistakes were naturally very frequent. The acknowledgment was often taken by an officer not fully authorized, or was defective in form, stating too little or too much. These defects had, in most instances, nothing to do with the wife's willingness or unwillingness to sell or incumber her land, or to bar her dower, but were simple accidents. She would have been just as willing to go before the right as before the wrong officer; to answer the right as to answer the wrong questions. But for want of the right certificate made by the right magistrate, her deed was void. Thus great hardships arose to purchasers or incumbrancers who had paid or advanced their money in the best of faith, and the legislatures stepped in, seeking to remove these hardships. Retrospective laws were passed, called by their authors and friends "healing" or curative acts, to give effect to the deeds of married women not properly acknowledged or certified, in almost every state in which "privy examinations" were known and used. Sometimes the curative act dealt with the body of the deed, or with acknowledgments of persons who were sui juris, rendering the registration of a deed valid which would otherwise have been ineffectual. In Kentucky, among other states, such acts have been held unconstitutional, as making a contract for the woman grantor, who has made none herself; as taking her property from her, and giving it to another.[529] This was also the decision of the supreme court of

[529] Pearce's Heirs v. Patton, 7 B. Mon. 162, 168. On a very mild law which directed that when a deed by baron and feme, otherwise good, except that the justices had not been commissioned by a dedimus, had been made to a purchaser for value, he might, after seven years' possession after the passage of the act, on showing that there was no "fraud or guile," have the deed established in chancery. The doctrine is broken in upon in the ill-considered case of Boyce v. Sinclair, 3 Bush, 261. The Kentucky Gen. St. 1873 provide in chapter 24, § 23, that deeds theretofore executed may be recorded thereafter; but this was held not to apply to a married woman's deed, on which the time had already run out, and which had thereby lost its effect.

Ohio, which at the time when rendered (1841), attracted great attention; but a few years later, under the pressure of widespread excitement and popular clamor, it appearing that many hundreds of deeds might be set aside, and in order to stop endless litigation, the court overruled itself by a vote of three to one.[530] The Ohio constitution of 1850 set the matter at rest for that state. The legislature may not validate deeds directly, but may empower the courts to do so; and a very broad statute passed with that view in 1857, has been applied and sustained.[531]

Pennsylvania has most fully and frequently acted on the view that no one is constitutionally entitled to set up a mere technical objection to his or her contracts; that not only a man, but also a married woman, can be compelled by the lawmaker to give up property rights which in honor and good conscience he or she cannot retain. Curative acts, or curative sections making part of more comprehensive acts, were passed in Pennsylvania in 1770, 1826, 1840, 1841, 1849, 1850, 1851, 1852, 1854, 1860, 1864, 1866, 1874, and 1881.[532] No question could arise as to the very broad colonial act, for Pennsylvania had then no constitution to limit her lawmakers. The act of 1826, which validated all acknowledgments certified by the proper officers, but defective in their contents, before September 1, 1826, was expressly held constitutional.[533] The act of 1840 cures all deeds acknowledged defectively, or by officers in other states authorized to take such acknowledgments by their home laws, though not

Lee v. James, 81 Ky. 443. An act of May 10, 1884, mentioned in section 54, note 246, may also fail in its retrospective features.

530 Good v. Zercher, 12 Ohio, 364; Silliman v. Cummins, 13 Ohio, 116, overruled in Chestnut v. Shane, 16 Ohio, 599, and other cases heard with it, in which the majority, to break the strength of the constitutional objection, also went back on itself on the question whether the acknowledgment was good as it stood. See section 54, note 236.

531 Article 2, § 28, Const. Ohio 1851. The act under this provision is embodied in the Revised Statutes as section 5872. In Miller v. Hine, 13 Ohio St. 565, it was held that the nonjoinder of the husband makes the deed a nullity, and it cannot be cured under this statute; but that he joins only in the testimonium clause can be cured. Goshorn v. Purcell, 11 Ohio St. 641.

532 Brightly's Purd. Dig. c. "Deeds and Mortgages," cls. 64–78.

533 Barnet v. Barnet, 15 Serg. & R. 72; Tate v. Stooltzfoos, 16 Serg. & R. 35. A volunteer as well as a purchaser for value can avail himself of the act. Mercer v. Watson, 1 Watts, 356.

by that of Pennsylvania, at any time before the 1st of January, 1841. These parts of the act were re-enacted, and thus extended, in 1848, 1849, and 1850. This act does not cure a certificate taken within Pennsylvania before a wrong officer, nor the absence of all semblance of a separate examination, and cannot divest the estate which has accrued to a second grantee before its passage.[534] The act of 1841 refers to deeds acknowledged prior to 1817 before the mayor or recorder of Philadelphia. That of 1849 cures all defects occurring before the year 1818, if the husband or wife, or either of them, had received the consideration of the deed. The act of April 15, 1850, refers to all deeds (not only to those executed by husband and wife) which have been recorded more than 30 years before its passage, and which had not been properly proved or acknowledged, but is restricted by act of 1851 to cases in which the possession of the lands has been held for 30 years in accordance with the deed. The act of 1854 again validates deeds acknowledged prior to its passage (May 5th) before an officer anywhere in the United States authorized by the laws of his own state to take acknowledgments.[535] The act of 1860 cures deeds made erroneously in the name of the attorney instead of that of the principal, and has a proviso that no case theretofore decided judicially shall be affected by this act, former acts having been thus applied. The act of 1864 validates all acknowledgments taken before notaries in Pennsylvania, or elsewhere in the United States, after the act of April 22, 1863 seemingly authorized notaries to certify deeds. The act of 1866 validates releases made before its passage in the manner provided therein as if executed thereafter. The act of May 25, 1874, cures the defects in the certified acknowledgment only upon the affidavit of one of the subscribing witnesses that the examination was actually carried on as the law requires. This law, and the next following, were not to apply to suits then pending. The act of May 26, 1874, refers to deeds made by husband and wife before 1850, under which the purchaser has entered and held possession since that time, and bars the title

[534] Tarr v. Glading, 1 Phila. 370. Green v. Drinker, 7 Watts & S. 440–444, extends to volunteers, such as a trustee of the wife. Rigler v. Cloud, 14 Pa. St. 364.

[535] Applies to mortgages as well as to absolute deeds, and is constitutional. Journeay v. Gibson, 56 Pa. St. 57.

of the grantors as fully as if all the requisites of the act of 1870 had been complied with. The act of 1884 supplies the lack of aldermanic seals to certificates.[536] But, even in Pennsylvania, a private act ratifying a deed which the grantor was prohibited from making by the nature of her estate, and by the will of the donor from which she derived it, was held to be a mere arbitrary transfer of property from one person to another, and as such null and void.[537] Minnesota enacted, within a much shorter time, an even greater number of curative laws; and these were sustained by her courts.[538]

[536] See the case of Satterlee v. Matthewson, first in 13 Serg. & R. 133, afterwards decided to the contrary in 16 Serg. & R. 169, under a curative act. The other acts will be found following those cited, but have not given rise to important decisions.

[537] Shonk v. Brown, 61 Pa. St. 320. The deed had been made by a married woman holding by devise a separate estate without power of alienation. Her heirs claimed under their grandfather's will, as if she had held no more than a life estate.

[538] Statutes of Minnesota, volume 1, which is the Revision of 1878, contains in chapter 123 all the "curative laws" up to that time; title first, those which refer to the deed defectively executed or recorded. Among these, section 1, enacted in 1856, cures all acknowledgments taken before clerks of court; section 2, of 1858, deeds attested by only one witness. Sections 3 and 4 do the same in 1863, and validate the record of such deeds. Section 5, of 1863, validates the certificate of a notary who was a banker or broker; section 6, of 1864, those made by McTavish, governor of Assiniboia. Sections 7 and 8 cure and make evidence all records in the proper county, though not recordable. Section 9, of 1866, gives force to acknowledgments taken by territorial judges of probate; sections 10 and 11, those before officer, out of state, who has an official seal, but is not further vouched for as required. Section 12, of 1867, cures conveyances not attested by any witness; sections 13 and 14, of 1870, those executed and acknowledged out of the state according to the law of the place, and bearing a certificate to that effect, the record thereof to be evidence. Sections 15 and 16 establish deeds acknowledged within the state without official seal; section 17, of 1871, certificates of foreign notary without seal; section 18, of 1872, deeds with one subscribing witness; sections 19 and 20, of 1873, acknowledgments of married women where "without compulsion by the husband" has been omitted; section 21, of 1875, where no separate examination is shown. Sections 22–30, from 1875 to 1878, cure other deeds defectively acknowledged or attested. The second volume, which contains the amendments down to 1889, contains other acts as late as 1887. One of that year, as section 30p, gives force to the power of attorney made by a married woman for the conveyance or incumbrance of land, if the

In New York, a colonial act of 1771 first made the separate acknowledgment of married women necessary; an act of 1773 cured deeds which since the former act might not have been thus acknowledged by women out of the colony. This was before any written constitution existed.[539] No general retrospective laws have since been passed in New York, like those of Pennsylvania, for the cure of faulty acknowledgments; but special acts confirming deeds of corporations that were void for irregularity, but were intended by the governing body to pass the title, have been sustained as valid.[540] In Arkansas, Texas, and New Jersey, healing statutes giving force to the otherwise invalid deeds of married women have been sustained. The difficulty here is that a married woman can, at common law, make no executory contract, and declare no trust, and that, therefore, the statute which gives validity to her attempted conveyance does much more than enforce a contract or an equity.[541] In Illinois, Wisconsin, and Alabama, the Kentucky doc-

husband joins with the attorney in the latter. Several of these acts (all of which are retrospective) provide expressly that the rights of intermediate purchasers shall not be affected. A curative act of 1858 gave force to deeds not attested by two witnesses. It was held in Thompson v. Morgan, 6 Minn. 295 (Gil. 199), that it was void as against intermediate incumbrancer. Again, in the acts of 1889 we find an act of February 26th curing the defect when a married woman is not described in the acknowledgment as the wife of her co-grantor; an act of March 16, 1891, cures deeds executed and put to record without subscribing witnesses.

[539] Jackson v. Gilchrist, 15 Johns. 89; Constantine v. Van Winkle, 6 Hill, 177; Hardenburgh v. Lakin, 47 N. Y. 109.

[540] People v. Law, 34 Barb. 494. The legislature may also transfer the title from the trustee of a naked trust to the beneficiaries. Dutch Church v. Mott, 7 Paige, 77.

[541] Johnson v. Richardson, 44 Ark. 365, lays down the principle (1) that the constitution (of that state) does not forbid retrospective laws; (2) that the healing acts of March, 1883, which allow a correction of the certificate by the district court, on showing what took place at the privy examination, affect only the proof, and must therefore be construed to apply to deeds theretofore acknowledged; (3) that a pending suit gives no vested right. So, in Texas, article 4353 et seq. of the Revised Statutes, authorizing courts to correct deeds according to the facts, were applied as acts of "evidence" to deeds of married women. Johnson v. Taylor, 60 Tex. 360. In New Jersey healing acts making instruments otherwise void carry out the intention of the parties were held valid in New Jersey Railroad & Transportation Co. v. Mayor, etc., of

trine has been followed. Acts of the legislature confirming deeds void in the matter of form have been held unconstitutional, as taking from the apparent grantor the freehold or property still belonging to him or her, without consent or trial. And this result must follow everywhere, when the rights of purchasers in good faith have intervened; that is, when the grantor, disregarding the first and inoperative deed, conveys the land to a third person for value,—a case which we have seen is expressly provided for in some of the Pennsylvania acts.[542]

The whole subject of these validating, retrospective laws is fully treated in Cooley's Constitutional Limitations, under the head of "Protection by Due Course of Law;" but very few of his cases refer to statutes which validate deeds void for informality.[543] Where curative acts are sustained at all, they are construed liberally, to carry out their evident purpose; for instance, powers of attorney defectively acknowledged are embraced by an act curing defective deeds and "other instruments." [544]

The older state constitutions do not generally contain a guaranty of vested rights in property, except, in the words of Magna Charta, that "no man's freehold shall be taken, unless by the judgment of his peers or the law of the land." In some cases they guaranty "due course of law." But these clauses did not attract attention till the days of the fourteenth amendment, which gave a national

City of Newark, 27 N. J. Law, 185, 197. The Iowa cases of Brinton v. Seevers, 12 Iowa, 389, and Ferguson v. Williams, 58 Iowa, 717, 13 N. W. 49, do not go so far, for they only give validity to the recording of deeds against which no vested rights had yet arisen. The New Jersey acts can be found mainly in the supplement (1877–1886), "Conveyances": sections 26–30, as to acknowledgments; sections 21–36, as to deeds; section 33 (act of 1882) validates deeds of married women made by attorney, section 35 (act of 1883) deeds made by attorneys in their own name.

542 Russell v. Rumsey, 35 Ill. 362 (act seeking to release dower); Alabama Life Ins. & Trust Co. v. Boykin, 38 Ala. 510; Orton v. Noonan, 23 Wis. 102.

543 Cooley, Const. Lim. quotes on the side of these acts Chief Justice Parker in Foster v. Essex Bank, 16 Mass. 245; also, "Courts do not regard rights as vested contrary to the justice and equity of the case," from supreme court of New Jersey in New Jersey Railroad & Transportation Co. v. Mayor, etc., of City of Newark, supra.

544 Collins v. Valleau, 79 Iowa, 626, 43 N. W. 284, and 44 N. W. 904.

guaranty for "due course of law." Hence, the older objections to curative laws were made on the general ground of some necessary restraint on the lawmaking power; and, on error to the supreme court of the United States, nothing could be invoked but the clause against "laws impairing the obligation of contracts." The supreme court has had three cases before it in which a healing act sought to give validity to a contract which, under the law in force at the time of its making, was void. In 1826 Pennsylvania repealed the old oppressive statutes directed against the holders of Connecticut titles, by which no contract of tenancy under them as landlords could exist, and enacted that such contracts theretofore made should be valid. The supreme court of Pennsylvania applied the new law to a pending suit, worked out an estoppel from the tenancy, and adjudged possession of a farm to the landlord. The supreme court of the United States could not find here any impairment of the obligation of contracts, and, there being no other casus foederis, had to affirm this judgment; and soon afterwards, upon the same ground, one that came up from Pennsylvania under the other healing act of 1826, above mentioned, referring to the deeds of married women.[545] A much later case came from Illinois, where a mortgage had been given to a New York corporation, while a law was in force declaring all contracts of loan by foreign corporations void. A subsequent statute, which gave validity to the securities theretofore executed upon such loans, was sustained by the supreme court of Illinois; and, on an appeal to the supreme court at Washington, the appellant claimed the guaranty of the fourteenth amendment for "due course of law"; but the constitutional point was evaded as the party who raised it had no standing in court for such a purpose, since he had acquired his rights after the passage of the act.[546] In Kentucky, no retrospective law, though otherwise unobjectionable, is allowed to affect a pending action, except as against the commonwealth or municipal corporations, on the ground that the legislature must not interfere with the province of the courts. However, the courts not only of Pennsylvania, but of other states, have disregarded this distinction,

[545] Satterlee v. Matthewson, 16 Serg. & R. 169; Id., 2 Pet. 380 (on error); Watson v. Mercer, 8 Pet. 88 (on error from Sup. Ct. Pa.).

[546] Gross v. United States Mortg. Co., 108 U. S. 477, 2 Sup. Ct. 940.

and hold that a person cannot acquire a vested right by bringing a suit.[547] In some of the states, the curative laws referring to deeds are scanty, rather mild, and of comparative late date, and do not undertake to give force to the deeds of married women, otherwise void; but deal only with smaller irregularities, mainly in the certificate of acknowledgment. So in Maryland, where a few of these retrospective acts have been passed between 1864 and 1882; and these have, so far as passed upon, been sustained.[548] Where an act seeks to give validity to the defective execution of a power to sell a debtor's land for debt (such as will be treated of hereafter under "Power of Sale—Deed of Trust"), the tendency is naturally against giving such act any retrospective effect; not only upon powers already faultily executed, but even upon former deeds containing such a power.[549]

[547] Thweatt v. Bank of Hopkinsville, 81 Ky. 1, 8. Contra, see note 536; Green v. Abrahams, 43 Ark. 420, resting on Cooley, Const. Lim. p. 476; and Johnson v. Richardson, supra, note 541. However, intervening vested rights are not to be disturbed.

[548] Gen. Pub. Laws, art. 21, cls. 77–82; Gambrill v. Forest Grove Lodge, 66 Md. 17, 5 Atl. 548, 10 Atl. 595.

[549] Gordon v. Collett, 107 N. C. 362, 12 S. E. 332. But see, contra, Madigan v. Workingmen's Permanent Bld'g & Loan Ass'n, 73 Md. 317, 20 Atl. 1069. In late years, laws curing flaws in deeds by married women have been quite numerous; e. g. there is a Connecticut act of June 29, 1893, which cures any conveyance made by the wife of a nonresident husband, without his co-operation, with the significant addition that the rights of a subsequent purchaser from husband and wife, already accrued, shall not be affected.

CHAPTER VI.

TITLE OUT OF THE SOVEREIGN.

§ 65. The Indian Title.

The country which is now embraced in the United States, whether a part of the original thirteen colonies, or acquired since from Spain, France, or Mexico, was, before the arrival of its present settlers of European descent, inhabited by a great number of wandering tribes of "savages, on whom the newcomers bestowed the general name of Indians." Even those among them who had advanced furthest in the arts of peace had no permanent possession or heritable ownership of land; and by far the greater portion lived mainly by hunting and fishing, only occasionally eking out their wants by a crop of maize. It is no wonder that European princes and colonists should have treated an ownership of land so loosely held, as that of the individual Indians, with very little respect. When they felt the need for purchasing land, they bought from a "nation," or tribe, through its chief men. The governments of the several nations which settled North America—the English, Dutch, Spanish, and French—named in their colonial charters or royal decrees vast tracts of territory over which they asserted sovereignty, and from which each of them excluded all other European governments; but they had still to deal with such right as the Indian tribes might have to the land, or such force as these tribes might exert to keep off intruders. Between the several European nations, the prior right

was nominally determined by first discovery, but really by the sword.

Chief Justice Marshall, in one of his most noted opinions, sets forth these historic truths with great force, and, applying them to the English colonies, says:[1] "In the first effort made by the English government to acquire territory on this continent, we perceive a complete recognition of the principle which has been mentioned. The right of discovery given in the commission (to Cabot) is confined to countries then unknown to all Christian people, and of these Cabot was empowered to take possession in the name of the king of England; thus asserting a right to the possession notwithstanding the occupancy of the natives, who were heathens, and at the same time admitting the prior title of any Christian people who may have made a previous discovery." The chief justice then refers to the Virginia charters of 1606 and 1609, to that which in 1620 was granted to the Plymouth Company, the charter of 1664 to the duke of York, and grants, made in 1663 and 1666, of the lands lying south of Virginia, and proceeds: "Thus has our whole country been granted by the crown while in the possession of the Indians. These grants purport to convey the soil as well as the right of dominion to the grantees." Under the governorship of Lord Dunmore, shortly before the Revolution, notwithstanding the proclamation made by the British crown in 1763, adventurous men from Virginia and the adjoining colonies pushed out westward to the fertile lands of the Ohio Valley, and many of them sought to acquire the ownership of vast tracts of land by bargaining on their own account with the Indians.[2] The jealousy of the state legislatures was aroused, and, as the chief justice further says: "Virginia, particularly, passed an act, in the year 1779, declaring her 'exclusive right of pre-emption from the Indians of all the lands within the limits of her own char-

[1] Johnson v. McIntosh, 8 Wheat. 543, 576, etc. The Indian title of occupancy is compatible with a fee in the state. Fletcher v. Peck, 6 Cranch, 87.

[2] The most noted example is that of Richard Henderson and his associates, who, in 1775, bought from the Cherokee Indians the vast tract between the Ohio, Cumberland, and Kentucky rivers. The Virginia legislature compromised their claims by granting to them 100,000 acres at the mouth of the Green river, including what is now the city of Henderson. 9 Henning's Virginia Statute at Large, page 571, reprinted in Morehead & Brown's Statute of Kentucky, page 938, and referred to in Holloway v. Buck, 4 Litt. (Ky.) 253; Buck v. Holloway's Devisees, 2 J. J. Marsh. 163.

tered territory, and that no persons have or ever had a right to purchase any lands within the same from any Indian nation, except only persons duly authorized to make such purchase, formerly for the benefit of the colony, and lately for the commonwealth.' The act then proceeds to annul all deeds made by Indians to individuals for the private use of the purchasers." The other twelve colonies pursued the same policy; though they sometimes, by sovereign act, recognized or ratified some one particular purchase of Indian land.[3] Speaking of the Indian title as subject to that of the crown or the colony, the chief justice says: "If an individual might extinguish the Indian title for his own benefit, or, in other words, might purchase it, still he could acquire only that title. Admitting their [the Indian's] power to change their laws or usages so far as to allow an individual to separate a portion of their lands from the common stock, and hold it in severalty, still it is a part of their territory, and is held under them by a title dependent on their laws. The grant derives its efficacy from their will; and if they choose to resume it, and make a different disposition of the land, the courts of the United States cannot interpose for the protection of the title." It follows that one holding a grant from an Indian tribe or from an individual Indian, cannot prevail in a contest with a purchaser from the state or the United States after the one or the other has extinguished the Indian title by treaty or otherwise.[4]

The first and greatest acquisition of new territory was that made of Louisiana by the treaty of 1803. By its second article, the cession made on behalf of the French republic is made to include "the adjacent islands belonging to Louisiana, all public lots, and squares,

[3] In the argument for defendant in error in Johnson v. McIntosh reference is made to Penn's purchase from the Indians, which did not strengthen his title in law. Penn v. Lord Baltimore, 1 Ves. Sr. 444. Counsel also concede some exceptions in the New England states, the Indian title being recognized for local and political causes. Lynn v. Nahant, 113 Mass. 433, and Clark v. Williams, 19 Pick. 499. Under a colonial statute a sale of the aboriginal title without the license or approbation of the general court was void.

[4] In Goodell v. Jackson (court of errors) 20 Johns. 693, 733, reversing Jackson v. Goodell, Id. 188, it is held that no white man can buy land from an Indian individually or from a tribe collectively, even where their title as a tribe has been recognized by the state or nation.

vacant lands, and all public buildings, etc., which are not private property."[5] In pursuance of the policy which the British crown and its successors in authority had pursued in the territory of the thirteen colonies, the United States interpreted the words "vacant lands" to embrace all those which were still held by the Indian tribes, and which extended from New Orleans and Mobile to Puget Sound on the Pacific. The same words, "vacant lands not private property," are used again in the treaty with Spain made in 1819 for the acquisition of Florida.[6] The treaty of 1848 between the United States and Mexico, by which the vast territory then known as Upper California and New Mexico was added to the Union, speaks distinctly of the "savage tribes" who are said to occupy a great part of the ceded territory. These are spoken of as the common enemies of both republics. A subsequent article reserves their "property" (not discriminating between land and movables) to all Mexicans, whether established in the ceded territory or not, implying that any claims on behalf of the "savage" tribes are not to be respected.[7]

It is well known that in Mexico a considerable, perhaps the greater, part of the settled population is of pure Indian blood; but with regard to those Indians who kept up their tribal relations, even though they were converted to Christianity, as the Mokalumne Indians of California, the policy of the Spanish and Mexican governments was the same as that of the British and United States governments in the colonies or older states. At least, the courts of California from the very beginning took that view of the Mexican law, and held that neither a single member or chief nor even all the members of a tribe, had a title which they could transfer to a white man[8] But while the courts of the states of the United States have never looked upon the "aboriginal title" of the Indian as anything more than a right of occupancy, to be enjoyed at the pleasure of the white man's government, an Indian tribe may have a better, and sometimes a perfect, title to land, under treaty, and, in the older states, under

[5] 2 Rev. St. U. S. "Pub. Treat." p. 232.

[6] 2 Rev. St. U. S. "Pub. Treat." p. 712.

[7] 2 Rev. St. U. S. "Pub. Treat." p. 492. These treaties are printed also in the 8th volume of Statutes at Large.

[8] Suñol v. Hepburn, 1 Cal. 255; s. p. in Hicks v. Coleman, 25 Cal. 122. See, also, People v. Antonio, 27 Cal. 404.

special laws, a number of which were enacted in Massachusetts and New York. The tribe acknowledges the supremacy of the state or Union as the supreme lord of the soil, and receives from it such title as it may give, either in its old capacity as a tribe or as tenants in common, with such power of partition into several shares or of alienation as the treaty or special law may confer.[9]

Timber is considered real estate, in a sense in which annual crops are not; and none but the owner of the land in fee has a full ownership in the timber. The Indians have, incident to their occupancy, the right to cut the timber, in order to clear, as well as for buildings and fences; and may sell what timber has been removed to clear the ground for tillage. But to cut timber on purpose to sell is not an incident of occupancy (just as a life tenant has no right to do so); hence, the Indian cutting timber for such a purpose and selling it cannot give title to it as against the United States.[10]

The United States, in granting the fee of land still "Indian country," whether as the ancient haunt of an Indian tribe or as a reservation, has often in its grant agreed to extinguish the Indian title as speedily as possible; and thereby impliedly forbidden its grantees to take possession before this is done. But, where congress grants a right of way to a railroad through an Indian reservation, the right to take possession is clearly given, as inseparable from the purpose of the grant. The justice of such action is a question for the government, and is "not a matter open for discussion in a controversy between third parties, neither of whom derives title from the Indians." [11]

[9] See Blacksmith v. Fellows, 7 N. Y. 401; Fellows v. Denniston, 23 N. Y. 420; Howard v. Moot, 64 N. Y. 262,—all growing out of the conventions made in 1786 between the states of Massachusetts and New York, the legislation of the latter, and the treaty of the United States with the Seneca Indians, on the disputed territory. See, also, the cases of Danzell v. Webquish, 108 Mass. 133, and Pells v. Webquish, 129 Mass. 469, and Mayhew v. Gay Head, 13 Allen, 129, on the Marshpee and Gay Head Indians of Massachusetts.

[10] U. S. v. Cook, 19 Wall. 591; Beecher v. Wetherby, 95 U. S. 517.

[11] Buttz v. Northern Pac. R. Co., 119 U. S. 55, 7 Sup. Ct. 100 ("United States will be governed by such considerations of justice as will control a Christian people in their treatment of an ignorant and dependent race"); Missouri, K. & T. R. Co. v. Roberts, 152 U. S. 114, 14 Sup. Ct. 496 (grant to predecessor of appellant of strip of 200 feet across Osage reservation).

It being thus clear that the Indian title can be acquired only by the sovereign, the next question arises, who, under the federal constitution, is this sovereign? Is it the state within which the land is occupied, or is it the nation? While an exception seems to have been made in favor of the state of Massachusetts, in its dealings with the Marshpee and Gay Head Indians, who were not treated as tribes, but as citizens "under guardianship," the unbending rule has been laid down by the supreme court of the United States that the power to deal with Indian tribes, under the commerce clause and under the reference to "Indians not taxed," belongs wholly to the national government in its law or treaty-making capacity, and can be exercised by a state only with the assent of congress.[12] In the opinion of the supreme court, as rendered in 1866, where Indians, being in possession of lands, their ancient and native homes, the enjoyment of which, without disturbance by the United States, has been secured to them by treaty with the federal government, with the assurance that "the lands shall remain theirs until they choose to sell them," the state in which the lands lie has no power to tax them, either for ordinary town or county purposes or for the special purpose of surveying them and opening roads through them. A fortiori, such lands cannot be sold for the tax, even though it be provided that such sale shall not affect the right of the Indians to occupy the land.[13]

Another case was decided by the supreme court, in the same year, defining what is meant by the tribal relations. As long as the national government makes treaties with a set of Indians, or has an agent

[12] Worcester v. Georgia, 6 Pet. 580; Mitchel v. U. S., 9 Pet. 748; The New York Indians, 5 Wall. 761. Following these cases, it was held in 1894 by the supreme court of New York, in Buffalo R. & P. R. Co. v. Lavery, 27 N. Y. Supp. 443, under an act of congress of February 19, 1875, validating prior leases by the Seneca Nation, and authorizing renewals, that the old lessee had a better right than a new tenant holding a lease under state authority only. Small bands of Indians in Connecticut seem also to have been left entirely to state regulation. The guardianship of the state of Massachusetts over the Indians within it was abolished by an act of 1869. See Ex parte Coombs, 127 Mass. 278. Although the state cannot deal with the Indians, it can grant the land while subject to their right of occupation. Clark v. Smith, 13 Pet. 195.

[13] The New York Indians, supra.

among them paying annuities, and dealing otherwise with head men in its behalf, the fact that the primitive habits of the savage tribe have been broken into by their intercourse with white men, among whom they find themselves, does not enable the state to look on the tribe as broken, to treat its members as citizens and to tax them. Even when, under treaties with the United States, patents have been issued to such members in severalty, the lands so held do not come within the taxing power of the state.[14] The lands of Indians held in severalty are free, not only from the tax laws, as long as the United States recognize the tribe as still existing, but from all other laws of the state, such as those governing descent. The customs of the Indian tribe in force at the time of the descent cast, to be proved like foreign laws, alone govern the devolution of the title upon the death of the owner. These laws generally forbid the descent from an Indian to a white person, which would otherwise often happen where the state law makes husband and wife heirs to each other.[15]

§ 66. Colonial and State Patents.

The titles in the United States run back to patents or grants from the sovereign power. Some of the colonies began their life under

[14] The Kansas Indians, 5 Wall. 737. A treaty exempted the lands of the Indians from levy, sale, and forfeiture. "This being construed favorably to them, is not confined to judicial sales, but extended to levies for taxes." In Board of Com'rs of Allen Co. v. Simons, 129 Ind. 193, 28 N. E. 420, this privilege of freedom from taxation was under the provisions of the ordinance of 1787, and the act for the admission of Indians allowed to the descendants of an Indian chief, who had remained in the state when their tribe emigrated, as to lands patented to him in severalty, in conformity to a treaty. See, as to restrictions on alienations, which in treaties with Indians formerly, and in acts of congress dealing with them lately, have often been introduced, and which hamper sales not only by the patentee, but also by his heirs: Pickering v. Lomax, 145 U. S. 310, 12 Sup. Ct. 860; Ashley v. Eberts, 22 Ind. 55; Steeple v. Downing, 60 Ind. 478, 497; Murray v. Wooden, 17 Wend. 531. Under the act of congress (18 Stat. 420) the clause against alienation is implied in the patent as effectually as if set out. Taylor v. Brown, 5 Dak. 335, 40 N. W. 525.

[15] A restraint upon alienation, made in a private act of congress, which granted land to an Indian in fee, was sustained in Smythe v. Henry, 41 Fed.

a royal charter, which not only conferred the powers of government, but also the title to the soil, on a "company," or on a "proprietary." In others, especially in Virginia, the soil remained in the king, and land patents were issued in his name by the governor, under the great seal of the colony. When New York was conquered from the Dutch, even when it had been lost, and was reconquered, the grants which had been made by the Dutch governor under the authority of the United Provinces were respected. Indeed, the titles to the most valuable lands on Manhattan Island run back to Dutch grants.

We have, in the preceding chapters, discussed some of the most important incidents of the patent: First, the laws of boundary and description, which belong to such instrument, which are simply the deeds of the sovereign, in common with deeds or other instruments by which title passes between man and man. And, in connection with boundaries, we have naturally touched upon riparian and littoral rights, accretion, and the title to oyster beds, or the land under water at low tide. We have referred to the necessity of the seal to constitute "letters patent," and thus to carry the legal title to land;[16] and have shown how a grant from the sovereign, unlike a private grant, is completed without delivery, taking effect as a matter of record.[17] Very many of the early land grants were legislative acts, or, rather, acts of the sovereign body. The general court of Massachusetts, or of Rhode Island, in its early days, was fashioned rather after a stockholders' meeting of the New England Company than a lawmaking assembly, and its "votes" and "ordinances" covered every subject of governmental activity. And among the most important of these was the grant of large tracts to bodies of "proprietors." The early acts of the Virginia legislature comprise, also, many grants of land to applicants, upon payment of the price or fulfillment of other prerequisites to the colony. The applicant had either to show that the Indian title had been previously extin-

705, although the same act made him a citizen. "As long as the United States recognize their national character, they are under the protection of treaties and the laws of congress, and their property is withdrawn from the operation of state laws." The Kansas Indians, 5 Wall. 737, 757; O'Brien v. Bugbee, 46 Kan. 1, 26 Pac. 428. The land of an Ottawa Indian could not be sold by guardian under license. Wiggin v. King, 35 Kan. 410, 11 Pac. 140.

[16] Supra, chapter 5, §§ 48, 58.

[17] Supra, chapter 5, § 51.

guished or that he himself had bought out and satisfied the Indian owners or occupants. Later on, general laws, empowering the governor to sell at a stated price, and on conditions fixed by law, took the place of these special acts; and then grants or patents were issued in the king's name.[18]

Aside of these legislative grants, and of patents which were issued in England to court favorites or adventurers for immense tracts, without any view or even knowledge of the ground, while the whole region was occupied by unfriendly Indians, we find that acquisition of title by private owners generally went through three steps, the first of which was an application known as an entry. This always indicated on what ground or consideration the land was claimed,—whether for payment in money or its equivalent in land warrants, or for services rendered in war (a military entry), or to comply with the policy of the sovereign to have his wild lands settled up (that is, by way of "settlement" or head right). The description given in the entry or application would be of the loosest kind, but might, when lodged in some public office, be a slight indication to others to keep off the ground thus preoccupied.[19]

[18] Rutherford v. Greene's Heirs, 2 Wheat. 196. Here an act of the legislature of North Carolina gave 25,000 acres of land to Nath'l Greene, to be surveyed out of a much larger tract. Held, that the fee vested in Greene as soon as the survey was returned; and the state seal was not necessary, though the constitution required it to be affixed to all grants. Virginia acts of this kind may be found in the early volumes of Henning's Statute at Large, and are referred to by Jefferson in his Notes. And so in New England. Proprietors of Enfield v. Day, 11 N. H. 520 (legislative grant requires no particular form). And see Massachusetts cases at end of this section.

[19] Lindsey v. Miller, 6 Pet. 666 (entry under Virginia laws): "The identity of the tract being ascertained, the inquiry is whether the description was at the date of the location with the surveyor sufficient to enable others to find and know it. This branch of the subject has called forth many decisions, and embraces the doctrine of notoriety," etc. Introduction to 1 Bibb, pp. xvi.–xxi. The North Carolina courts required no such notoriety to make a valid entry, and very little certainty. Blunt v. Smith, 7 Wheat. 248. Tennessee decisions are not quite so loose, Winchester v. Gleaves, 3 Hayw. 213 (on notoriety); on certainty, Murfree's Lessee v. Logan, 2 Overt. 220. Under the North Carolina law, entries must be laid off in squares or oblong rectangles. McGavock v. Shannon, 5 Yerg. 128 (but quaere if those in other forms were held void?). The older reported cases (e. g. Stith v. Hart's Heirs, 6 T. B. Mon. 630) often count four links in the chain, viz. warrant, entry, survey, and

The next step was the survey, which in some states had to be preceded by a warrant to authorize it, based on the entry. The survey had to be made on the ground. Lines had to be run and marked, by blazing the forest trees or by other visible signs. The monuments and lines thus run were considered the survey. The field notes and map returned by the surveyor were deemed only a copy of the survey. The survey being returned, the applicant would, upon compliance with all other requisites of the law be entitled to his patent; and such patent was the third and last step in perfecting the title.[20]

In the proprietary colonies the land grants proceeded from the proprietaries, the heirs of William Penn or of Lord Baltimore.[21] In

patent. We do not here count the "military warrant" or "treasury warrant," which takes the place of money as one of the steps, as it does not call for any particular land; it is only "located" by means of the entry.

[20] Supra, chapter 2, § 4. The Virginia assemply in 1748 and 1763 provided county surveyors for each county, who were examined and approved by the professors of William and Mary College. Patents could issue only upon the return made by the county surveyor in person or by deputy. A survey made by deputy is in law deemed that of the principal. Craig v. Radford, 3 Wheat. 594. For several years Kentucky, as a part of Fincastle county, Virginia, had only a deputy surveyor.

[21] Kirk v. Smith, 9 Wheat. 241 (from Pennsylvania) gives a fair and full account of the land system of that state. The soil of the whole state was granted by Charles II. to Wm. Penn, March 4, 1681, and all titles are derived from him or his heirs. In July 1681, he agreed with a number of adventurers "that one-tenth of the soil in tracts of 100,000 acres should be set aside under the name of manors, to be sold on special terms, the rest being sold on common terms to all comers. In 1779 the legislature confiscated so much of the other lands as were still vested in the proprietary, the then living heir of the founder; but left him the so-called "manor lands"; and, as was decided in the above case, those parts of the manor the title whereof was still retained as security for purchase money. The commonwealth then opened a land office for its own lands, while the land office of the Penns was kept open till all the remaining manor lands were sold. Sales, as it there appears, were generally made subject to a quit rent of a half penny per acre,—a rent service. In Pennsylvania a survey by the proper officer, duly returned, and payment of the price, gave a legal title (there being then no "equity" known in that state), without a patent. Irvine v. Sim's Lessee, 3 Dall. 425. All the Maryland titles are derived from the original grant to Lord Baltimore. See Penn v. Lord Baltimore, 1 Ves. Sr. 444. In 1 Har. & McH., which contains all the reported cases of the provincial court from 1658 to 1774, a number of cases bearing on

Virginia and New York, lands were granted in the name of the king, but "tested" and signed by the governor of the colony.[22] At the Revolution the style was changed in accordance with the new conditions. The governor acted henceforward in the name of "the people," or of "the commonwealth." Patents were issued by the royal governors for some time after hostilities had broken out. The provincial congress of New York fixed the 9th day of October, 1775, as the last date of which royal grants would be respected. In other states other dates were chosen, according to the progress of the revolutionary movement.[23]

The following is the form of patents as they were issued by the governors of Virginia for a number of years after the commonwealth was proclaimed. Under patents in this form, all the best lands in Western Virginia, West Virginia, and Kentucky are held: "Patrick Henry, Esq., governor of the commonwealth of Virginia, to all to whom these presents shall come, greeting: Know ye, that, in consideration of military service performed by C. D. to this commonwealth [or in consideration of the sum of £———, current money, paid by C. D. into the treasury of this commonwealth, etc.], there is granted by the said commonwealth a certain tract or parcel

the old land system can be found. In Maryland, the land office was always deemed a court of record. Formerly, the chancellor presided in it, in all contentious matters (see Baltimore v. McKim, 3 Bland, 453), and from his decision there was no appeal. At present, under the first section of the article on the land office, the commissioner holds a court of record.

[22] Lord Dunmore's patents, in the name of George III., for military services rendered in the "French and Indian War," issued in 1773 and 1774, are the basis of many Kentucky titles, and repeatedly spoken of in the reports of that state. Gov. Dongan's patents of land in New York especially by way of confirmation of Dutch titles are well known from the reports of that state. See Trustees of Brookhaven v. Strong, 60 N. Y. 56, for an account of a colonial patent granted by the governor on the advice of the council and under the colonial seal. A colonial act of 1699 forbade the issual of grants by the governor to hold for a longer time than during his term of office. This act was repealed November 27, 1702, but the repealing act was annulled by Queen Anne in council in June, 1708. Grants issued between the passage of the act of 1702, and its veto in England were valid. People v. Rector, etc., of Trinity Church, 22 N. Y. 44; Bogardus v. Trinity Church, 4 Sandf. Ch. 721.

[23] The date above is named in the New York constitutions of 1777, 1822, and 1846. By act of October 22, 1779, the state of New York assumed the ownership of all colonial property.

of land, containing ——— acres, lying in the county of ———, and hundred of ———, etc. [describing the land by metes and bounds, courses and distances, and the date of the survey on which the grant issues], with its appurtenances, to have and to hold the said tract or parcel of land, with its appurtenances, to said C. D. and his heirs forever. In witness whereof, the said Patrick Henry, governor of the commonwealth of Virginia, hath hereto set his hand, and has caused the seal of the said commonwealth to be affixed, at ———, on the ——— day of ———, in the year of our Lord 17—, and of the commonwealth the ———. Patrick Henry. [L. S.]"

A patent, having been issued under the great seal of the state, under that of the king by the English law, or under the proper seal of the United States for sealing land grants, cannot be assailed collaterally. It may have been obtained by fraud,—for instance, upon a false suggestion that the price had been paid, when it had not been paid, or that the grantee was a settler within the meaning of some law enacted to encourage settlements, when in fact he was a speculator and absentee,—yet it stands good against all the world, unless or until the sovereign who granted shall bring his writ of scire facias or his bill in chancery to recall or quash the patent;[24] which will not be done after the land has passed into the hands of a bona fide purchaser. The great seal imports "absolute verity." But when the patent, upon its face, is issued under conditions or circumstances which do not, under the law, justify its issue, it may be collaterally assailed as void. For the king or commonwealth can only act through officers and agents, and is not estopped by their mistakes, nor by their willful misdeeds, or their connivance with fraud.[25]

[24] Taylor v. Fletcher, 7 B. Mon. 80, 82; McMillan's Heirs v. Hutcheson, 4 Bush, 613; Marshall v. McDaniel, 12 Bush, 381. In all these cases the right of the injured party, as relator, to have a scire facias brought by the commonwealth, is stated arguendo; but nothing of the kind was ever successfully done in Kentucky. Sullivan's Lessee v. Brown, 1 Overt. (Tenn.) 6 (consideration not inquired into). A conflicting junior grant is void only as far as it conflicts, Patterson v. Jenks, 2 Pet. 216; Miller's Lessee v. Holt, 1 Overt. (Tenn.) 111 (junior grantee cannot set up voidness of older patent against bona fide purchaser under it); Bouldin v. Massie's Heirs, 7 Wheat. 122 (patent issued, assignment of warrants on which it rests need no longer be proved); Decourt v. Sproul, 66 Tex. 368, 1 S. W. 337.

[25] Patterson v. Winn, 11 Wheat. 389 ("but where the grant is absolutely

Thus, when the law limits land grants to a given quantity, such as 400 acres, a patent purporting to be issued under such a law, but conveying 500 acres, would be void.[26] Or, where the law forbids the issue of patents within named lines, which then bound off an

void upon its face, or where the state has no title, or the officer has no authority to issue the grant," etc.); Blunt v. Smith's Lessee, 7 Wheat., 248; Brown v. Brown, 103 N. C. 213, 8 S. E. 111 (in Cherokee country), relying on Reynolds v. Flinn, 1 Hayw. (N. C.) 123; Avery v. Strother, Conf. R. 434; Lovinggood v. Burgess, Busb. 407. Taylor v. Fletcher, supra, affirms, but does not apply, the principle. In Bledsoe v. Wells, 4 Bibb. 329, a patent under the Kentucky treasury warrant law, which forbade grants within the "military district," did not show on its face that the lands lay within it, but made it apparent to those acquainted with the locality. It was held not to be void. In Rollins v. Cherokees, 87 N. C. 229, 248, the query is put whether avoiding a patent as against bona fide purchasers would not be denying them due process of law. The following English authorities and positions, showing when the king's grant can be avoided, are quoted by counsel in Bell v. Hearne, 19 How. 252: Barwick's Case, 5 Coke, 94, where it is said: "And it is a maxim that if the consideration, which is for the benefit of the queen, be it executed or be it executory, or be it on record or not on record, be not true, or be not duly performed, or if prejudice may accrue to the queen by reason of nonperformance of it, the letters patent are void." (This is not good law in America, unless "void" means "voidable.") In the Case of Alton Woods, 1 Coke, 51a, it is held, if the king's grant cannot take effect according to its intent, it is void. 2 Saund. 72, note 4, to Underhill v. Devereux. Where a patent is granted to the prejudice of another's right, he may have a scire facias to repeal it at the king's suit, and the king is of right to permit the person prejudiced to use his name (Sir Oliver Butler's Case, 2 Vent. 344). (The attorney general of the United States has often sued to vacate land patents in the interest of private parties; the state governments very rarely.) Bill in equity will lie to decree a patent to be delivered up and canceled in a case of fraud, surprise, or gross irregularity in issuing it. Attorney General v. Vernon, 1 Vern. 277, 280, 370. But the grant may follow the survey, even when the latter conflicts with the entry. Sullivan v. Brown, 1 Overt. (Tenn.) 6. In North Carolina, in 1798, a statute authorized a proceeding by scire facias. Vacating the patent under such a writ binds all purchasers. Terrell v. Manney, 2 Murph. 375.

[26] Plain as the proposition is, and often intimated, it is hard to find a case in which it was applied. See, for instance, Mendenhall v. Cassells, 3 Dev. & B. 49. In Polk's Lessee v. Wendell, 9 Cranch, 87, an area by course and distance of over 50,000 acres, where a quantity of only 25,600 was paid for and named, was excused on the ground that prior grants within the lines took up the surplus. However, this voidness of a patent at law comes to little in a contest with a junior grantee; for the effect, even of a void patent, or of the

Indian reservation, a patent describing and conveying a tract within those limits is void, though at the time of its issue the Indian title in the reservation had been extinguished by the United States.[27] Great frauds have, however, been allowed to pass, by discrepancies between the quantity stated and the courses and distances of the survey; the latter including a much larger area than is expresed in acres. Thus, patents have been sustained which showed upon their face, with the aid of a little calculation, that more land was granted than the law permitted at all, or certainly more than had been paid for; yet the court felt bound by the assurance on the face of the patent that lines measuring 300 acres inclosed only 200, or even that 8,000 acres were 1,400.[28]

entry or survey, which precedes it, under many of the state laws, is to "segregate the land from the public domain," and thus to render the junior entry or grant also void, under statutes which restrict the land office to entries on, or grants of, vacant lands. Roberts v. Davidson, 83 Ky. 281,—where a mandamus against the county surveyor on behalf of a subsequent entry was refused after a void patent on this ground. It will be seen that this doctrine of "segregation" plays a great part in the United States land law. A patent of land granted before to another, under the older Virginia land laws, and on the Kentucky claims before the internal improvement law of 1835, is not deemed void. Clark v. Jones, 16 B. Mon. 126. Though it does not carry the title, it gives "title out of the commonwealth," within the meaning of the short limitation and the occupying claimant laws.

[27] Scott v. Price, 2 Head (Tenn.) 532 (act of 1851, being on occupied land); Smith v. Lee, 1 Cold. (Tenn.) 549 (under act of 1824, no notice given to occupant). The effect in these cases was that the grantee, as plaintiff, could not recover by reason of the title outstanding in the commonwealth. But, generally, the standing of a mere occupant, denying the validity of the patent for this purpose, is even weaker than that of a junior grantee. Todd v. Fisher, 26 Tex. 239; Kirksay v. Turner, 95 Ky. 226, 24 S. W. 620 (the mere prohibition in the statute to issue a patent does not render it void).

[28] Frazier v. Frazier, 81 Ky. 137. A rather weak conclusion after the brave remark that "the metes and bounds, courses and distances, are the highest evidences of the number of acres the commonwealth intended to convey." Overton's Lessee v. Campbell, 5 Hayw. (Tenn.) 166, and other cases in Tennessee. Under the Kentucky act forbidding grants of more than 200 acres, it was decided on mandamus (Register v. Reed, 9 Bush, 103) that one man might take out as many separate grants as he chose, and one man actually took patents for 252,000 acres in two adjoining counties, before the legislature could interfere. In White v. Burnley, 20 How. 235, a patent, which, under the law of "Coahuila & Texas," could be issued for only one square league,

There have been, however, many statutes which declared patents that might be issued under them in a given state of facts to be void in toto. Thus, the North Carolina act of 1777, under which the Western parts of that state and much of Tennessee were taken up and settled, directed that a senior grant issued on a junior entry should be void; and the elder entry could thus be set up against the elder grant in an action of ejectment,[29] while, under the analogous Virginia act of 1779, the elder entry could be made available only, either by caveat against the issue of the patent, or by bill in equity.[30] But, generally speaking, a bill in equity lies in many other cases on behalf of one who should have gotten the patent against him who actually got it; the latter being, in many judicial opinions, broadly declared to be a trustee of the title for the former. The distinction, when the issual of the patent should be deemed conclusive, and when subject to the scrutiny of a court of equity, will be discussed in the next section, with regard to congressional grants.[31] Thus, also,

covered by its outline over two square leagues, with a recital in the words of the surveyor that the excess was taken up by salt-water inlets. This recital was shown to be untrue. The court below charged the jury (with some qualification) that the grant was not fraudulent and void. On error the supreme court held that these qualifications were needless; that a grant or completed title from those having the political power to grant lands is not open to this objection by the holder of a junior title.

[29] See Taylor v. Brown, 5 Cranch, 234 (applicant for patent takes risk of finding unoccupied land; and is not a bona fide purchaser). There was such an act in Kentucky as to patents issued upon entries for which the survey was not returned before the time allowed by law (2 Morehead & B. 917), and a similar provision (1818) as to patents unlawfully issued in "Jackson's Purchase."

[30] The Kentucky reports show over a hundred cases in which the elder entry is set up in equity against the older patent. The last of these came before the court of appeals in 1848 (Rountree v. Barton, 8 B. Mon. 627), and went off against the older entry, not upon a question of notoriety or certainty, like almost all the others, but the benefit of the entry was lost through the failure of the surveyor to return the survey into the land office within the time limited. The same principle as to elder entries prevailed in Virginia, but was rather sparingly applied.

[31] Monroe Cattle Co. v. Becker, 147 U. S. 47, 13 Sup. Ct. 217. This was a purchase of school lands from the state of Texas. The patentee had, in fraud of the law, applied in several names for more land than he was allowed to buy, and had also filed and withdrawn applications fraudulently to keep

a Tennessee act of 1824 provided that all grants that might be issued for land in actual occupation by others than the grantee should be void, unless 30 days previous notice had first been given to the occupant; a later act, that no land under occupation can be granted at all. In Kentucky, an act of 1814 as to seminary lands declared any patent issued under it void if it interfered with prior claims. And the "internal improvement acts" of the latter state, beginning in 1835, under which the county courts were authorized to sell the remaining vacant lands at five cents an acre, or even less, directed that any grant under these acts of lands which had been granted before should be fraudulent; thus subjecting them to collateral attack, and taking from such grants the advantages which a junior patent enjoyed under the limitation and the occupying claimant laws.[32] While these laws have been enforced, another Kentucky act of 1809, declaring void any patent, under the treasury warrant law, that should be located within the "military" district, was evaded, in the good-natured view that the locator might not have known the true boundaries of that district.[33]

In a much-quoted case, the supreme court of the United States declared a patent issued by the state of North Carolina void, so as to let in a junior grant, on the following grounds: First, the express words of the statute declaring void a grant not supported by a previous entry; second, the cession by the state to the Union of all the western lands, except such as had been previously entered, before the issue of the elder patent: thus, if the entry had not in fact been made, as the junior grantee proposed to show, the state had no property in the land in question which it could convey.[34] State

others from applying for the desired lands. The distinction between law and equity is recognized in the early case of Patterson v. Winn, 11 Wheat. 380.

[32] But they are void only to the extent of interference. Hartley v. Hartley, 3 Metc. (Ky.) 59. The occupant under a void patent does not deduce title from the commonwealth. Little v. Bishop, 9 B. Mon. 240; McMillan's Heirs v. Hutcheson, 4 Bush, 611.

[33] Bledsoe v. Wells, 4 Bibb, 329.

[34] Polk's Lessee v. Wendall, 9 Cranch, 87; Id., 5 Wheat. 293, under the North Carolina act of 1777. It is also intimated that the North Carolina courts have upheld patents which those of Tennessee (where the land lay) would have disregarded. See Tate v. Greenlee, 2 Hawks, 231; Newsom v. Pryor's Lessee, 7 Wheat. 7 (a grant in Tennessee; only the first corner marked, all

statutes for the sale or disposition of public grants have often been so drawn that the patent could not lawfully issue without a previous survey, run out and marked on the ground; and that, by a natural construction given to the words of the law, a patent without such previous survey would be void. At the same time the country was so much infested with savages that a continuous survey, lasting perhaps two weeks or more, could not be undertaken. The patent would often indicate that the lines had not been run out; and the ground would certainly show that they had not been marked, and that such monuments as the law required had not been set up. Yet the states have excused delay in making survey and were unwilling to annul such patents when they came up for adjudication, in view of the necessities of the case, and the mischief of unsettling great numbers of other titles resting on the same character of paper surveys.[35]

In a former chapter, under the head of "Certainty of Description," those "inclusive patents" have been mentioned which the law of Virginia authorized, and that of North Carolina tolerated.[36] Often the inclusions were fraudulent. The buyer of public lands, having paid for 20,000 acres, would enter a quantity measuring 50,000 acres by its outer boundaries, "less 30,000 heretofore entered" or "heretofore granted," when in fact none had been entered or granted, or a much smaller quantity. Unless the burden to locate the exclusions is put upon the grantee, the commonwealth is cheated out of the quantity not paid for. While the supreme court of the United States, in a West Virginia case, intimated that the state can sell the excluded quantity, the Virginia courts seem to sustain the fraud; and Tennessee inclines in the same direction.[37]

It has been the rule in most of the states which disposed of their

else "protracted on paper"); Williamson v. Simpson's Ex'rs, 16 Tex. 435 (under the law of Coahuila & Texas, which required not only an actual survey, but monuments to be set up by the settlers); Armstrong v. Morrill, 14 Wall. 143.

[35] See 2 Morehead & B. St. Ky. pp. 907, 915; Kentucky Jurisprudence, p. 159; Beard v. Smith, 6 T. B. Mon. 430. In Fowler v. Nixon, 7 Heisk. (Tenn.) 719, it was held that a grant issued without a previous survey of the land is not void.

[36] Chapter 2, § 6, notes 77–79.

[37] See cases cited as above. Also Bowman v. Bowman, 3 Head (Tenn.) 49; which was, however, a contest between the fraudulent grantee and a mere intruder.

own lands that the land office deals only with the original domain, which has never been in private hands; not with lands which the commonwealth may have again acquired, either by deed from the private owner, escheat, or forfeiture for nonpayment of taxes, or which it has, for want of other bidders, bought at a tax sale. Other officers than those of the land office are appointed to dispose of and convey those lands which may have been acquired in such ways.[38]

A patent to a grantee who is dead at the time when it passes the seal is void at common law, upon the ground that every grant requires a "grantor, a grantee, and a thing granted." [39] Several of the states have, however, remedied the defect by statutes directing that the grant should inure to the dead man's heirs, or to his heirs and devisees; and such acts are rightfully retrospective, as far as the rights of the granting commonwealth are concerned, but where the land has meanwhile been granted to another the curative act could do no good.[40]

Where, by failure to survey the boundary between two states, a strip of land really belonging to the one is, with its full acquiescence,

[38] Stith v. Hart's Heirs, 6 T. B. Mon. 624; Governeur v. Robertson, 11 Wheat. 332 (also a Kentucky case), proceeding on the ground that the Virginia act of 1779 confined the operations of the land office to waste and unappropriated lands, and though the Kentucky statute then in force allowed the holder of an entry to relinquish it (which was sometimes done to avoid being taxed for it), a deed of relinquishment after patent did not restore a tract to "the waste lands" of the commonwealth. In Virginia, however, a different policy has since been followed, and large tracts have been restored to the public domain by tax proceedings. For the statutes and decisions on this subject the reader is referred to Hutchinson's Land Laws of Virginia and West Virginia. In North Carolina escheated or confiscated lands could not be sold through the land office. University v. Sawyer, Tayl. (N. C.) 114.

[39] Lewis v. McGhee, 1 A. K. Marsh. 199. But a grant to the heirs of S. T. is valid, unless he left none. Finlay v. Humble, Id. 294.

[40] So in Kentucky, by act of 1792, since enlarged so as to apply to deeds by private parties. See Skeene v. Fishback, 1 A. K. Marsh. 356 (retrospective as against commonwealth); Lewis v. McGhee, supra (ineffective against intermediate grantee). Where the statute does not provide for devisees, the heirs are held to be trustees for them. Cobb v. Stewart, 4 Metc. (Ky.) 255. In Maine it was held that a resolve of the general court of Massachusetts, for dividing a plantation among the proprietors, their heirs and assigns, meant "heirs or assigns," and that a patent issued to a dead proprietor's heirs inured to his devisee. Sargent v. Simpson, 8 Me. 148.

governed in all respects by the other, as a part of its territory, and grants of land are made within it in good faith, by the state thus sovereign de facto over the strip of land, yet can these grants not be sustained as those of a lawful sovereign and paramount owner, when the true boundary is afterwards ascertained by a survey.[41]

The sale of the school lands or of the swamp lands which have been granted to the states by congress hardly gives rise to any question which could not arise upon the sale of land between man and man. But we may remark here that lands were, in some of the Southern states, set aside to "seminaries,"—institutions quite different from the common schools of the present day. They were private eleemosynary bodies; and the land granted to a seminary, or the property into which it was converted, cannot be taken from it by the state, nor can it be turned over to the common school, as the successor of the seminary.[42]

In the original 13 states (with exceptions in Virginia and North Carolina) the questions arising from the original disposition of the soil have long been settled. Almost the only disputes which can, at the present day, come before the courts, arise upon riparian or littoral rights, or lands reclaimed from the adjoining sea. To authorities on these subjects, reference is made in a former chapter of this work. Where the states have disposed of school lands, or other parts of the public domain granted to the state by congress, the dispute has nearly always hinged more upon the congressional than upon the state grant.[43]

[41] Coffee v. Groover, 123 U. S. 1, 8 Sup. Ct. 1, reversing the judgments of the supreme court of Florida between the same parties, in 19 Fla. 61, and 20 Fla. 64, that court having sustained the grants made by the state of Georgia in a strip or gore, while it was in possession. The case is distinguished from Poole v. Fleeger, 11 Pet. 185 (arising out of the compact between Kentucky and Tennessee over the new boundary line, which treaty gave force to the Virginia and Kentucky land grants that have been made to the south of it, but north of "Walker's Line"); the court holding that Tennessee had the power, with the assent of congress to disavow the grants made by herself and North Carolina in the disputed territory. The court relied on its early decisions against the validity of Spanish grants in the territory claimed and occupied by Spain as a part of West Florida.

[42] Graded School Dist. No. 2 v. Trustees of Bracken Academy, 95 Ky. 436, 26 S. W. 8.

[43] Throop's Massachusetts Digest, published in 1887, contains only 12 cases

As a general rule, in all grants from the government to the subject, the terms of the grant are to be taken most strongly against the grantee, and in favor of the grantor,—reversing the common rule as between individuals,—on the ground that the grant is supposed to be made at the instance of the grantee, and the terms of the particular instrument of grant prepared by him, and submitted to the government for its allowance.[44]

§ 67. United States Grants.

When Virginia and those of the Northern states that claimed, under their charters, a westward extension to the Mississippi, had transferred to the Confederation the lands of the Northwestern

of "grants," made either by towns, by bodies of "proprietors," or by the agents of Eastern lands (lands in Maine), or by the legislature; most of them quite early, none later than 1866. The more important are Mayo v. Libby, 12 Mass. 339 (resolution of legislature relinquishing public lands operates as grant in praesenti); Springfield v. Miller, Id. 415 (a town may grant by vote); Thomas v. Marshfield, 10 Pick. 364 (no consideration need be shown for grant by town). Ipswich Grammar School v. Andrews, 8 Metc. (Mass.) 584, is of historic interest, deciding that a grant made in 1650 carried a fee without words of limitation, for lack of legal lore at that time. In Boston v. Richardson, 13 Allen, 146, is said that the rule construing public grants most strongly against the grantee applies only when the grant is ambiguous, and no other rule can be found to determine the meaning.

[44] Com. v. City of Roxbury, 9 Gray, 456, 492, relying mainly on Martin v. Waddell, 16 Pet. 411, which rests on the English authorities. (See doctrine limited by last case in preceding note.) In modern American practice, where land patents are always made out on printed blanks, and in close pursuance of law and regulations, there is little room for applying this rule of construction, and much less reason than there was in England when crown lands were granted to the king's favorites,—a practice which only went out during the reign of George III. In order to evade the full force of the rule, the words, "of his free will, pleasure, and own motion" (ex proprio motu), used to be inserted in crown grants; words nearly always untrue in fact. A late case going to the supreme court of the United States from New York (Lowndes v. Board of Trustees of Town of Huntington, 153 U. S. 1, 14 Sup. Ct. 758) has been referred to in the first chapter of this work in connection with "Oyster Beds." Another case came quite recently to that court from Pennsylvania,—Murphy v. Parker, 152 U. S. 398, 14 Sup. Ct. 636, following Diamond Coal Co v. Fisher, 19 Pa. St. 267,—involving, among other things, the right to the patent which arises from the ownership of the warrant. The case passed off mainly upon

Territory, the United States government was confronted with the problem of disposing of the soil; and it wisely chose a plan which differed broadly from the loose system, or rather lack of system, which caused so much mischief in Virginia and North Carolina, and their western offshoots. No land was surveyed unless the Indian title had first been extinguished, and none was offered for "entry" or sale until it had been surveyed. The public domain was divided into land districts; these into ranges, or strips six miles in width, running north and south; the ranges into townships, or squares of 36 miles (that is, six in each direction,—each township into 36 sections, each of a square mile); each section into 4 quarter sections; and each of these into 4 quarter quarter sections (the smallest subdivision), each of 40 acres. All entries and sales had to follow these divisions. Where a lake or river intervened, there would be fractional townships, sections, or smaller divisions.[45]

Lands were granted to the states, by description, for the establishment of public schools, or of universities or agricultural colleges, or the reclamation of swamps, and for other purposes, as will be shown hereafter; the state to sell such lands under its own laws.[46]

the length of time during which the appellee's claim had been held undisturbed, and no case analogous to it is likely to arise hereafter. Among the late Tennessee cases on state land grants that of Rainey v. Aydelette, 4 Heisk. (Tenn.) 122, may be still of some interest, declaring that an entry in the name of the "entry taker"—i. e of the local land officer—is void under the act of 1777, and, being "a fraud upon the state," not cured by the act of 1853, curing all other invalid entries.

[45] This plan of division and survey was first laid down in the act of May 18, 1796, which went into no smaller units than sections. An act of 1820 divided these into quarters, and each quarter, by a north and south line, into half quarters. An act of 1832 first ordered the lower unit of quarter quarter sections of 40 acres each, and such is now section 2395 of the Revised Statutes. Fractional sections must also be laid off into as many parts as there are the smallest legal subdivisions found complete, or the sale is void. See Brown v. Clements, 3 How. 650; modified, however, by Gazzam v. Phillips, 20 How. 372. (The description must in all cases be such that it will fully identify the land; and a court of law cannot go beyond this.)

[46] The effect of legislative grants in praesenti is illustrated further on under the head of "Railroad Land Grants," of grants for schools to the states, etc. (for instance, in Deseret Salt Co. v. Tarpey, 142 U. S. 241, 12 Sup. Ct. 158). But the act must contain apt words. Foley v. Harrison, 15 How. 433; Lessieur v. Price, 12 How. 75 ("that there shall be granted to each state," etc.,

Sometimes, also, acts were passed granting or relinquishing title to classes of individuals, or to public bodies, taking effect upon condition, or upon proof being made of facts already existing; and these acts have sometimes given rise to difficulty in determining whether the grant so made was self-executing, and at what time it took effect.[47] This system was extended from the Northwestern Territory to the Southwestern Territory ceded by Georgia (known as "Lands South of Tennessee"), and to all the later acquisitions of the United States, except Texas, which retained its public lands. It was never in force in the original 13 states, nor in their offshoots,—Vermont, Maine, Kentucky, and Tennessee. The last named of these states was, indeed, at one time ceded by North Carolina to the United States, but it retained its public lands upon its admission to the Union. Kentucky imitated the United States system of surveys by rectangular lots, into townships and sections, in the country acquired from the Indians in 1819, west of the Tennessee river, known popularly as "Jackson's Purchase."[48]

not sufficient). The language in act of 1841, giving land to new states for internal improvements is, "there shall be granted, and hereby is granted, to each new state." Held grant in praesenti in Doll v. Meador, 16 Cal. 295; but held the contrary in Terry v. Megerle, 24 Cal. 609. See cases reviewed in McNee v. Donahue, 142 U. S. 587, 12 Sup. Ct. 211.

[47] Guitard v. Stoddard, 16 How. 494, and cases there cited, as to the act of June 13, 1812, confirming title in common lands and outlots in Missouri, without description. Held to vest the fee subject to identification by parol. See, also, Pollard's Lessee v. Files, 2 How. 591. Contra, Burgess v. Gray, 16 How. 48, as to acts of March 2, 1807, and April 12, 1814. The subject will be recurred to hereafter under the head of "Railroad Land Grants." Confirmation of title in a claimant vests fee without patent. Grignon v. Astor, 2 How. 319; Stoddard v. Chambers, Id. 284. And see Chouteau v. Eckhart, Id. 344. See, also, Savignac v. Garrison, 18 How. 136; West v. Cochran, 17 How. 416; Act Jan. 27, 1831, confirming titles in St. Louis and other Missouri towns.

[48] Virginia, in its deed of cession (1784) to the United States, reserved the country between the Scioto and Little Miami, to make up a deficit of good lands to fill military bounty warrants, and until 1804 made the sales through her land office (see M'Arthur v. Browder, 4 Wheat. 488; Doddridge v. Thompson, 9 Wheat. 469, etc.). In 1804 the United States, by act of March 23d of that year, undertook to make the sales through the general land office. See, also, act of July 7, 1838, and Fussell v. Gregg, 113 U. S. 550, 5 Sup. Ct. 631. Lindsey v. Miller, 6 Pet. 666, defines the limits of the Virginia reservation, and decides that an encroachment by that state is not condoned by a confirm-

The power of congress "to dispose of the territory and other property of the United States, and make all needful rules and regulations concerning the same," as given by the constitution, is exclusive of all interference by the states, and remains such until the legal title is divested out of the United States by legislative grant or by patent.[49] Without stopping here to inquire on what terms the patent of the United States may have been obtained,—whether by private entry and payment or purchase at public sale, for cash, for bounty warrants, or for scrip, or under the pre-emption or the homestead or the timber-culture laws, whether for town sites or for mining,—we may state here, what has already been said of state patents, that the seal of the United States land office imports absolute verity, and that a patent which is good upon its face cannot be collaterally attacked;[50] and, on the other hand, that whenever the patent has been obtained by fraud,—that is, whenever the applicant has pretended compliance with the terms required by law, but they have not been truly complied with,—the United States may, by bill in chancery, have their judgment or decree to vacate the patent, just

atory act of congress of March 2, 1807. After Virginia had exhausted the military warrants to be located on the reservation in Ohio, and relinquished all further claims, the United States, by act of February 18, 1871, granted the remnant of the unsold lands to the state of Ohio, as shown and explained in Coan v. Flagg, 123 U. S. 117, 8 Sup. Ct. 47. It may be remarked that the district was not laid off into square lots under the congressional plan, and an opportunity was thus given for fraudulently surveying a much larger quantity than the warrant and entry called for; and that the supreme court declared the patent void for fraud. As to Kentucky surveys in "Jackson's Purchase," see Morehead & B. St. p. 1040.

[49] Bagnell v. Broderick, 13 Pet. 436; U. S. v. Gratiot, 14 Pet. 526; Gibson v. Chouteau, 13 Wall. 98 (a hard case, denying the benefit of the limitation law to the possessor, whilst the true owner had no patent, but only the equitable title).

[50] Minter v. Crommelin, 18 How. 87 (the patent imports that all proper action has been taken); Morrison v. Shalnaker, 104 U. S. 213; Smelting Co. v. Kemp, Id. 636 (both cases of mineral lands patents). Also Stringer v. Young, 3 Pet. 320; Hoofnagle v. Anderson, 7 Wheat. 212. The two latter cases concede the right of the party entitled to the patent to sue the wrongful impetrator in equity. The correctness of the survey is unassailable, Knight v. United States Land Ass'n, 142 U. S. 161, 12 Sup. Ct. 258 (except for fraud). But see under "Mineral Lands," as to patent issued during pending controversy.

as a private grantor may have his suit to set aside a deed which has been obtained from him by fraud or misrepresentation. The connivance of officials in the land office is not material either way. The fraud most frequent is the entry for homestead or pre-emption by men who are not actual settlers, and who intend to sell their grants as soon as obtained.[51] The right of the United States to proceed, by bill in equity, to vacate the patent upon principles of equity, implies that it can be exercised only against the patentee and those claiming under him as volunteers or with notice of the fraud, not against purchasers in good faith and for value.[52] And, for success in such a suit, a simple preponderance of evidence is not sufficient. The proof must be "clear, unequivocal, and convincing." That similar frauds were probably committed by the parties in other cases is a circumstance which the supreme court is hardly willing to consider.[53]

[51] San Pedro & Canon del Agua Co. v. U. S., 146 U. S. 120, 13 Sup. Ct. 94, where a Mexican grant was confirmed by a private act of congress, and was surveyed under such act, and a patent issued on the survey, which comprised a great deal of land lying outside of the description in the grant. There is no presumption in favor of the grant when it is thus assailed and fraud is proved. U. S. v. Minor, 114 U. S. 283, 5 Sup. Ct. 836; Moffat v. U. S., 112 U. S. 24, 5 Sup. Ct. 10 (the United States does not guaranty the honesty of its officers). But in U. S. v. Throckmorton, 98 U. S. 61, a Mexican grant had been confirmed before a board of commissioners, appointed under the law for that purpose, and a patent was issued. A bill to vacate it was dismissed, as not showing facts sustaining a "bill for new trial," the board being deemed judicial. The remedy of scire facias, given by the common law, has not been used by the United States. The federal government has been much more active than those of the states to vacate fraudulent grants, often in the interest of actual settlers. See, as to proof of frauds to set aside a mining land patent, U. S. v. Iron Silver Min. Co., 128 U. S. 673, 9 Sup. Ct. 195. A congressional grant cannot be assailed for fraud. Tameling v. United States Freehold & Emigration Co., 93 U. S. 644.

[52] There can be no bona fide purchase where the grantee's name is fictitious. Moffat v. U. S., supra. The distinction between annulling at law or in equity is recognized, but is not the point passed upon, in Colorado Coal & Iron Co. v. U. S., 123 U. S. 307, 8 Sup. Ct. 131; U. S. v. Minor, 114 U. S. 233, 243, 5 Sup. Ct. 836, and several other cases.

[53] U. S. v. Iron Silver Min. Co., supra; U. S. v. Hancock, 133 U. S. 193, 10 Sup. Ct. 264 (that the surveyor had received a portion of the surveyed tract not deemed convincing proof of fraud); Colorado Coal & Iron Co. v. U. S., supra; U. S. v. San Jacinto Tin Co., 125 U. S. 273, 8 Sup. Ct. 850; Maxwell

Not only the patent secures the holder against collateral attack by any one who might obtain a junior patent, but any of those certificates which the law provides for, and which show that the holder has complied with those terms and requisites which entitle him to a patent. This rule does not rest upon the sanctity of such a certificate; but it is settled by the supreme court that when lands have once been sold by the United States, and the purchase money paid, the lands sold are segregated from the public domain and are no longer subject to entry. A subsequent sale and grant of the same lands to another person would be absolutely null and void so long as the first sale continues in force.[54]

It was maintained in a noted case, involving an even then highly valuable tract in or near the city of Chicago, that the action of the register and receiver in allowing a pre-emption and issuing the "patent certificate" is in its nature judicial, and the United States, being parties to the proceeding cannot gainsay it. The supreme court gave some color to this contention, but answered that if such officers "undertake to grant pre-emptions in land in which the law declares they shall not be granted, then they are acting upon a subject-matter clearly not within their jurisdiction." In plain English, the register and receiver are not a court of justice, and when the register acts or decides against the law his action is void; though if a patent had issued upon his decision, the United States might have been bound.[55] While a patent issued to the wrong party among two contestants, by an improper decision of the officers of the land office (the highest among whom is the secretary of the interior) upon a question of law, cannot be assailed as void, yet the

Land-Grant Case, 121 U. S. 325, 382, 7 Sup. Ct. 1015 (stated as the rule in all attacks on written instruments); U. S. v. Budd, 144 U. S. 154, 12 Sup. Ct. 575 (where 22 timber land grants, including that in question, had been taken out by 22 different parties in one year, and sold to the same man; held not sufficient proof of fraud).

[54] Baldwin v. Stark, 107 U. S. 467, 2 Sup. Ct. 473 (when fraud is practiced on the party entitled by the patentee or the officials, or the law has been misapplied); Johnson v. Towsley, 13 Wall. 72; Minnesota v. Bachelder, 1 Wall. 109; Silver v. Ladd, 7 Wall. 219. The earlier entry was sustained in Branson v. Wirth, 17 Wall. 32, which came up again as Wirth v. Branson, 98 U. S. 118; Simmons v. Wagner, 101 U. S. 260.

[55] Parley's Park Silver Min. Co. v. Kerr, 130 U. S. 256, 9 Sup. Ct. 511.

person who was by law entitled to have the patent issued to himself can in equity treat his successful rival as a trustee for his benefit, and thus have the merits of the dispute re-examined.[56] This is even clearer where the wrong complained of is a fraudulent misrepresentation, especially when the patent has been granted ex parte, and without notice to the party really entitled.[57] But, as to questions of fact, which are submitted to the land officers, and on which they may hear conflicting evidence, their decision is made final, and cannot be overturned by the courts any more on equitable than on legal grounds.[58]

It will be seen hereafter how the mining laws of the United States recognize the customs of miners. It is the duty of the officials of the land office to know these customs. If they act upon such knowledge, and issue a patent according to their best lights, their decision is conclusive.[59]

It is, in the language of the supreme court, a well-settled rule of law that the power to make and correct surveys of the public lands belongs exclusively to the political department of the government, and that the action of that department in this respect is unassailable, except for fraud, in a direct proceeding; but in the political depart-

[56] Wilcox v. Jackson, 13 Pet. 498 (a case to be discussed hereafter).

[57] Quinby v. Conlan, 104 U. S. 420; Lytle v. Arkansas, 22 How. 193; Garland v. Wynn, 20 How. 8; Lindsey v. Hawes, 2 Black, 554; Brush v. Ware, 15 Pet. 93 (fraud in the assignment of the warrant with which the land was entered).

[58] See the distinction in Baldwin v. Stark, supra (reversing Stark v. Baldwin, 7 Neb. 114, because the decisions of the secretary of the interior on disputed facts is final); citing Shepley v. Cowan, 91 U. S. 330; Marqueze v. Frisbie, 101 U. S. 473; s. p. Heath v. Wallace, 138 U. S. 573, 11 Sup. Ct. 380. Haydel v. Dufresne, 17 How. 23 (as to power of surveyor "south of Tennessee" to run side lines back for river lots in New Orleans). It was held in Caha v. U. S., 152 U. S. 211, 14 Sup. Ct. 513, that the proceedings in the land office on a homestead application are so far judicial that false swearing therein is perjury. The most important case affirming the quasi judicial power of the secretary of the interior is Secretary of Interior v. McGarrahan, 9 Wall. 298. See cases in next note (town-site commissioners cannot be compelled to act till an appeal to the secretary is disposed of, McDaid v. Oklahoma, 150 U. S. 209, 14 Sup. Ct. 59); Carr v. Fife, 156 U. S. 494, 15 Sup. Ct. 427.

[59] Parley's Park Silver Min. Co. v. Kerr, 130 U. S. 256, 9 Sup. Ct. 511.

ment, dealing with public lands, the decision of the secretary, the head of the department, overrules every other action.[60] Where the legislature establishes a tribunal, either judicial or quasi judicial, before which it invites claimants by name (for instance, whose claims are already filed) to a contest with the government, those not so invited are not concluded, and may sue the successful claimant to recover from him the fruits of his contest. This principle has been applied as readily to claims for land as to those for money.[61] No one can assail the patent on equitable grounds, though he be in possession, and be sued in ejectment, unless he can show in himself a good right to the patent.[62] Mistake, as well as fraud, has occurred in the issual of patents, and has been corrected whenever it could be done without injustice to third parties. Thus, where, by a mistake in the land office, a patent for land paid for by John, on certificate bearing his name, was issued to James, and it was returned at the instance of the former, and a new one issued to him, his claim under this latter patent was preferred to that derived from a sale under execution against James.[63]

So much as to voidable grants. It is admitted that those patents which show their illegality upon their face are void. This could only happen if recitals in the patent were to show that the United States did not, at the date of the grant, own the land conveyed (which is not likely to happen), or that the terms of the law under which

[60] Knight v. United States Land Ass'n, 142 U. S. 161, 12 Sup. Ct. 258, relying on Cragin v. Powell, 128 U. S. 691, 9 Sup. Ct. 203; Buena Vista Co. v. Iowa Falls & S. C. R. Co., 112 U. S. 165, 5 Sup. Ct. 84; Hastings & D. R. Co. v. Whitney, 132 U. S. 357, 10 Sup. Ct. 112: Maguire v. Tyler, 1 Black, 195–202.

[61] Bohall v. Dilla, 114 U. S. 47, 5 Sup. Ct. 782; Sturr v. Beck, 133 U. S. 541, 550, 10 Sup. Ct. 350; Stark v. Starrs, 6 Wall. 402,—where such cases are said to be only an application "of the well-established doctrine that, where one party has acquired the legal title to property, to which another has a better right, a court of equity will convert him into a trustee," etc.

[62] Lee v. Johnson, 116 U. S. 48, 6 Sup. Ct. 249, where the equitable claimant had been guilty of a fraud against the policy of the homestead act. Sparks v. Pierce, 115 U. S. 408, 6 Sup. Ct. 102.

[63] Bell v. Hearne, 19 How. 252. In Widdicombe v. Childers, 124 U. S. 400, 8 Sup. Ct. 517, the question of fraud and mistake is mixed. One located on a section, which he knew had been occupied for years by another under a preemption claim, which erroneously described another section; he was held not to be a purchaser in good faith, and compelled to restore.

a patent of the particular character may be issued have not been complied with, or that the law to which the instrument purports to conform is no longer in force, or that the land is of a nature which cannot be granted by the land office, or that the quantity is greater than what the law in general, or the recited consideration, allows and justifies. The routine of the general land office works on such steady lines that mistakes in any of these directions happen very rarely.[64]

A patent of the United States, valid upon its face, seems to be always admissible in evidence, in contests with other claimants, as to any lands which, as a matter of law and history, were ever within the ownership of the nation. The patent relates back to the time when the right arose in recognition of which the United States give up their own title, and is conclusive upon all parties whose rights are of later origin.[65] We have seen, in a former chapter, that the destruction or redelivery of a deed of conveyance once delivered does not affect the title created by the deed. The same principle applies even more fully to a patent; for that takes effect when sealed and noted on the records of the general land office, without delivery. Any mutilation of either the patent or of the record thereafter leaves the grantee's title unimpaired.[66]

§ 68. Inchoate Rights under the United States.

I. The simplest way of acquiring public lands, and for many years almost the only one, after credit sales were abolished, in 1820, was by cash entry. Soon after a body of public land was surveyed,

[64] Doolan v. Carr, 125 U. S. 618, 8 Sup. Ct. 1228; Coan v. Flagg, supra, note 48. A number of other supreme court cases on void patents are referred to in Simmons Creek Coal Co. v. Doran, 142 U. S. 417, 12 Sup. Ct. 239, but the voidness arose from a previous grant. There is, as has been shown already under the head of "State Grants," very little practical result in the voidness of a patent. A subsequent grantee cannot generally invoke it, and establish his own priority, as the steps leading to the void patent are apt to be such as will "segregate the land from the public domain," and thus render the junior grant unlawful, and bad, at least in equity.

[65] Beard v. Federy, 3 Wall. 478, 491; Knight v. United States Land Ass'n, 142 U. S. 161, 188, 12 Sup. Ct. 258.

[66] Bicknell v. Comstock, 113 U. S. 149, 5 Sup. Ct. 399.

the president would fix a day for a public sale, at which it was disposed of to the highest bidder, and whatever remained unsold might be bought by any one, in any multiple of the quarter quarter section (together with fractions), at the minimum price of $1.25 per acre. The great drawback to this exceedingly simple arrangement was the wide opportunity it gave for "jumping" actual settlers; that is, it enabled greedy men with some ready cash to buy land on which others had settled and on which they had made lasting and valuable improvements, without paying anything for these improvements. The settler, having invested all his means in these improvements, had none to pay for the land, and lost the fruits of years of toil, or at least was compelled to bid against a stranger who had invested nothing, and thus had to pay twice for his improvements. This mode of acquiring land had long fallen very much into disuse, when "private entry" was by an act of March 2, 1889, abolished, except as to the small remnant of public lands in the state of Missouri; and by an act of 1891 sales at either private entry or public auction were still further abridged.[67]

[67] Sales of land under the act of 1796 were made partly on credit. The act of 1820 required cash payments. The sale of lands at public auction was, till March 3, 1891, governed by sections 2353, 2357–2360, 2455, Rev. St. U. S., but was prohibited by act of that date (26 Stat. 1095, §§ 9, 10), save under the exceptions therein noted: "Sec. 9. That hereafter no public lands of the United States, except abandoned military or other reservations, isolated and disconnected fractional tracts authorized to be sold by section twenty-four hundred and fifty-five of the Revised Statutes, and mineral and other lands the sale of which at public auction has been authorized by acts of congress of a special nature having local application, shall be sold at public sale. Sec. 10. That nothing in this act shall change, repeal, or modify any agreements or treaties made with any Indian tribes for the disposal of their lands, or of land ceded to the United States to be disposed of for the benefit of such tribes, and the proceeds thereof to be placed in the treasury of the United States; and the disposition of such lands shall continue in accordance with the provisions of such treaties or agreements, except as provided in section 5 of this act." The circular issued by the land office in 1892, explains that these provisions forbid only the disposal of the mass of public lands in this manner, but not necessarily under special or local laws, referring to specific lands, and which provide, among other modes of disposal, for public auction or private sale; such, for instance, as section 2357, Rev. St.; Osage trust and diminished reserve lands, Act May 28, 1880, § 5; salt spring reserve lands, Act Jan. 12, 1887. As to the minimum price the same circular says: No land shall be sold,

In all procedures for gaining the title to public land, unless it be bought at public auction, the first step on the part of the buyer, is his application for a definite portion of the public domain, known as an "entry,"—a word borrowed by congress from the Virginia land laws, already referred to. But the entry under the national law differs broadly from the Virginia entry, in that the former can only be made after a survey, while the latter preceded the survey, and is the only warrant for a survey.[65]

II. To prevent the evils arising from the sale of land which had been improved by actual settlers, and to prevent speculators from buying up large tracts and shutting new settlers out therefrom, the pre-emption laws were passed, the most important of which is that of 1841, which is, in its main features, embodied in the Revised Statutes. The pre-emptor must be qualified, i. e. he must be the head of a family, or a widower, or a single person over the age of

either at public or private sale, for less than $1.25 per acre, which is therefore called the "minimum price," and lands held for sale at that price are called "minimum lands" (Rev. St. 2357, Append. No. 1, p. 126). The double minimum price established by law is $2.50 per acre, and lands held for sale at that price are called "double minimum lands." Alternate reserved sections within the limits of railroad grants are double minimum in price (Rev. St. § 2357), except such as were put in market at the enhanced price prior to January 1, 1861, and were subject to entry June 15, 1880, all of which were reduced in price to $1.25 per acre by the third section of the act of congress of June 15, 1880 (21 Stat. 237; Append. No. 15, p. 137), and, except those opposite those portions of railroads not completed on March 2, 1889, which were reduced in price by section 4 of the act of that date (25 Stat. 854; Append. No. 33, p. 161), or where a different price is provided for in statutes for the disposal of lands under special conditions. Lands reduced in price under act of June 15, 1880, are not, however, subject to private entry at the reduced price until again offered at public sale. Eldred v. Sexton, 19 Wall. 189. Considering that the supreme court itself quotes the "Land Decisions" of the secretary of the interior department freely (e. g. in Barden v. Northern Pac. R. Co., 154 U. S. 288, 300, 14 Sup. Ct. 1030), and speaks highly of them in Hastings & D. R. Co. v. Whitney, 132 U. S. 366, 10 Sup. Ct. 112, passages from such a circular may be given as being very probably good law at the time. Military bounty warrants, scrip issued in satisfaction of private land claims under acts of June 22, 1860, March 2, 1867, June 10, 1892, and scrip issued under act of June 2, 1858, may be used, like cash, in payment of land at private entry or pre-emption.

[65] Chotard v. Pope, 12 Wheat. 589.

21, and a citizen of the United States, or must have declared his intention to become a citizen according to law. He must have his residence upon a quarter section of land, and file affidavits in the prescribed form in the land office of his district. Furthermore, the land must not be (1) included in a reservation by any treaty, law, or president's proclamation; (2) nor within an incorporated town, nor in a selected city or town site; (3) nor actually settled and occupied for purposes of trade or business, nor for agriculture; (4) nor having on it any known mines or salines. A person is not qualified who already owns 320 acres of land in any state or territory, or who has abandoned his residence on his own land to reside on the public land in the same state or territory. The payment and proofs have to be made, when no shorter time is prescribed, within 30 months from the times prescribed for the preliminary notice which is made before the register and receiver of the land district.[69]

The right of the pre-emptor by occupation and notice is inchoate only, not vested, and congress has the power to destroy it by ordering the lands to be withdrawn from sale.[70] It was always a prime condition that one person could have only one pre-emption, and this must embrace his residence; and when he bought any tract, though less than a quarter section, his right was exhausted, and he could, neither under the old claim for pre-emption, nor under any subsequent one, pre-empt any more land.[71] This rule must be strictly followed. The land office has no power to allow the "declaration," when once filed in good form, to be amended so as to include other lands, for to allow this would simply permit two applications in place of one.[72]

No land can be gained by pre-emption, before it is surveyed. Hence, if the settler dies before the survey, no available right in the

[69] Rev. St. U. S. §§ 2257–2259, 2262, 2267, based on act of September 4, 1841 (5 Stat. 455, etc.), and of June 2, 1862 (12 Stat. 413, etc.). There were previous temporary acts passed on May 29, 1830, and June 19, 1834.

[70] Frisbie v. Whitney, 9 Wall. 187.

[71] Nix v. Allen, 112 U. S. 129, 5 Sup. Ct. 70 (where a pre-emptress on a quarter section had paid for 40 acres, and taken a patent; pre-emption on other 120 acres gone); Baldwin v. Stark, 107 U. S. 463, 2 Sup. Ct. 473 (declaration once made as to one parcel, precludes another).

[72] Sanford v. Sanford, 139 U. S. 642, 11 Sup. Ct. 666 (a case of gross fraud, aside of the illegality).

land passes to his heirs or devisees. However, the statute gives some effect to a settlement on unsurveyed lands, even to the extent of displacing the section granted to the state for school purposes.[73]

In analogy to the laws which disallow pre-empting wild lands before they are surveyed, the statute for admeasuring and confirming Mexican or Spanish grants in California kept the whole tract which was claimed out of the market, and a pre-emption sued out before a survey was made and the boundary of the grant ascertained is void, though it turns out not to be within its limits.[74] During the long contest over the true construction of the "Des Moines river land grant," and while it was in doubt whether the "odd sections" above the mouth of Raccoon fork were granted to the state of Iowa, the land in dispute was withdrawn from settlement by the land office; and a settlement and pre-emption then made was held void, though the supreme court shortly thereafter decided that the lands above the mouth of the fork were not within the grant.[75] But the failure of the pre-emption resulted in these cases from the limitations of the statute then in force, substantially like the present, which excluded from settlement and pre-emption all "reserved lands" and all known mines and salines.[76] However, the same act,

[73] Buxton v. Traver, 130 U. S. 232, 9 Sup. Ct. 509; Hot Springs Cases, 92 U. S. 698, which were sought to be resuscitated in Rector v. Gibbons, 111 U. S. 276, 4 Sup. Ct. 605. See Rev. St. U. S. §§ 2275, 2276, 2280. The two former sections, which recognize a settlement of unsurveyed lands which may afterwards be designated as the school section, are among those excepted from the general repeal of the pre-emption law; while section 2280 gives effect to settlement on land reserved for "French, Spanish, or other (i. e. Mexican) grants," when such grant is rejected, and the examination withdrawn.

[74] Newhall v. Sanger, 92 U. S. 761; Van Reynegan v. Bolton, 95 U. S. 33. This point will be discussed further under the head of "Spanish and Mexican Grants."

[75] Bullard v. Des Moines & Ft. D. R. Co., 122 U. S. 167, 7 Sup. Ct. 1149, and seven other cases in the supreme court, which really involved the same question.

[76] An interesting and leading case, decided in the circuit court in favor of the assignee of the pre-emptor, but reversed, as it must have been, in the supreme court, is Wilcox v. Jackson, 13 Pet. 498. The quarter section on which Ft. Dearborn stood was "settled on" and pre-empted by the half-breed Beaubien, who had bought the buildings upon it, which had been placed there by an army contractor. The fort had been discontinued as such, but the quar-

which has, in all but a few detached places, done away with "private entry and public sale," approved on the 3d of March, 1891, has also repealed all existing pre-emption laws, except that those who before its approval had taken any steps under those laws may perfect them, by filing the proper entries, and otherwise complying with all the requisites after that time.[77]

III. The repeal of the pre-emption laws leaves the homestead entry as the only general mode for acquiring agricultural lands. To be qualified as a homesteader a person must be the head of a family or must be 21 years of age, and a citizen of the United States or one who has filed declaration of intention to become such; and, under the land act of 1891, the further condition is added that he must not own more than 160 acres of land in any state or territory. The homestead was, under the Revised Statutes, to be chosen from unappropriated lands subject to pre-emption, now simply from "unappropriated public lands."[78] The homesteader, unlike the pre-emptor, pays no substantial price for his land, but otherwise the terms of acquiring ownership are harder. He must, within six months after making his entry, establish his actual residence in a house upon the land, and must reside upon and cultivate the land continuously in accordance with law for the term of five years. Occasional visits to the land once in six months or oftener is not residence. The homestead party must actually inhabit the land, and make it the home of himself and family, as well as improve and cultivate it. At the expiration of five

ter section was used for other government purposes; among others, for a lighthouse. The act of 1830, revived in 1834, excluded from entry or sale any "land which shall have been reserved for the use of the United States (or a state), or which is reserved from sale by act of congress, or by order of the president, or which may have been appropriated for any purpose whatsoever." The court held that the orders of the secretary of war about the use of the land were in law the orders of the president. Wilcox, the defendant below, was the military commander, holding the fort, by order of the government, on behalf of the United States. The wide powers of the president to reserve lands and to enlarge or reduce the reservation are affirmed in Grisar v. McDowell, 6 Wall. 363.

[77] Act March 3, 1891, § 4 (26 Stat. 1097). The repeal saves only sections 2275, 2276, Rev. St. U. S., which deal with pre-emptions on the school sections, and section 2286, which allows a county or parish to pre-empt 160 acres to establish a seat of justice.

[78] Rev. St. § 2289.

years or within two years thereafter, he may make proof of his compliance with law by residence, improvement, and cultivation for the full period required, and must show that the land has not been alienated except for school, church, or cemetery purposes, or for the right of way of a railroad.[79] Proofs can only be made by the homestead claimant in person, and cannot be made by an agent, attorney, assignee, or other person, except that in case of the death of the entryman proof can be made by the statutory successor in the homestead right, in the manner provided by law.[80] If he dies before the consummation of his claim, the widow, or, in case of her death, the heirs, may continue settlement and cultivation, and obtain title upon requisite proof at the proper time.[81]

In determining what is "unappropriated land," the same rules govern the homestead entry as the pre-emptor's entry. Thus, land which the land office has, under a railroad land grant, set aside or "reserved" as the "place limit" belonging to the road cannot be entered for a homestead, and the entry is void, though it may turn out afterwards, upon a corrected location, that the tract entered upon was not within the limit.[82]

The conflict between an imperfect homestead entry and a subsequent railroad location will be discussed hereafter.

[79] Two laws allow "leaves of absence" under circumstances to be given by the register and receiver,—that of March 2, 1889, in case of destruction or failure of crops, sickness or other unavoidable accident rendering the settler unable to support himself or family on the land; and that of July 1, 1879, providing for the case of devastation by grasshoppers. The permission to dispose of part of the homestead for church or like purposes is given by section 2288 of the Revised Statutes.

[80] Rev. St. §§ 2289, 2307.

[81] Bernier v. Bernier, 147 U. S. 242, 13 Sup. Ct. 244. Homestead passes under section 2291 to all children of a widower, not under section 2292 to the minor children only, who take with the widow. The latter section relieves the minor children from conditions of cultivation, etc. It is seen how the United States as grantor undertakes to establish a law of descent of its own. The 160 acres to which the homestead is limited must lie in a contiguous tract, but may be parts of more than one section. Ard v. Brandon, 156 U. S. 537, 15 Sup. Ct. 406. As the law stood in 1866, the occupation of public lands, with the intention of entering them at some later time gave to the settler no inchoate rights. Maddox v. Burnham, 156 U. S. 544, 15 Sup. Ct. 448.

[82] Hamblin v. Western Land Co., 147 U. S. 531, 13 Sup. Ct. 353.

IV. Land may be acquired for town sites by three methods, all of which are prescribed by the Revised Statutes, the leading principles of which may be thus stated:

1. Section 2380 authorizes the president to reserve public lands for town-site purposes on the shores of harbors, at the junction of rivers, important portages, or any natural or prospective centers of population. Section 2381 provides for the survey of such reservation into urban or suburban lots, the appraisement of the same, and the sale thereof at public outcry; the lots remaining unsold are thereafter to be disposed of at public sale or private entry, at not less than the appraised value thereof.

2. Sections 2382, 2383, 2384, 2385, and 2386, Revised Statutes (Act March 3d, 1863, 12 Stat. 754; Act 3d March, 1865, 13 Stat. 530), limit the extent of the area of the city or town which may be entered under said acts to 640 acres, to be laid off in lots, which, after filing in the Land Office the statement, transcripts, and testimony required by section 2383, are to be offered at public sale to the highest bidder at a minimum of $10 for each lot. An actual settler upon any one lot may pre-empt that lot, and any additional lot on which he may have substantial improvements, at said minimum at any time before the day of sale. Such person must furnish pre-emption proof showing residence and improvement upon the original lot, and improvement upon additional lot after the usual notice of intention by publication. Lots not sold at public sale are thereafter subject to private entry, at a price to be fixed from time to time by the secretary of the interior.

3. Lands actually settled upon and occupied as a townsite, and therefore not subject to entry under the agricultural pre-emption laws (now repealed), may be entered as a town site, in accordance with the provisions of sections 2387, 2388, and 2389 of the Revised Statutes, as amended by Act March 3, 1877. If the town is incorporated, the entry may be made by the corporate authorities through the mayor or chief officer; otherwise by the judge of the county court for the county in which the town is situated.[83]

V. Lands in certain of the Pacific states (that is, in California,

[83] The instructions of the department issued in June, 1887, say "the land must be unfit for cultivation if the timber were removed"; but a circuit court held in U. S. v. Budd, 43 Fed. 630, that the land need not be sterile. It is

Oregon, Nevada, and Washington) may be purchased, under an act of June 3, 1878, as "stone or timber lands," by any one person or association in a quantity of not more than 160 acres, if it is valuable chiefly for timber or stone; but it must be "unoffered, unreserved, unappropriated, and uninhabited, and, except by the applicant or those whom he represents, unimproved." Lands containing valuable deposits of gold, silver, cinnabar, copper, or coal cannot be entered. A married woman may purchase if at the time of entry she makes affidavit that she proposes to pay for the land with her separate money, in which her husband has no interest. Under this act (though the land is to be paid for in cash), as well as under the pre-emption and homestead acts, the purchaser must not, before his grant is completed, make any agreement for the sale of the title that he may acquire; and he is examined under oath on this, among other points, before obtaining the certificate on which the patent issues. Whether land which can be used for tillage when the timber is cleared may be entered under this act, is doubtful; and the question has not yet reached a decision in the supreme court.

The donation acts, among which the most important, also the last and best known, was the act of September 27, 1850, known as the Oregon donation act, are temporary in their nature, being a bounty to those who at the time inhabit a newly-settled part of the country, whom it is sought to retain in their new homes by liberal gifts of the public land. They are of interest mainly as the forerunners of our present homestead policy. It is hardly possible that further disputes under the last of these acts should ever come before the courts.[84]

held in the same case that the sale of the title, as soon as it is perfected, does not show that the oath taken, denying an agreement to sell, was untrue.

[84] See 9 Stat. 496. Section 4 gives to every resident of the territory, or any one who shall become a resident before December 18, 1850, and a citizen who has declared his intention, 320 acres of land; if a married man, for self and wife, 640 acres, after settlement on the land and four years' residence. Land claimed under the donation act is "segregated" when the notification is filed, and becomes assignable when the settler has resided on it for four years. Ramsey v. Loomis, 6 Or. 367. On completion of the settlement, the right of the owner's wife accrues without any act on her part. Murray v. Murray, Id. 26. The donee being a married man, dying before final proof, though after four years' residence, half the donation land goes to the wife in her own right. Love v. Love, 8 Or. 23. The supreme court of Oregon, in Dolph v. Barney, 5 Or. 191, considers the donation act as a grant in praesenti to each

§ 69. Railroad Land Grants.

The number of acres of the public land which has been granted to railroads counts by the hundreds of millions; hence, the questions incident to these grants are of the widest importance. The grants for the purpose of building railroads were preceded by that made to the state of Illinois in 1827 for the purpose of connecting Lake Michigan and the Illinois river by a canal, and one made in 1846 to the state of Iowa for the purpose of regulating the navigation of the Des Moines river.[85]

A common feature of these grants is that the lands granted lie on both sides of the proposed line of canal, improved river, or railroad, generally within a width of five miles on each side, and that only the odd-numbered sections of land are given up for the purpose. The government retains the even-numbered sections, and holds them at double the minimum price for private entry, assuming that the nearness of the land to a railroad, and through it to a market,

settler taking the preliminary step, to be defeated by noncompliance, and the patent issuing afterwards as mere evidence of the facts by which the title is vested. Land obtained under section 5 of the donation act is governed by the ordinary law of descent. Chambers v. Chambers, 4 Or. 153. The donee dying as an alien was held not to avoid the grant. Id. The wife's right to one-half is not affected by the donee taking less than what he had a right to as a married man. Pittman v. Pittman, Id. 298. A man having an Indian woman for a wife is a married man within the meaning of the donation act. Vandolf v. Otis, 1 Or. 153. The donation act took the place of the pre-emption act of 1841 and of the town-site act of 1844, which were not extended to Oregon. Stark v. Starr, 6 Wall. 402. Section 5 provides for the pre-emption and sale of public lands in Oregon, and is no part of the scheme of donation.

[85] Act Aug. 8, 1846 (9 Stat. 77). The supreme court having in 1850 decided against the contention of the state of Iowa, that only the lands below Raccoon Fork—that is, the lands alongside of the proposed work alone—were given to the state (Dubuque & P. R. Co. v. Litchfield, 23 How. 66), congress, on the 12th of July, 1862, by act published 12 Stat. 543, transferred the lands above the fork within the state to the state of Iowa, for the use of its grantees under the river grant. See Dubuque & S. C. R. Co. v. Des Moines Val. R. R. Co., 109 U. S. 329, 3 Sup. Ct. 188, and other cases cited in this and preceding section. The canal land grant of 1827 is referred to as an illustration in the late case of U. S. v. Missouri, K. & T. R. Co., 141 U. S. 358, 368, 12 Sup. Ct. 13.

doubles its value; and, when the government land is put up for auction, it is started at the "double minimum," that is, at $2.50 an acre, instead of $1.25. This was, however, reduced by later laws.[88] Most of the land grants have been made to the states, within which the canal or railroad was to be built, with authority to use it for that purpose; but the heaviest grants, those to the Pacific roads, were made directly to the corporations engaged in the work.[87] It is a leading principle in the land legislation of the United States that

[86] Act July 1, 1862, § 3. There is "granted to the said company, for the purpose, etc., every alternate section of public land designated by odd numbers, to the amount of five alternate sections per mile on each side of said railroad, on the line thereof, and within the limit of ten miles on each side of said road, not sold, reserved or disposed of by the United States, and to which a pre-emption or homestead claim may not have attached at the time the line of said railroad is definitely fixed. Provided, that all mineral lands shall be exempted from the operation of this act; but where the same shall contain timber, the timber thereon is hereby granted to said company. And all such lands, so granted by this section, which shall not be sold or disposed of within three years after the whole road shall have been completed, shall be subject to settlement and pre-emption, like other lands at a price not exceeding one dollar and twenty-five cents per acre, to be paid to said company." This section from the first act incorporating the "Union Pacific Railroad & Telegraph Company" is a fair sample of the ordinary land grant, aside of the width of the place limit and indemnity limit. As to reduction of double minimum, see note 67, § 68.

[87] The land subsidy to the Northern Pacific Railroad, which received no aid in bonds, is the largest (see Act July 2, 1864) for a railroad and telegraph line from Lake Superior to Puget Sound, "alternate sections of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile on each side of said railroad line as said company may adopt through the territory of the United States, and ten alternate sections," etc., "whenever it passes through any state." The subsidy to the Union Pacific and its branches was by the act of July 2, 1864, enlarged from 5 to 10 miles on each side of the road; and, to make sure of indemnity lands, a strip of 25 miles on each side was withdrawn from entry. Ten miles, since 1864, became the ordinary "place limit," as will be seen by reference to numerous acts. The granting of land to railroads or to states for the benefit of railroads came to an end on the 4th of May, 1870, when the last act of the kind was approved. Since then, however, congress has, upon terms, granted the right of way over public lands which proposed railroads had to cross, together with grounds (generally not to exceed 20 acres for each 10 miles) for depots, turnouts, etc. (See, among others, Act March 3, 1875, c. 171, for the benefit of the Jacksonville & Mobile Railroad.)

grants, whether perfect or imperfect, or, more correctly speaking, that rights to or in the public land, shall never come into conflict. Hence, provision has been made in nearly all the acts giving public lands to railroads for "indemnity lands" to be taken at a greater distance from their line (say within five and ten, or ten and twenty, miles from it), in lieu of such lands within the so-called "place limit" (i. e. the narrower zone on each side of the line) as may be lost to the railroad company through its being already "segregated" from the public domain, and in the same quantity as the land thus lost.[88]

It has been held that land supposed and claimed to be within a Mexican grant yet unsurveyed is "reserved," so as not to fall within a railroad grant, though it may turn out afterwards, upon a survey, that the lot in controversy was not a part of the Mexican grant; but this ruling has since been qualified by pointing out the threefold nature of those grants: (1) Grants by specific boundaries, where the donee was entitled to the whole tract; (2) grants of quantity, as of one or more leagues within a larger tract, described by what was called "outboundaries," where the donee was entitled to the quantity specified, and no more; (3) grants of a certain place or rancho by name. In the second class, the grant was a float, to be located by the action of the government before it could attach to any specific tract; and grants of this sort, though confirmed by the executive

[88] As an example of the indemnity clause, take the following proviso from the act of July 26, 1866 (14 Stat. 289): "But in case it shall appear that the United States have, when the line of said road is definitely located, sold any section or any part thereof, granted as aforesaid, or that the right of settlement or homestead has attached to the same, or that the same has been reserved by the United States for any purpose whatever, then it shall be the duty of the secretary of the interior to cause to be selected—from the lands of the United States nearest to the sections above specified, so much land as shall be equal to the amount of such land as the United States have sold, reserved or otherwise appropriated, or to which the right of homestead settlement or preemption has attached as aforesaid," etc. "And provided further that said lands hereby granted shall not be selected beyond twenty miles from the line of said road." The act subsidizing the Burlington & Missouri River Railroad for good reasons fixed no lateral limits. It was held in U. S. v. Burlington & M. R. R. Co., 98 U. S. 334, that the location was subject to four restrictions: (1) It must be all on odd sections; (2) one-half on each side of the road; (3) on the line of the road; (4) not sold or pre-empted when the road was finally located.

boards or courts of justice of the United States, do not constitute a reservation till the place to be covered is fixed by a survey.[89]

Among the exceptions which most congressional acts of this kind have engrafted upon the grant within the place limit, and a fortiori upon the selections within the indemnity zone, is nearly always one of all those lands to which pre-emption or homestead rights have attached; and the supreme court has taken hold of these words, as being the best fitted within the English language that could have been chosen to prevent all contest between the settlers and the great corporations. That the first step towards pre-emption or homestead right has been taken at the office of the local register is enough. This withdraws the quarter section so entered from the railroad grant; and it is immaterial to the corporation, or those claiming under it, whether the settler has in good faith, or, indeed, whether he has at all, completed his title according to law.[90]

It has been held in nearly all cases in which public lands were granted for railroad purposes, either to the state or to the corporation, that the act of congress is a grant in praesenti, i. e. that it operates by its own force to confer the ownership on the state or corporation, without the need of a patent; that, even where the issue of patents is directed in the law, the effect of such issue is only to furnish evidence that the conditions of the grant have been fulfilled, and thus to cut off all prospect of forfeiture.[91] The acts of congress

[89] Newhall v. Sanger, 92 U. S. 761, is qualified in U. S. v. McLaughlin, 127 U. S. 428, 8 Sup. Ct. 1177, where a tract of 11 leagues had been granted with out-boundaries embracing over 80 square leagues, and in Carr v. Quigley, 149 U. S. 652, 13 Sup. Ct. 961, where 2 square leagues were granted in an out-boundary of 10, and the grant had been confirmed by the supreme court of the United States. See same distinction also in Doolan v. Carr, 125 U. S. 618, 8 Sup. Ct. 1228.

[90] Walden v. Knevals, 114 U. S. 373, 5 Sup. Ct. 898; Sioux City & I. F. Town Lot & Land Co. v. Griffey, 143 U. S. 32, 12 Sup. Ct. 362 (good faith of pre-emption cannot be questioned); Hastings & D. R. Co. v. Whitney, 132 U. S. 357, 10 Sup. Ct. 112; Witherspoon v. Duncan, 4 Wall. 210 (lands cease to be public when entered at the land office for any purpose).

[91] Frasher v. O'Connor, 115 U. S. 102, 5 Sup. Ct. 1141 (grant to state becomes complete by report of surveyor general for the state). "The grant was in praesenti, and attached upon the filing of a map of definite location." Curtner v. U. S., 149 U. S. 672, 13 Sup. Ct. 985, 1041. Deseret Salt Co. v. Tarpey, 142 U. S. 241, 12 Sup. Ct. 158, has already been cited (section 67, note 46); s. p.

giving public lands to a railroad company or to a state, which it may give to a company to be chartered by it, have never prescribed the line to be pursued by it, so exactly that the alternate sections within the "place limit" could be laid off by the words of the act alone. The state or the corporation was always directed to make its survey of the line deemed most expedient, and to report it to the land office; the secretary of the interior, to whose department the land office belongs (before March 3, 1849, it was the secretary of the treasury), has to approve the location, to make it final. It has been held that on filing a map of the location in the land office, and its approval, the legislative grant takes effect.[92] Not from the time when the survey is traced on the ground, or written out by the surveyor of the railroad; nor, again, from the time when the final location is notified by the general land office to that of the district in which the land must be entered.[93]

When the location thus becomes final, pre-emption or homestead rights can no longer be gained, as shown in the cases cited; but, moreover, the corporation has then such title to the land within the place limit that it may give leases, and that it or its lessees may bring ejectment against all intruders.[94]

Where the line of an earlier land-grant railroad is laid out and returned before the definite location of another railroad, which receives a like grant thereafter, the place limit of the former is "segregated" so far from the public domain as not to fall within the later grant; and though afterwards, by joint resolution of congress, and for good cause, the earlier land grant is forfeited and resumed, the lands within the limits do not inure to the benefit of the second rail-

U. S. v. Des Moines Nav. & Ry. Co., 142 U. S. 510, 12 Sup. Ct. 308; the former under a grant to the road company, the latter to the state. To same effect, Sioux City & I. F. Town Lot & Land Co. v. Griffey, 143 U. S. 32, 12 Sup. Ct. 362 (railroad grant to Iowa of May 15, 1856).

[92] Kansas Pac. Ry. Co. v. Dunmeyer, 113 U. S. 629, 5 Sup. Ct. 566; New Orleans Pac. Ry. Co. v. Parker, 143 U. S. 42, 12 Sup. Ct. 364 (no title till map filed and approved); Van Wyck v. Knevals, 106 U. S. 360, 1 Sup. Ct. 336 (when filed and accepted).

[93] Sioux City & I. F. Town Lot & Land Co. v. Griffey, supra (filing the map under the state law insufficient); s. p. Grinnell v. Chicago, R. I. & P. R. Co., 103 U. S. 739 (the company is not concluded by staking the line; hence it takes no benefit by it).

[94] Deseret Salt Co. v. Tarpey, supra.

road company, or to its alienees.[95] Congress has in several instances, after the original land grant act, but before the corporation had earned anything under it by building portions of the road, enacted, further, that the corporation must pay the costs of survey, selection, and conveyance, before any patents can be issued. Such legislation reduces the title in land grant to an equity subject to an incumbrance in favor of the United States. This equity, as was thrice decided by the supreme court of the United States, screens the land in the hands of the railroad company or of its assignees against sale for state or county taxes,—which seems right enough, unless the sale is subject to such lien,—and, moreover, against assessment for such taxes; a proposition for which we can see no reason whatever.[96]

The indemnity lands, unlike those within the place limit, do not pass as a grant in praesenti, but are to be first selected by, or with the approval of the secretary of the interior, after the deficiency is proved to his satisfaction. But when so selected, by an official act on his part, they are segregated from the public domain, and no longer subject to entry under any other law; though patents are still to be issued for the lands so selected. The even sections retained by the United States within the place limit cannot be taken as indemnity lands, as the increased value which these lands have through their nearness to the proposed line of the railroad is one of

[95] U. S. v. Northern Pac. R. Co., 152 U. S. 284, 14 Sup. Ct. 598. A fortiori, where the definite location of the first line had been filed before the second grant was made to the state for another undertaking. Lake Superior Ship Canal, Railway & Iron Co. v. Cunningham, 155 U. S. 354, 15 Sup. Ct. 103; Donahue v. Lake Superior Ship Canal, Railway & Iron Co., 155 U. S. 386, 15 Sup. Ct. 115. (There was an attempt by the governor of Michigan to convey back all the forfeited lands to the United States; but, as he had no authority to do so, this did not restore them to the public domain so as to carry them into the second grant.)

[96] Kansas Pac. Ry. Co. v. Prescott, 16 Wall. 603; Union Pac. R. Co. v. McShane, 22 Wall. 444; Northern Pac. R. Co. v. Traill Co., 115 U. S. 600, 6 Sup. Ct. 201. The validity of the act of 1870, imposing this lien upon the lands of the Northern Pacific, is here vindicated, and the distinction sought to be drawn in Cass Co. v. Morrison, 28 Minn. 257, 9 N. W. 761, is brushed aside. The court admits that by delaying the payment of these charges the railroad companies can indefinitely stave off a liability for local taxes, but says it belongs to congress to remedy this evil.

the considerations for the land grant.[97] Where a homesteader or pre-emptionist settles on and applies for his 160 acres within the indemnity limits, and his application is improperly rejected, his right remains superior to that which the railroad company acquires by a subsequent patent; as the land, when selected by or for the railroad, was not "unappropriated."[98] The power of the railroad company over the strip granted to it for right of way is sufficient to dedicate streets across it in a city through which the road passes; such use being compatible with the right of way.[99]

§ 70. Mineral Lands.

From the very beginning of land sales by the United States, and in accordance with the usages of the British crown and of the several colonies and states, salines and mineral lands have been excluded from entry or sale on the ordinary terms; the purpose of the government being either to work salines and mines on its own account, or to sell lands containing salt brine or minerals in small quantities and at high prices, or, lastly, to allow them to be worked in small "claims" by the discoverers, according to the local usage of miners, without any interference by the owner of the soil.[100] The present laws regulating the disposition of mining lands have been changed but little since they were embodied in a chapter of the Revised Statutes, of which the substance is given below. The provisions as to veins or lodes are taken from an act of May 10, 1872. Those which refer to "placers" (that is, to mines of the more precious metals not deposited in veins or in "rocks in place") are re-enacted in part from an act of July 9, 1870; in part from the act of 1872.

(Until 1866, all mining for gold, silver or cinnabar on the Pacific

[97] U. S. v. Missouri, K. & T. Ry. Co., 141 U. S. 358, 12 Sup. Ct. 13 (but may be taken from the even sections within the indemnity limits). The even sections in the place limit are sold by the government at double the minimum price.

[98] Ard v. Brandon, 156 U. S. 537, 15 Sup. Ct. 406. Secus, where the lands had before the homestead entry been withdrawn by the secretary of the interior from the market. Wood v. Beach, 156 U. S. 548, 15 Sup. Ct. 410.

[99] Northern Pac. R. Co. v. City of Spokane, 56 Fed. 915,

[100] Compare chapter 2, § 13, as to boundaries of mines, especially vein or lode mines, both on or under ground.

slope was done on the public domain of the United States, generally on unsurveyed lands, without any title legal or equitable, other than was given by the custom of miners, as recognized by the local courts and legislatures. The act of July 4, 1866, for the first time enabled the locator or claimant, or his grantee, to obtain a patent from the United States, and consequently that equitable title before the issue of the patent which grows out of the successive steps by which the patent is earned.)[101]

[101] In Jennison v. Kirk, 98 U. S. 453, the court speaks of the growth of the custom of miners, after referring to the gold discovery in California, the sudden immigration, the fact that the metals were found in unsurveyed public lands not open by law to settlement. "Little was known of them further than that they were situated in the Sierra Nevada Mountains. Into these mountains the emigrants penetrated, etc. Wherever they went they carried with them the love of order and fair play, which are the characteristics of our people. In every district they framed certain rules for their government, by which the extent of gound they could severally hold for mining was designated, their possessory right to such ground secured and enforced, and contests either avoided or determined. These rules bore a marked similarity, varying in the several districts only according to the extent and character of the mines; distinct provisions being made for different kinds of mining, such as placer mining, quartz mining, and mining in drifts and tunnels. They all recognized discovery as the foundation of the possessor's title, and development by working as the condition of its retention. And they were so framed as to secure to all comers absolute equality of right and privilege in working the mines. The first appropriator was, in all controversies, except as against the United States, regarded as the original owner, from whom title was to be traced." The case, arising on a dispute over water supply, then proceeds: "But the mines could not be worked without water. To carry water to mining localities became an important business in carrying on mining. Here, also, the first appropriator of water to be conveyed to such localities was recognized as having, to the extent of actual use, the better right. The doctrines of the common law respecting the rights of riparian owners were not considered as applicable, or only in a very limited degree, to the condition of miners in the mountains." The statutes of California and the other mining states and territories recognized these conditions long before the congressional act of 1866. The local customs and facts, and correctness in stating them, cannot be passed upon on demurrer. Glacier Mountain Silver Min. Co. v. Willis, 127 U. S. 471, 8 Sup. Ct. 1214. This was a suit where the title of mining and tunnel claims, on land never patented, was decided under the state law (including the limitation act of Colorado), all operating on the possessory right merely; said to be good against everybody but the United States. Records of district meetings of miners have been kept, which are the best proof of their customs, but not

Section 2318 reserves land "valuable for minerals" from sale.

Section 2319 declares all valuable mineral deposits, surveyed or unsurveyed, free and open to exploration and purchase, and the lands containing them to occupation and purchase, by citizens and intended citizens, under regulations of the law, and "the local customs or rules of miners in the several mining districts," when not inconsistent with the United States laws.

Section 2320 subjects mining claims on veins or lodes of "rock in place bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits," of earlier date, to the customs and laws of the date of location. A mining claim located after May 10, 1872, may equal 1,500 feet along the vein; but no location must be made before discovery of the vein, within the claim. No claim shall extend at the surface more than 300 feet on each side from the middle of the vein, and cannot be limited by custom to less than 25 feet on each side. The end lines shall be parallel.

Section 2321 prescribes how citizenship shall be proved.

Section 2322 gives to the locator the exclusive right of possession, together with the underground extension, which has been explained in the second chapter of this work, in a section on "Boundaries of Mining Claims."

Section 2323 gives to the owners of a tunnel which is run for development or discovery the right to all veins or lodes within 3,000 feet from its end, along its line, in like manner as if discovered at the surface, unless the tunnel is abandoned by failure to work on it for six months.

Section 2324 gives to the miners of the district the power, subject to state or United States law, to regulate the amount of work necessary to hold a mining claim, subject to these requirements: (1) The location must be clearly marked on the ground; (2) the records of claims must give names of locators, date of location, and description with calls for natural objects or monuments. On claims after

the best proof of priority of possession that may be noted upon them. Campbell v. Rankin, 99 U. S. 261. It seems that under some of these customs a mining claim may be sold without writing. Mining Co. v. Taylor, 100 U. S. 37. One who settles on mineral lands knowing that they are such, without complying either with the miners' customs or the United States mining laws, has no equity to be recompensed for improvements. Sparks v. Pierce, 115 U. S. 408, 6 Sup. Ct. 102.

May 10, 1872, work worth not less than $100 must be done each year till the patent is issued. There is temporary provision for older claims, "but where such claims are held in common" (quaere, are only these older claims meant?) this outlay may be made upon any one. On failure, the claim or mine is open to new location, unless the former owners have resumed work before such location. When one of several co-owners fails to contribute his share of the cost, the others who have contributed may, upon a notice in writing or by publication, close him out.[102]

Section 2325 directs that a patent may be issued to any person, corporation, or association who has claimed and located under the above sections; prescribes the oath to be taken, and the filing of plat and field notes, which must be made by, or under the direction of, the surveyor general. The boundaries must be marked on the ground. The application must be posted on the ground, and published for 60 days in a newspaper. If no adverse claim comes in, the register issues a patent, upon the payment of $5 per acre to the proper officer. Section 2526 assumes that an adverse claim is filed within the 60 days, which must be on oath, and contain a full description of its boundaries, whereupon all proceedings are stayed until the controversy is settled by a court of competent jurisdiction, or the adverse claim is waived. The claimant must begin his suit for possession in the proper court within 30 days, and prosecute it with reasonable diligence to final judgment. Not to do so is a waiver. After such judgment the party entitled to the possession of the claim, or any part thereof, may, without further notice, file the prescribed documents with the register, and pay five dollars per acre to the receiver, and, having these facts certified by the former, is entitled to his patent at the general land office. If, under the judgment, several parties are entitled, each may have his patent for the part adjudged to him.

Section 2327, as to description, has been referred to in a former chapter.

Section 2328 extends the provision for patents to applications made before the date of the law.

Section 2329 directs that "placer" claims (being those on all forms

[102] The conditions under which part owners may be closed out under this section are discussed in Turner v. Sawyer, 150 U. S. 578, 14 Sup. Ct. 192.

of deposit, except veins of quartz or other rock in place) shall be subject to entry and patent in like manner; but if the lands are already surveyed the entry, in its outer limits, must conform to the legal subdivisions.

Under section 2330, these subdivisions may be divided into 10 acre lots, and two or more persons or associations having contiguous claims of any size, though less than 10 acres each, may join in one entry, but no location is to exceed 160 acres, and must conform to the public surveys; and this law cannot defeat a pre-emption or homestead entry made in good faith, or authorize the sale of a settler's improvements.

Under section 2331, where placer claims are on surveyed land, and conform to the subdivisions, no further survey is necessary. Since May 10, 1872, an individual cannot locate more than 20 acres. Where placer claims cannot be made to conform, survey and plat shall be made as of unsurveyed lands.

Section 2332 directs that where "such person or association, they and their grantors, have worked their claims for the time of the local limitation law for mining claims, evidence thereof gives right to a patent, in the absence of an adverse claim, subject, however, to all valid liens attaching before the issual of the patent."

Section 2333 provides for the case where the same person or persons own the placer claim and a lode claim within it. The patent issues for the former, subject to the obligation of paying $5 an acre for the vein or lode and 25 feet of surface on each side thereof. If the existence of the vein is known when the patent for the placer is applied for, not to name it in the application is conclusively a waiver. When it is not known, all minerals within its area pass by the placer patent. While the vein or lode has to be paid for at $5 an acre, the ground for placer mining is to cost only $2.50. The patent granted is subject to these provisions.

Section 2334 provides for the appointment of deputy surveyors of mineral lands, and for the payment of the extra expense by the applicants.

Section 2335 relates to affidavits.

Section 2336 provides: "Where two or more veins intersect or cross each other, priority of title shall govern, and such prior location shall be entitled to all ore or mineral contained within the space of

intersection; but the subsequent location shall have the right of way through the space of intersection for the purposes of the convenient working of the mine. And where two or more veins unite, the oldest or prior location shall take the vein below the point of union, including all the space of intersection."

Section 2337 allows the owner of a vein or lode to buy not exceeding five acres of non-mineral land, not contiguous thereto, for "mining or milling purposes." "The owner of a quartz mill or reduction works, not owning a mine, etc., may also receive a patent for his mill site."

By section 2338, the state or territorial legislatures are permitted, in the absence of congressional law, to "provide rules for working mines, involving easements, drainage, and other necessary means to their complete development."

Sections 2339 and 2340 recognize all vested rights to the use of water, and all the local laws and customs regarding such use, and make all patents that may be granted for mineral lands subject to those rights.

Section 2341 restores lands theretofore designated as mineral lands, on which qualified persons have established homesteads and used them for agricultural purposes, if no valuable deposits of "gold, silver, copper, or cinnabar" have been discovered on them, and the lands are properly agricultural, to the operation of the preemption and homestead laws; and, under section 2342, the secretary of the interior may withdraw lands clearly agricultural from those classed as mineral. Section 2343 has no bearing here.

Section 2344 confirms the Sutro tunnel grant of 1866.

By section 2345, the mineral lands in Michigan, Wisconsin, and Minnesota are excepted from these provisions. They are free and open to exploration and purchase, as before May 10, 1872, and may be entered, pre-empted, and bought according to legal subdivisions, like other public lands.

Section 2346 reserves mineral lands from all grants or extensions of grants made at the first session of the 38th congress to either states or railroads.

The later acts are not very important. That of June 6, 1874, suspends for a short time the requirement of work. That of February 11, 1875, suspends it again as to those who run a tunnel for develop-

ing mines. That of May 5, 1876, excludes deposits of coal, iron, lead, or other mineral in Missouri and Kansas from the operation of the act of May 10, 1872: "And all lands in said states shall be subject to disposal as agricultural lands." An act of June 3, 1878, permits the citizens of Colorado and Nevada and of the mining territories to cut timber from the public lands for mining purposes. An act of January 22, 1880, regulates the proofs on which a patent is to issue, for nonresident claimants. An act of March 3, 1881, provides for verdicts and judgments in suits between adverse claimants; that neither is entitled to a patent, if such be the right.[103] The act of April 26, 1882, relates to affidavits on adverse claims. The act of March 3, 1883, withdraws mineral lands in Alabama from the operation of the act of 1870, and subjects them to disposal as agricultural lands. Section 8 of an act of May 17, 1884, extends the mining laws to Alaska. Section 16 of the act of March 3, 1891 ("to repeal timber-culture laws, and for other purposes"), allows in certain cases the entry of a lode-mining claim, and the issual of a patent thereon within a town site. An act of August 4, 1892, includes chiefly lands valuable for building stone among those which may be entered under the laws relating to placer mining. Lastly, the act of July 18, 1894, suspends the requirement of the yearly outlay in labor for the current year.[104]

The successive exclusion of Michigan, Wisconsin, Minnesota, Missouri, Kansas, and Alabama leaves the mining laws practically in force only in the states and territories in which gold, silver, quicksilver, and lead are the chief products of the mine. Iron and coal are by their nature not within laws regulating veins or lodes, though there certainly are veins of these minerals. Beds of iron or coal stretch over such large areas that to exclude them from railroad grants might render these nugatory. Hence in the acts for the benefit of the Pacific roads, only mineral lands other than coal and iron are excluded. But the pre-emption and homestead,

[103] Under this act (perhaps without it) each claimant under section 2326 must show a right of possession, not only as against his rival, but as against the United States. Jackson v. Roby, 109 U. S. 440, 3 Sup. Ct. 301; Gwillim v. Donnellan, 115 U. S. 45, 5 Sup. Ct. 1110.

[104] These acts (all but the last, but including that of 1892) are found in the land-office circular on mineral lands, dated December 10, 1891.

and the old private entry and sale laws, reserved all mineral lands (which includes those containing coal deposits of such richness as to make the land more valuable for mining coal than for tillage and pasture); but an act of February 26, 1895, at last clears away much difficulty by declaring that iron and coal lands shall no longer be classed as mineral.[105] All salines were, even by the earliest land laws, reserved from entry and sale.[106]

Coming to the details of the Revised Statutes, we meet, at the very beginning, the qualification of the discoverer or explorer: a citizen, or one who has formally declared his intention. But a corporation, formed under the laws of any of the states, and composed of citizens or those who have declared their intention, is qualified.[107] What is a "known" location may depend greatly upon the laws of the state or territory which provide for recording these locations; and these laws being changed from time to time, the notice by which those in adverse interest may be affected may change accordingly. The local statutes may, by providing for the recording of mining locations, make it "known" within the meaning of the law, though it be not in fact known to the party against whose subsequent entry or application it is set up.[108]

[105] Colorado Coal & Iron Co. v. U. S., 123 U. S. 307, 8 Sup. Ct. 131 (under pre-emption act of 1841, "known mines or salines"); Mullan v. U. S., 118 U. S. 271, 6 Sup. Ct. 1041 (act of 1853, donation to California). The word "vein" is in the former case applied to coal. As to railroad grants, see section 69, and particularly Barden v. Northern Pac. R. Co., 154 U. S. 288, 318, 14 Sup. Ct. 1030. See under old laws, U. S. v. Gear, 3 How. 120 (lead mines not open to sale or pre-emption under act of 1834).

[106] "The policy of the government since the acquisition of the Northwest Territory to reserve salt springs from sale has been uniform. The act of 1796 required every surveyor to note on his field book the true situation of all mines, salt lakes, and salt springs, and reserves for the future disposal of the United States every other salt spring that should be discovered." Morton v. Nebraska, 21 Wall. 660, 667. The principles are by the Nebraska act of 1854 extended to Kansas and Nebraska, and render void an entry or patent where the saline had been noted on the field book, and is palpable to the eye. Id.; McKinley v. Wheeler, 130 U. S. 630, 9 Sup. Ct. 638.

[107] Manuel v. Wulff, 152 U. S. 505, 14 Sup. Ct. 651 (only the United States can complain of lack of citizenship; and it is too late to do so when it is acquired).

[108] Hoyt v. Russell, 117 U. S. 401, 6 Sup. Ct. 881 (Montana statutes as to

In reading the Revised Statutes we must keep in mind the distinction between "location" and mining claim. The former is earned and staked out by a single miner, and the local customs as to allowable size of vein or lode location, and the statute restriction on placers, apply to it alone; but the individual miners may, by assignments, combine several locations into a lode claim (about which there never was a doubt), and, in like manner, several placer locations into one placer claim, which then may exceed 160 acres; and a patent for a larger quantity is, under such circumstances, perfectly good.[109] A vein or lode claim made up of several locations would be bad only as to the excess, if the combined length should exceed the sum of those which the local custom permits.[110]

A patent which is issued while a controversy is pending between the applicant and an adverse claimant, under section 2326 of the Revised Statutes, is deemed surreptitious as against the applicant, and cannot be set up in the progress of the suit.[111] The contest for mining rights has in late years been carried on mostly against town-site entries. These are void, when a "known" vein or lode is running under the site.[112] The occupancy of land as a town site is of no avail against a newly-discovered mine, unless the town site has been duly entered at the land office before the

recording when change in statute came into force in each locality); Noyes v. Mantle, 127 U. S. 348, 8 Sup. Ct. 1132.

[109] Smelting Co. v. Kemp, 104 U. S. 636; Tucker v. Masser, 113 U. S. 205, 5 Sup. Ct. 420. Before 1870, placer locations were unlimited. The court draws attention to the words "or their grantors," in the Revised Statutes, showing that locations are assignable, as they must be considering the large scale and capital which mining requires. The work required each year for all the locations combined into one claim may be put on any one of them. Chambers v. Harrington, 111 U. S. 350, 4 Sup. Ct. 428. The work may be done at a distance, is in the first-named case said incidentally.

[110] Richmond Min. Co. v. Rose, 114 U. S. 576, 5 Sup. Ct. 1055 (under Nevada act allowing 200 feet to each locator along the vein, besides 200 feet to the discoverer).

[111] Richmond Min. Co. v. Rose, 114 U. S. 576, 5 Sup. Ct. 1055. The land office must not assume that a claim is abandoned because there is delay in bringing it to trial.

[112] Sparks v. Pierce, 115 U. S. 408, 6 Sup. Ct. 102. It was also held here, as was stated generally in section 67, that none but the person entitled to the patent can assail the patent actually issued by bill in equity.

discovery.[113] But, where a mine has been worked in times past, and been abandoned, and its further possibilities are unknown, the town site entered before work is renewed may stand good.[114] Nor is land considered within the exception unless, at the time of the grant, it is known to contain ore or coal enough to pay for the expenditure of extracting it.[115]

In the contest between placer and lode mining claims, the same principle governs as in the contest between the town site or farm, on the one side, and mining on the other; that is, the lode must be sufficiently rich in ore that to follow the veins, lodes, or ledges should be profitable.[116] As the placer patent is on its face made subject to all known vein claims (where they are disclosed in the application, they are excepted), the patentee cannot recover where

[113] Id., distinguished from Deffeback v. Hawke, 115 U. S. 392, 6 Sup. Ct. 95, where an entry of the town site had actually been made. This case, as well as the other, affirms that one in possession of public land, knowing that he has not complied with the law, cannot be said to hold in good faith.

[114] Dower v. Richards, 151 U. S. 658, 14 Sup. Ct. 452.

[115] Davis' Adm'r v. Weibbold, 139 U. S. 507, 11 Sup. Ct. 628.

[116] A placer patent gives the fee in the surface land as well as in the minerals below. Deffeback v. Hawke, supra. In U. S. v. Iron Silver Min. Co. (sometimes quoted as U. S. v. Iron Min. Co.) 128 U. S. 673, 679, 9 Sup. Ct. 195, a placer claim is defined as "ground within defined boundaries, which contains mineral in its earth, sand, or gravel; ground that includes valuable deposits not in place, that is, not fixed in rock, but which are in a loose state, and may in most cases be collected by washing or amalgamation without milling." The word "placer" (pron. platherr) is Spanish, and means "pleasure." "Veins or lodes" are said to be meant for "lines or aggregations of metals embodied in quartz or other rocks in place." But a lode may contain more than one vein. Iron Silver Min. Co. v. Cheesman, 116 U. S. 529, 533, 6 Sup. Ct. 481, which quotes from Mr. Justice Field's opinion in Eureka Case, 4 Sawy. 302, 311, Fed. Cas. No. 4,548: "A fissure in the earth's crust, an opening in its rocks or strata, etc., would seem to be essential to a lode in the judgment of geologists. But to the practical miner the fissure and its walls are only of importance as indicating the boundaries within which he may look for, and reasonably expect to find, his ore. A continuous body of mineralized rock, lying within any other well-defined boundaries, would equally constitute in his eyes a lode." And this is said to be the meaning of "lode" as used in the acts of congress. There may be a discovery of a vein within the lode, which, under the Nevada law or custom of miners, will entitle the discoverer to an additional 200 feet in length. Richmond Min. Co. v. Rose, 114 U. S. 576, 5 Sup. Ct. 1055; Sullivan v. Iron Silver Min. Co., 109 U. S. 550, 3 Sup. Ct. 339.

a known vein existed, though it be possessed and worked by one who has not followed either the miners' customs or the laws of congress in locating and extending it.[117] If the vein or lode is not known at the time when the placer claimant applies for his patent, having fulfilled all previous conditions and made his payments, he seems to be entitled to a patent including all minerals, though the vein or lode is discovered and brought to his notice before the patent is actually issued.[118]

The opening and working of mines while the Indian title to the land is not yet extinguished is unlawful. Yet, when the Black Hills miners worked on the Sioux reservation while the national authorities were negotiating with the Indians for that country, the time of exploration and work preceding the sale by the Indians was credited to the miners, the extinguishment of the Indian title relating back to the beginning of the work.[119]

§ 71. Grants to the States.

In consideration of the great cessions of land and sovereignty which Virginia and the states north of it made to the United States in or before 1784, and Georgia in 1802, the national government undertook, not only to extinguish the Indian title, and to survey the public domain, but they also set aside a great part of that domain for purposes of education. Section 16 in each township was granted to each of the states formed out of the common territory, to some of them also section 36; and the same policy was pursued with regard

117 Reynolds v. Iron Silver Min. Co., 116 U. S. 687, 6 Sup. Ct. 601, decided on the ground that the plaintiff in ejectment must recover on the strength of his own title. The patent excludes all known veins; hence no recovery can be had on it. In Iron Silver Min. Co. v. Reynolds, 124 U. S. 374, 8 Sup. Ct. 598, between the same parties, and with regard to the same placer patent, and a vein coming into it from outside of its vertical lines, it was decided that the wording of the patent allowed the vein miner to enter under ground in the pursuit of his vein. The priority between placer and lode claims is a question of fact, on which the decision of the land office, if submitted to it, is final. Iron Silver Min. Co. v. Campbell, 135 U. S. 286, 10 Sup. Ct. 765.

118 Dahl v. Raunheim, 132 U. S. 260, 10 Sup. Ct. 74; Sullivan v. Iron Silver Min. Co., 109 U. S. 550, 3 Sup. Ct. 339.

119 Noonan v. Caledonia Min. Co., 121 U. S. 395, 7 Sup. Ct. 911.

to the new states carved out of the Louisiana and Florida purchases, and out of the conquests and purchases from Mexico. Several townships in each new state were also granted to it in aid of a state university,[120] which it might establish; and other donations followed from time to time. The most important of these were the act of September 8, 1841, giving to each "public-land" state then in the Union, and to each new one that might be thereafter admitted 500,000 acres (including amounts already received for the same purpose), to aid the state in works of internal improvement; the swamp-land act of 1850 (entitled "An act to enable the state of Arkansas and other states to reclaim the swamp lands within their limits"), with subsequent amendments greatly enlarging its scope; the agricultural college act of 1862, and other acts in favor of one or more states. The one great question under all these acts is as to the time when the legislative grant takes effect: whether the statute operates by its own force, or is only an agreement to be carried out either by patent or by another confirmatory act; a question already stated in a general way in opening the law as to United States grants in a former section.[121] There have been many different grants of public lands to one or more states for a number of different purposes, aside of those stated above, and aside of those made to aid in the construction of railroads. The grant made to the state of Oregon in 1866 for the establishment of a military road (in its nature closely akin to a railroad land grant) may be mentioned. This grant, being resumed for supposed noncompliance with its conditions, brought up the interesting question of the quality of the work that must be done, or of the road that must be built, in order to preserve the land grant from forfeiture.[122]

120 The University grant contemplates that the receiver may be a private corporation, which may hold its lands against any subsequent resumption by the state. Vincennes University v. Indiana, 14 How. 270.

121 Kissell v. St. Louis Public Schools, 18 How. 19; Cooper v. Roberts, Id. 173. The same has been held as to the legislative grants to Michigan and Wisconsin. The act of 1841, giving land for internal improvements, was not a grant in praesenti. Foley v. Harrison, 15 How. 433. The grant to Nevada, by act of June 16, 1880, of 2,000,000 acres in lieu of the sixteenth and thirty-sixth sections, was to be selected out of unappropriated lands. See as to meaning thereof, U. S. v. Williams, 30 Fed. 309. On selection of school lands in California, see McCreery v. Haskell, 119 U. S. 327, 7 Sup. Ct. 176.

122 U. S. v. Willamette Val. & C. M. Wagon Road Co., 55 Fed. 711; U. S.

The swamp-land act of September 28, 1850, by its first section gave to the state of Arkansas, and by another section to all other states, "the whole of those swamp and overflowed lands" remaining then unsold; "and the same are hereby granted to said states." Each legal subdivision, of which the greater part is "wet and unfit for cultivation," is to be included in plats, which the secretary of the interior is to prepare, of the lands coming within the purview of the act, and which lists he is to transmit to the governor of each state, and at his request to issue patents therefor. The legislature of each state is to dispose of the lands given to the state, the proceeds to be used exclusively for reclaiming such lands.[123] Here is a grant in praesenti. As soon as the bill was signed by the president, every 40-acre lot of which the greater part was on the 28th of September, 1850, "wet and unfit for cultivation," belonged to the state containing it, before any report by the surveyor to the secretary, or by him to the governor; a rather loose way of legislating, considering how men differ on the question what land is wet, or unfit for cultivation. This view was actually enforced in an early decision under the act, in which the supreme court allowed the proof by parol that the lands in dispute were "wet and unfit," and thus withdrew them from a railroad grant taking effect in 1852 before a plat of the lands had been returned.[124] In subsequent cases this view was so far restricted that proof of "swamp or no swamp" can only be introduced as long as a plat has not been made out by the secretary of the interior, and patents issued; but that his action, when taken, is conclusive, and cannot be controverted in the courts.[125] The act of July 23, 1865, to

v. Dalles Military Road Co., 2 C. C. A. 419, 51 Fed. 629. The decision of the courts was favorable to the road; it took the wild state of the country at the time of its construction into consideration.

[123] 9 Stat. 519; Brightly's Dig. (1857) p. 492.

[124] Wright v. Roseberry, 121 U. S. 483, 7 Sup. Ct. 985 (title complete without patent to the state). See, as to the act of 1860 in favor of Oregon, with its condition precedent of selection in due time, Pengra v. Munz, 29 Fed. 830; Hannibal & St. J. R. Co. v. Smith, 9 Wall. 95; Chandler v. Calumet & Hecla Min. Co., 149 U. S. 79, 13 Sup. Ct. 798. As to grant by state of swamp lands for purpose of public improvement, see Wineman v. Gastrell, 4 C. C. A. 596, 54 Fed. 819.

[125] French v. Fyan, 93 U. S. 169, 173; Ehrhardt v. Hogaboom, 115 U. S. 67, 5 Sup. Ct. 1157; Chandler v. Calumet Min. Co., 149 U. S. 79, 13 Sup. Ct.

quiet land titles in California, as far as it gave to the state the sections selected in place of school lands lost by prior Mexican grants, operated in praesenti (though it did not do so as to the gift of 500,000 acres contained therein). Such lands having been selected from lands already surveyed, and notice of the selection having been given to the local land office, the title of the purchaser from the state is superior to that derived under the United States land laws after such act; such as a purchase from the regents of the university under the grant to the state for the establishment of agricultural colleges.[126] A law of 1894 (it is section 4 of the "sundry civil bill" passed for the then current year) authorizes the secretary of the interior, with the president's approval, to contract and agree with the states of Washington, Oregon, California, Nevada, Idaho, Montana, Wyoming, Colorado, North and South Dakota (or other state containing desert lands) to grant to them the desert lands therein, not exceeding 1,000,000 acres in each, upon the filing of a map by the state, and its agreeing, through its legislature, to irrigate the same in a manner therein specified. Of course, no judicial decisions have yet been rendered construing the act; and probably none of the states have yet perfected all the steps for receiving their allotments.[127]

§ 72. Spanish and Mexican Grants.

By far the greater part of the area of the United States has come to the nation by successive cessions. First Louisiana, then East and West Florida, then the Republic of Texas, were incorporated into the Union; then the immense tracts known as Upper California (comprising the state of California and great parts of Utah and Nevada) and New Mexico (containing the northern parts of the present territories of New Mexico and Arizona, and much of the

798. The act of March 3, 1857, confirming the swamp-land selections to the several states, at least as to all selections made before that day, cuts off the plea that the land was not "wet or unfit."

126 McNee v. Donahue, 142 U. S. 587, 12 Sup. Ct. 211. The agricultural college act of 1862, with its amendments (15 Stat. 68, c. 55, § 4; 16 Stat. 581, c. 126), that even after its acceptance by the state, no title vested in the state, till it made a formal selection.

127 See Acts Cong. Aug. 18, 1894; March 3, 1877; March 3, 1891.

state of Colorado); lastly the Mesilla Valley, comprising, roughly speaking, the southern half of the territories of New Mexico and Arizona, was annexed. All of these acquisitions, with the exception of Louisiana, the largest among them, had before its entry into the American Union (Texas until a short time preceding that entry), been governed by Spanish law. Louisiana had been settled by the French. The population in and around New Orleans and at St. Louis was almost exclusively French. But from 1763 to 1802 it was governed by Spanish laws and Spanish officials; in fact, the treaty by which it was ceded back to the French republic had not been carried into effect by the appointment of French officials, before the First Consul ceded his new acquisition to the Americans.[128]

[128] A very few French grants antedating the Spanish régime in Louisiana have come before the supreme court of the United States. Two of these were thrown out because dated after the cession by the treaty of Fontainebleau, November 3, 1762. U. S. v. D'Auterive, 10 How. 609, and U. S. v. Pillerin, 13 How. 9. A British grant, made during the British rule in Florida was thrown out in Harcourt v. Gaillard, 12 Wheat. 523, because made in the country north of the thirty-first parallel of latitude, after the Declaration of American Independence. The early French grants, even more perhaps than the late Spanish ones, were often too vague, unaided by survey, could not be located, and thus conferred no legal title. Denise v. Ruggles, 16 How. 242. French grants were also given on condition of improvement and occupancy; and, after a long lapse of time, the condition remaining unfulfilled, congress might resume the grant, its act to that effect being equivalent to office found. U. S. v. De Repentigny, 5 Wall. 211. See, also, New Orleans v. De Armas, 9 Pet. 224, for a contest between a French and a late Spanish grant. The Mexican grants in Texas, mainly under the colonization laws of Mexico, will be treated hereafter in connection with the land system of that state. A Spanish grant, made after the treaty of 1802 by which Spain had given Louisiana back to France, was thrown out in U. S. v. Reynes, 9 How. 127, as unauthorized, though the treaty had been kept secret till the cession by France to the United States, and though by the rule of both France and Spain laws were not in force till promulgated at the place. A case of some historic interest is U. S. v. De Repentigny, 5 Wall. 211, under a French grant of 36 square leagues at the Sault Ste. Marie, in what is now the state of Michigan. That the country was before the Seven-Years War a part of Canada or New France is tacitly admitted. The important point in the case is that of international law and the treaty of 1763 as to the French subjects who left Canada, thereby forfeiting and abandoning their lands to the British government. The very informal titles of the French settlers in Kaskaskia, Vincennes, Cohokia, etc., were recognized in the "Ordinance of 1787 for the Organization of the Northwestern Ter-

Broadly speaking, then, the land titles, of other than English or American origin, with which we are confronted, are governed in their origin either by the law of royal Spain, or by that same law modified by the institutions of the Mexican republic.[129]

The parts of this vast domain which had been wrested from the mastery of the red man were, at the dates of the several annexations, comparatively small, except in New Mexico, where the Indians had adopted Christianity, peaceable habits, and in a great measure the use of the Spanish language; and here the largest and most valuable, perhaps also the most fraudulent, "Spanish grants" have been set up. A rather late decision of the supreme court of the United States illustrates how the study of Spanish law may be ma-

ritory"; and an ordinance of the continental congress, passed in 1788, directed the governor of the Northwestern Territory to examine and pass on such of them as might be submitted to him. A title thus passed upon by Gov. St. Clair was sustained by the supreme court in Reichert v. Felps, 6 Wall. 160.

[129] It is said in Fremont v. U. S., 17 How. 542, 557, that the courts take notice of the old Spanish or Mexican law, and it need not be proved as a fact, like foreign law. See this applied in Doe v. Braden, 16 How. 635, to the nature of the grant made by the king of Spain to the duke of Alagon. The linear league is equal to 5,000 varas, each vara being about 2.786 feet. The sitio or square league is equal to 4,456.8 acres, nearly seven square miles. The decree of 1824 of the Mexican congress, by article 12, directs that not more land shall be permitted to unite in the same hands than one league suitable for irrigation, four leagues of arable land, having no facilities for the same, and six leagues of grazing land. But article 14 of this decree speaks of "the contracts which the empresarios [undertakers] make with the families which they bring at their own expense, provided they are not contrary to the laws." Article 7 of the rules adopted in 1828 for carrying out the law or decree of 1824 speaks of "grants made to empresarios for them to colonize with many families." It is upon the ground of these latter grants that the supreme court of the United States in the Maxwell Land-Grant Case, 121 U. S. 325, 360, 7 Sup. Ct. 1015, sustained the grant known as "Una de Gato," made by Gov. Armijo, in 1841, to Beaubien and Miranda. The conflicting claim to part of the same land set up in Interstate Land Co. v. Maxwell Land-Grant Co., 139 U. S. 569, 11 Sup. Ct. 656, appeared to rest on a mere executory contract, as most of the empresario grants did, and could not be considered. The judicial delivery of possession by a magistrate, under the Mexican law, is illustrated by the accompanying document in Tameling v. United States Freehold & Emigration Co., 93 U. S. 648. The Mexican departmental governors had no power to make grants of land, except under the colonization law of 1824. Van Reynegan v. Bolton, 95 U. S. 33.

terial in judging of the validity of a link in the chain of title. In 1817 a tract of land in the then Spanish province, now state of Texas, was sold as confiscated property for the supposed treason of the owner. The documents evidencing the sale recited, under the hands and seals of the proper civil officers to conduct such a sale, that the commanding general of the department had confiscated the land; but did not show by whom the owner's guilt had been inquired into, or whether there had been any trial at all. It was decided, upon reading the royal decree of the king of Spain, that there could be no confiscation without a trial, and the documents were rejected as insufficient.[130]

The Spanish grants were either "perfect" or "incomplete." The former correspond to patents under the English-American law; the latter rather to homestead entries. It seems that the "subdelegates" of royalty had authority to allot lands to applicants; but only the royal governor or "intendant general" could issue what we would call a patent. And for East Florida it seems the signature of the captain general of Cuba was needed. Hence, in the provinces far removed from the seat of government, perfect grants were exceedingly rare.[131] Under the Mexican rule perfect

[130] Sabariego v. Maverick, 124 U. S. 261, 8 Sup. Ct. 461. A document there relied on showed only that the king of Spain granted such title as he had, but did not show that he had acquired it by confiscation. In Mitchel v. U. S., 15 Pet. 52, questions of political and military history were raised. The petitioner's grantor had, with the assent of the Spanish governor of East Florida, and of the captain general of Cuba, bought the tract surrounding Ft. Marks from the Indians, the documents being so worded as to include the fort. It was held that such could not be the intent, and that a wide clearing around the fort, a zone 3,400 yards wide, measured from the "salient angles" was part of the fort, and excluded from the grant.

[131] In Menard v. Massey, 8 How. 293, the supreme court remarks that in Upper Louisiana (what is now the state of Missouri) only two men, both of them Anglo-Americans, took the trouble to go or send to New Orleans for a regular grant. The difficulties and dangers of the journey, the poverty and illiteracy of the people, the small value of the land, and the preference of the French habitants for village life on narrow strips of land within a common fence, all tended against any desire for new and good land titles. The document given, as appears in this case, to the ancestors of plaintiffs by the governor at St. Louis, is "to enable him to solicit the title in due form from the intendant general of Louisiana." This was in 1799. Before 1798 the power was lodged in the military governor. See Chouteau's Heirs v. U. S., 9 Pet.

grants were somewhat more common than under the Spanish. They hardly ever comprised less than a square league, not seldom eleven square leagues. But, as has already been remarked, while some of these grants gave boundaries agreeing with the area, or described the parcel by its usual name, many other of the Mexican grants gave a comparatively small area within much wider "out boundaries." As to these grants, the supreme court has decided that the Mexican government had the right, upon a survey, to confine the grantee to the quantity named, which generally corresponded with the quantity prescribed by law; and that the United States government, as the successor of the Mexican, may exercise the same right.[132] The great bulk of imperfect grants in the Louisiana purchase was many years ago fully disposed of under the acts of congress of 1824 and 1844, which provided for proceedings by the claimant against the United States in the proper district court. The grantee must have had his residence within the province of Louisiana at the time of the grant, or, at least, on or before the 10th of March, 1804, when it was formally turned over to the United States. The relief prayed was either a confirmation of the grant, or, if the lands embraced therein had in whole or in part been sold by the United States, then indemnity out of other unappropriated lands. No remedy could be given, under these acts, where the Spanish title was perfect on its face.[133] Most of the Mexican grants

137. Under Mexican law, a perfect title could only be made by a formal delivery of possession through a magistrate (More v. Steinbach, 127 U. S. 70, 8 Sup. Ct. 1067); which in California, as there said, could not be done after the conquest. See, as to the importance of the judicial delivery, Malarin v. U. S., 1 Wall. 282, 289. It has been repeatedly held in Texas that the alcalde who delivers the judicial possession need not be the same who has jurisdiction over the locus in quo. Martin v. Parker, 26 Tex. 257.

132 U. S. v. McLaughlin, 127 U. S. 428, 8 Sup. Ct. 1177. In a number of cases Mexican grants within a large "out boundary" were by our courts, after confirmation, confined to the number of square leagues (usually 11) recited in the Mexican grant. Hornsby v. U. S., 10 Wall. 224, 231. Here the regulations of 1825, under the colonization law of 1824, are stated in full, in nine articles, the translation being credited to Rockwell's Spanish & Mexican Laws in Relation to Mines and Titles (volume 1, p. 453).

133 U. S. v. Castant, 12 How. 437. The grant being of titulo in forma, the petition was dismissed. A great number of cases under these acts are found in the 9th, 10th, 11th, and 12th volumes of Howard, in nearly all cases on

in California, perfect or imperfect, about the validity or extent of which any doubt prevailed, were either rejected or confirmed and defined under the act of March 3, 1851, by the board of commissions appointed by authority of that act. From its decisions an appeal lay to the district court of the United States for the district of California, in which the proceeding was "original," not appellate, in form; and from the district court an appeal lay to the supreme court as in other cases.[134] A similar act for the settlement of titles in the Mexican department, and then United States territory, of New Mexico was approved on the 22d of July, 1854.[135] In dealing with these Mexican grants, the United States were bound both in

appeal by the United States from a judgment giving the relief prayed, and resulting almost always in reversals, couched sometimes in words of ill-concealed indignation against the lower courts, which allowed fraudulent claims to slip through. Perhaps no class of litigation is fuller of deliberate falsehood and forgery than is shown in setting up Spanish or Mexican grants. In Fremont v. U. S., supra, a history of the old Spanish imperfect title is given, and of the many attempts to set up grants which had no merit whatever.

[134] The act of March 3, 1851, invited all claimants to bring the proofs of their titles before the board of commissioners within two years from that date, to be passed upon by the board, subject to appeal to the courts; declaring, "in effect, that if the claim be not thus presented, within the period designated [the government] will not recognize or confirm them, but that the claims will be considered as abandoned." Waiving in that case the constitutional question as to perfect titles, the court proceeds: "Such legislation is not subject to any constitutional objection so far as it applies to grants of an imperfect character which require further action on the part of the political department to render them perfect." Beard v. Federy, 3 Wall. 478, 490. The working of this board is also illustrated by U. S. v. Workman, 1 Wall. 745 (passing on the powers of the "departmental assembly" over land grants, and holding that they had no power except to assent to colonization grants); Lynch v. De Bernal, 9 Wall. 315; and U. S. v. Rocha, Id. 639. It is pointed out in Fremont v. U. S., 17 How. 542, that, while the act of 1824, as to Louisiana and Florida, dealt only with imperfect titles, the act of 1851 subjected both perfect and imperfect titles to its scrutiny.

[135] Under this act the surveyor general for New Mexico had to report the various claims perfect or incomplete, with his conclusions on the evidence, and his recommendations for the action of congress. The report was, through the secretary of the interior, submitted to the house early in 1857. The several grants were passed upon at different times. The surveyor's report alone, without the action of congress, is not proof in a court of justice. Pinkerton v. Ledoux, 129 U. S. 346, 9 Sup. Ct. 399.

the political and the judicial aspect, as well by the express provisions of the treaty of Guadalupe Hidalgo as by the principles of international law, to protect all rights of property in that territory emanating from the Mexican government previous to the treaty.[136]

The title of the city of San Francisco, and those claiming under it, to the tract of four square leagues granted by the Mexican government to the pueblo or town of which the city is the successor, was at first brought before the board of land commissioners under the act of 1851, but was, after a long litigation, both with the state of California and with the United States, finally settled by acts of congress. As a final result, the city and those claiming under it were confirmed in the ownership of the tidal lands and of the valuable lots redeemed from the open sea and the bay by filling.[137]

[136] Teschemacher v. Thompson, 18 Cal. 11; Beard v. Federy, 3 Wall. 478; Soulard v. U. S., 4 Pet. 511; Strother v. Lucas, 12 Pet. 436; San Francisco v. Le Roy, 138 U. S. 656, 11 Sup. Ct. 364—where it is said that the property rights of pueblos, equally with those of individuals, were entitled to protection; quoting Townsend v. Greeley, 5 Wall. 326, 337. It will, however, be seen from Beard v. Federy, supra, that the United States do not recognize any grants made by the republic of Mexico in California after it was occupied by the American army, the 9th of July, 1846, being deemed the end of Mexican dominion. See, also, as to same point, U. S. v. Yorba, 1 Wall. 412, 423, and More v. Steinbach, supra.

[137] A full history is found in San Francisco v. Le Roy, supra; in Hoadley's Adm'rs v. San Francisco, 124 U. S. 639, 8 Sup. Ct. 659; and in Knight v. United States Land Ass'n, supra. The four leagues are at the northern end of the tongue of land on which the city stands, bounded on the west by the Pacific, on the east by the Bay, on the north by the connecting waters, on the south by an east and west line such as will make the quantity. Such, at least, is the survey made by order of the department by way of construction of the Mexican grant. On the 20th of June, 1855, the city council of San Francisco passed "An ordinance for the quieting and settling of titles," known as the "Van Ness Ordinance," or as "No. 822," whereby the city relinquishes and grants all right and claim to the lands within its corporate limits to the parties in the actual possession thereof, by themselves or tenants, on or before January, 1855, excepting the "slip property," which is described; excepting also the land south, east, or north of the water-lot front of the city as established by legislative charter of 1851; those holding titles by grants from the alcalde or ayuntamiento, or town council, or conveyances thereunder, to be deemed in possession. This ordinance was ratified by the California legislature March 11, 1858. Congress, on July 1, 1864, passed an act for settling California land titles, by section 5 whereof all right of the United States to

California and New Mexico were departments of the republic of Mexico; "territories" we would call them. And the disposition of the public lands was made by the central government through the governor of the department. It was different in Texas, which, soon after the obtention of Mexican independence from Spain, became part of the self-governing province or state of "Coahuila and Texas," whose legislature (congreso) disposed of the public lands, mainly through commissioners for "colonies" in the uninhabited or sparsely-inhabited parts of the double province. These grants were never submitted to boards or officers of the United States, but were dealt with by the republic, afterwards by the state, of Texas.[138] The manner in which the republic or state has dealt with those titles must be told in another section. In passing upon a perfect Spanish or Mexican grant, made by a "judicial delivery of possession," the court often finds that the description in the official act, signed by the alcalde, differs from that contained in the application to which the grant is an answer. In such a case the former description is preferred, as showing the true contract between the parties.[139] The word "testimonio," which is so often met with in the judgments and opinions of courts upon Spanish and Mexican titles, requires some explanation. Under the English and American views of law,

the lands within the corporate limits as defined by the charter was relinquished, and granted to the city, with some slight exceptions. 13 Stat. 333. By virtue of this act the circuit court of the United States for the California district, on May 18, 1865, confirmed the claim of the city to the Pueblo lands in suit pending in the name of the city against the United States, upon an appeal from the board of land commissioners. From this decree both parties appealed to the supreme court, but, before a decision was reached, congress, on the 8th of March, 1866, gave up all rights in opposition to the decree, and both appeals were dismissed. Conflicting rights of the state of California as littoral owner were settled in the case cited above from 142 U. S. and 12 Sup. Ct.

[138] An act of the congress of Coahuila & Texas, enacted at Monclova on the 28th of March, 1832, and repealed March 26, 1834, is relied on successfully to sustain the grant to the ancestors of plaintiffs in Gonzales v. Ross, 120 U. S. 606, 7 Sup. Ct. 705, though the authentic act was dated 23 days after the repeal, as the laws of Mexican states did not come into force at the several localities until published, and the very action of the commissioner under the repealed act was prima facie evidence that the repealing act had not been published at his seat of office.

[139] Pinkerton v. Ledoux, 129 U. S. 346, 9 Sup. Ct. 399.

land passes by deed, which, among individuals, must be delivered; and, when it proceeds from the sovereign, and called a patent, usually is delivered. There are record books for deeds, and public archives in which counterparts of patents are kept. But these are the copies; the deed or patent delivered to the grantee is the operative instrument. Among the nations of continental Europe, the Spanish among them, this is otherwise. The entry of the conveyance or of the sovereign's grant in the public archives is the effective instrument for conferring the ownership of land, while the instrument delivered to the grantee is deemed only a counterpart or "second original." And such is the testimonio of the Spanish-Mexican law.[140]

[140] An example of a testimonio is given in Word v. McKinney, 25 Tex. 259: (1) The petition of Rafael Manchola, February 12, 1829, for four leagues of land, which he solicited on the terms prescribed by the colonization law of the state. (2) Its reference to the ayuntamiento of Goliad to report according to article 17 of the colonization law, dated Leona Vicario, February 14, 1829. (3) Report as to the locality, and the qualifications of the application. (4) The concession made at Leona Vicario, on the 5th February, 1830, of four leagues, as an augmentation headright; and commissioner general directed to give possession. (5) Petition of Rafael M., 8th October, 1830, that the alcalde of Goliad may give possession. (6) Corresponding direction to the alcalde. (7) Petition by Maria, as the widow of the original applicant to the alcalde, that possession be given to her according to the concession of her husband, dated October 2, 1833. (8) The order of survey, dated October 3, 1833, by the alcalde, on the petition of the widow. (9) Report of the surveyor. (10) Title of possession for four leagues to the widow from Miguel Aldrete, sole constitutional alcalde for the town of Goliad, and commissioner to distribute and give possession of vacant land within that jurisdiction, dated October 7, 1833. The certified copy of all these entries and documents was the testimonio offered. To it was appended a ratification in form following: "Executive Department of the Free State of Coahuila & Texas. Book A. No. 161. Fol. 147. Monclova, April 25, 1835." The possession of two leagues of land, given by the alcalde commissioned of the town of Goliad, citizen José Miguel Aldrete, according to the foregoing document, is ratified by the government, provided they do not affect the rights of other parties. Let this be returned to the party interested for the suitable purposes. [Signed] Viesca. [Signed] J. Mariano de Yeala, Secretary." The confirmation in this case, being addressed to the grantee, was rather irregular. In Paschal v. Perez, 7 Tex. 348, the nature and effect of the testimonio are fully explained. In Edward v. James, Id. 372, the testimonio is called a "second original." The diseño is a map furnished by the applicant, a sample of which is found in the Maxwell Land-Grant Case, supra.

§ 73. Texas Titles.

Much that has been said in reference to state and colonial grants, and much that has been said concerning Spanish and Mexican grants, finds its application here. The land system of Texas, however, grew gradually out of that of the Mexican state of Coahuila and Texas. The settlers of English-American descent, who settled the country northeast of the Nueces river, were at first loyal to that state, and willing to live under its laws, and adapted themselves to those laws as well as the difference of language and habits allowed. Not only after the struggle for independence began, but after it became successful by the victory of San Jacinto, and the republic of Texas had been established, the English-speaking Texans lived on under the old law of real estate.[141] The Spanish law was only abrogated in March,

The denunciation is the informal designation of the tract of land applied for, corresponding to the entry under the Virginia land law. See Cavazos v. Treviño, 6 Wall. 773, 783. A sample of a complete Spanish title, given in 1802 by Intendant General Morales for a small tract near New Orleans, is given at the foot of the report of Menard's Heirs v. Massey, in 8 How. 293. Being upon a sale, there is nothing but the grant, and a document signed by the royal surveyor, witnessing the delivery of possession. Another example of both the grant and the survey is given in Cavazos v. Treviño, 6 Wall. 773, a case turning mainly on the true boundaries of that survey. The books most quoted for the laws of Mexico and Spain are the Coleccion de las Cortes; Schmidt's Laws of Spain and Mexico; Escriche Diccionario de Legislacion; White's Nueva Recopilacion; also White's Land Laws of California, Oregon, and Texas. The Mexican national and state laws bearing upon titles in Texas are given in full in Paschal's Digest of Statutes, and many of them in his Digest of Decisions. A word often met with in Spanish documents bearing on land titles is "rubrica," following the name of an official, or of some person of standing. It is thus written out in print, and represents the flourish peculiar to every man of official or of business or social standing which he puts under his signature as a means of more certainly identifying it.

[141] The independence of Texas dates from November 13, 1835, when the "consultation" adopted the "plan and powers of the provisional government." (There was a more formal declaration of independence on March 2, 1836. Residence, at this date, fixes citizenship.) It was decided in Donaldson v. Dodd, 12 Tex. 381, that on that day (November 13th) the powers of the land commissioner of Coahuila & Texas ceased, in accordance with a section of the "plan," which ordered the closing of the land office; and a grant issued by him on November 20th was void, although there had not been time for the

1840, though the Civil Code of Louisiana had in part been introduced in 1836. The minutes and original documents in the archives of the Mexican departments became the first record books and files in the recorder's offices for the new counties, and the continuity was never broken. The Spanish and Mexican titles were not subjected to a board of commissioners, like those of California, nor to a surveyor general reporting to congress, like those of New Mexico. Nothing more was required (and that only by an article in the constitution of 1876) than that the muniments of title issued before November 13, 1835, must be either recorded in the county which at the time of recording contained the land, or "archived" in the general land office, or that the land must be in the possession of the grantee, or those claiming under him, in order to be preferred to one claiming under a junior title "from the sovereignty of the soil," under circumstances reasonably calculated to give notice to such junior grantee.[142] The supreme court of the United States has strongly intimated that in so far as this clause in the constitution of 1876 purports to act retrospectively, so as to subordinate a valid older to a junior grant, for things omitted to be done before the date of that instrument, it is invalid, as depriving the owner of his property without due course of law.[143]

Even the old measures—the vara, or Spanish yard, the square league, or sitio, and, in addition to these, the "labor" or millionada, as a measure of area—were for a long time retained in the Texas laws for the disposition of public lands.[144]

plan to reach him. An act of January 20, 1840, taking effect 60 days thereafter, abolished the Spanish and Mexican laws, except as to "grants and the colonization of lands in Coahuila & Texas, to the reservation of lands, and those relating to salt lakes, salt springs, mines, and mineral." 1 Pasch. Dig. art. 804.

142 Const. 1876, art. 13, § 2. The words "reasonably calculated," etc., qualify the manner of possession, which, considering the vast stretches of wild and waste land contained in a Mexican grant, must have often been quite shadowy.

143 Gonzales v. Ross, 120 U. S. 605, 7 Sup. Ct. 705.

144 The headright grant guarantied by the first constitution of the republic (General Provisions, § 10) to every citizen, the head of a family, is a "league" (i. e. a square of 5,000 varas each way) and "labor" (i. e. a square of 1,000 varas). The first mention of an English mile is found in the land law of December 14, 1837, in fixing compensation of surveyor according to the length of lines run. The league or sitio (and consequently the vara) seems to be

Leaving out of view Spanish grants antedating the independence of Mexico, as to which hardly any disputes can arise hereafter, our first landmark is the colonization law of the congress of Mexico of 1824; and closely following it, and acknowledging its authority, the act of the state of Coahuila and Texas of March 24, 1825. The great colonies known in Texas history and jurisprudence, sought to bring themselves within the federal as well as the state law. One great feature is found in both,—the border and littoral leagues. It was feared that an influx of foreigners along the border of the United States, or along the coast, might become too powerful, and betray the country to a foreign power. Hence the federal law forbade colonizing by the states of any land within 20 leagues from the border of a foreign nation, or within 10 leagues of the coast, without the previous approbation of the federal president; and the state law made it the duty of the governor to see to it that this rule be fully observed. There was a commissioner for each colony, and in the instructions sent out to the commissioners in 1827 is one which forbids their giving possession within the forbidden zone. The republic and state found it good policy to uphold the Mexican law when, after the settlement of the coast and the border along the Sabine, Mexican patents—often forged, nearly always fraudulent claims—were set up for the recovery of the most valuable lands, and it soon became a settled principle that Mexican grants within "the coast and littoral leagues are void." [145] An exception has, however, arisen under an

slightly in excess of the measure used in New Mexico and California; for two-thirds of the "league and labor," which by the latter standard would amount only to 3,090 acres, is by Rev. St. art. 4108, made equal to 3,129 acres. Mr. Paschal, on the other hand, in the introduction to his Digest of Decisions speaks of the sitio as equal to 4,428 acres, which is less than that of New Mexico.

[145] 1 Pasch. Dig. arts. 546, 569, 615, 693; Const. 1836, 10th General Provisions (as to 20 border leagues); Wilcox v. Chambers, 26 Tex. 281, and earlier cases; followed in the supreme court of the United States in League v. Egery, 24 How. 266, and Foote v. Egery, Id. 267, as the acknowledged local law. The 10 coast leagues were by the Mexican government counted from the mouths of rivers, though emptying into a bay. See as to this and as to how to measure the border leagues, Hamilton v. Menifee, 11 Tex. 751. As to how to show consent of the Mexican president to a grant within the forbidden zone, see Yancy v. Norris, 27 Tex. 49. In California it was not considered unlawful for the governor to grant land to native settlers singly (not as colonies) within the coast leagues. De Arguello v. U. S., 18 How. 547.

article (No. 32) of the law or decree of Coahuila and Texas of March 24, 1834, which repealed the old colonization laws—the only article of the decree which was ever applied in practice. It directed the issue of grants to the inhabitants of the Nacogdoches frontier, and to those east of Austin's colonies, for the land which they may occupy (que ocupen), without reference to any further assent of the president of Mexico; lands being thus thrown open which were notoriously within the 20 border leagues.[146] The Mexican grants to settlers were somewhat like patents under the homestead laws of the United States. Settling on the land being the principal consideration which induced the state to part with its land, the settler was not allowed, for six years after he took possession, to sell the whole or any part of the tract granted to him, nor to contract for the sale. The sale being void, his heirs could recover the land from the purchaser,—not however, as it was afterwards decided, without offering to return the purchase money.[147] The colonization laws of Coahuila and Texas, enacted March 24, 1825, and April 28, 1832, still breathe this spirit of hospitality, inviting settlers on easy terms;[148] but they were repealed on the 26th of March, 1834, and the new act brought in a new system,—that of selling land at public sale, to the highest bidder. The English-speaking settlers had evidently become objects of suspicion and fear. Very little land was sold, but many inchoate rights were completed by grants. The state, in article 32 of the new law, assumed to sell the "border leagues" near Nacogdoches, without regard to the inhibitions of the national law of 1824.

146 Blount v. Webster, 16 Tex. 619, followed in Johnston v. Smith, 21 Tex. 724. The former case has instructive remarks on the working of the Mexican federal constitutions.

147 Ledyard v. Brown, 27 Tex. 393; Houston v. Killough, 80 Tex. 296, 305, 16 S. W. 56. The colonization law of Tamaulipas required a residence of 20 years.

148 This law is reprinted in 1 Pasch. Dig., beginning with article 574. It begins with guarantying to all foreign settlers full protection, and authorizes native or foreigner to specify any vacant land to the political authority, who shall forward his application to the executive, etc. Settlements under this law gave no absolute title. Edgar v. Galveston City Co., 21 Tex. 302, 329; Tolle v. Correth, 31 Tex. 364. The vara and sitio are fixed as units. Article 24 of the law (article 584 in 1 Pasch. Dig.) requires certain fees to be paid,—$30 for a sitio of grazing land, for a "labor" or millionada of irrigable land $5, of land not irrigable, $2.50.

The country between the lower waters of the Rio Grande and of the Nueces, now comprised in the state of Texas, was originally a part of the Mexican province of Tamaulipas. There were a few English-speaking settlers in the country, but not enough to gain the upper hand against the Mexicans. However, on the 18th of December, 1836, the republic of Texas, through its congress, declared that its boundary reached to the Rio Grande. But the authorities of Tamaulipas seem to have remained in quiet possession and control of the disputed country till the outbreak of the Mexican war, in April, 1846. The grants made under the Tamaulipas authorities before December 18, 1836, are fully recognized by the legislation of Texas, especially by an act of 1870 which provides for judicial proceedings against the state to establish titles derived from this or older sources in the country between the Nueces and the Rio Grande.[149] It has been since held that the ordinary workings of the Tamaulipas state government, between 1836 and 1846, in the disputed district, must be treated as binding.[150] The Tamaulipas colonization laws dealt with a country much more accessible than that of Coahuila and Texas and limited "concessions" to any one settler to five square leagues. The lowest price was $30 for the league, or sitio. However, larger grants were not deemed void.[151]

The details of the colonization laws of the Mexican nation, or of the two states, have lost their practical importance. We need, at

[149] An act of August 15, 1870, looks to the settlement of Tamaulipas titles having their origin before December 18, 1836. See State v. Sais, 47 Tex. 307. A Spanish or Mexican title in that country may be good by possession or presumption of grant; but judgment against the state under this act can be only had upon a regular title, regularly proved. State v. Cardinas, 47 Tex. 250. In such cases, documents issuing from the Spanish or Mexican government must be proved. Id.

[150] City of Brownsville v. Basse, 36 Tex. 499. It is here admitted that the claims of Texas to that region were very shadowy, and it is intimated, but not decided, that grants after December 18, 1836, if such were made by the government of Tamaulipas, ought to be good.

[151] The Tamaulipas colonization laws are published in 1 Pasch. Dig. along with those of Mexico and of Coahuila & Texas. It was held in State v. Sais, 60 Tex. 87, that, an expediente being sent by the proper alcalde to the governor of Tamaulipas, showing compliance with all previous steps, accompanied with the purchase money, the settler thereby gained such equitable title that the state of Texas, under the act of 1870, was bound to complete it.

present, look only to the executed grants. These were executed by the commissioner appointed by the state government for each of the several colonies.[152] The espediente (or expediente), which accompanied the judicial possession given by an alcalde, was in all cases in duplicate; that is, upon his own books, and as a second original, delivered to the grantee. It was indispensable to complete the grant, but mistakes, irregularities, or erasures would occur at times, and had to be overlooked or condoned.[153]

The republic of Texas opened its land legislation with an act of December 14, 1837, in which it is recited that many persons have acquired land which is incumbered by conditions, and these the republic relinquishes, but with several provisos, the most important of which is that the act shall apply only to estates of not more than "a league and a labor," and that the purchasers must pay what is due to the land commissioners of the county within six months after a land office is opened therein; that they must remain in the country; and that the clause forbidding the sale to aliens is not repealed. The conditions, of which performance is excused, are, plainly, those of colonization.[154] The clause requiring the grantee to remain in the country has been nullified by the decisions of the Texan courts. They have held, uniformly, that only the republic or state could take advantage of a breach of this condition; and grantees of Mexican blood and sympathies, who, during the struggle for independence, left the country, and settled to the southwest of the Rio Grande, as well as those who went to the United States, were allowed to recover the

152 Three different holdings, among them the "emphyteutic," derived from the Roman law, and corresponding to the English copyhold, were in vogue, besides the absolute property sought by American settlers. These are discussed in Trevino v. Fernandez, 13 Tex. 630, where White's translation in his Recopilacion of "censo de quitar" into "tenancy at will" is shown to be incorrect. The entries on the commissioner's book were, under the act of 1832, part of the title. Weir v. Van Bibber, 34 Tex. 229. The extent of the settler's right in a colony is explained in Edgar v. Galveston City Co., 21 Tex. 302, 329.

153 Hanrick v. Jackson, 55 Tex. 17, 28, where for good reasons the testimonio could not be embodied. Sheppard v. Harrison, 54 Tex. 91, where the grantee's name, appearing otherwise, was left blank in the granting clause.

154 Kilpatrick v. Sisneros, 23 Tex. 113, 125, following Hardy v. De Leon, 5 Tex. 211, and Paul v. Perez, 7 Tex. 338; and the analogies of common law, as shown in M'Ilvaine v. Coxe, 4 Cranch, 209; Jones v. McMasters, 20 How. 8; also White v. Burnley, Id. 235 (directly in point).

lands which had been granted to them under the laws of Mexico or of Coahuila and Texas.[155]

The "land certificate," under the Texas system, is a much more important document and more closely interwoven with the title to the land on which it is located, than the scrip or land warrant in other states. Deeds to the land, which may be acquired under the certificate, have often been indorsed upon it; and, as soon as there is a location, there is an equitable ownership, on which such deed or other assignment will operate.[156] Equities in the ownership of the certificate become equities in the land acquired, and follow it into the hands of all subsequent owners except purchasers in good faith from the holder of a patent.[157] The certificates or warrants enumerated in the Revision of 1893 are of no less than ten different kinds, dating back to the constitution of 1876; but any "genuine land certificate" issued after 1876 becomes void, unless it be located within five years from its date.[158] The certificate is divisible. A smaller quantity than what

[155] It is held that the constitution of 1836, recognizes every person then living within it as a citizen, and he could not lose his rights as such until a forfeiture was adjudged. Kilpatrick v. Sisneros, 23 Tex. 127. Secus, where the grantee had left Texas before the constitution was adopted. Bissell v. Haynes, 9 Tex. 556.

[156] Beatty v. Masterson, 77 Tex. 168, 13 S. W. 1014 (any one may deliver the certificate to the county surveyor; his agency need not be shown; the surveyor may fill up a blank application); Greening v. Keel, 72 Tex. 107, 10 S. W. 255 (the identity of the applicant being in doubt, the patent belongs to him who had the certificate).

[157] Goode v. Lowery, 70 Tex. 150, 8 S. W. 73.

[158] Articles 4106 (3871) 4118 of the Revised Statutes enumerate: (1) Headright certificates (i. e. a league and labor to a head of family, or third of a league to those residing in Texas March 2, 1836, who have received no land scrip from Mexico, or of the same to volunteers arriving between March 2 and August 1, 1836; unconditional for 1,280 acres to heads of families, 640 to single men, to emigrants between March 2, 1836, and October 1, 1837, and the same for 640 acres to heads of families, 320 to single men arriving between October 1, 1837, and January 1, 1842, and colony headright). (2) Augmentation certificates (two-thirds of league and labor to single men of first class, who married before December 14, 1838; for 640 acres to single men of third class, who married before October 1, 1837, and 349 acres to single men who received one-quarter league; and of 177 acres to heads of families who had received only one-quarter league from the Mexican government. (3) Bounty warrants to volunteers in the war of independence for 1,280, and for 640 acres

is called for in the certificate may be entered under it, and the residue placed elsewhere; and the assignee of one-half or of any other fraction of the certificate can enter the number of acres coming to him, and leave the rest to his assignor to enter elsewhere.[159] The old headright certificates to heads of families, or augmentation certificates, which were given to a single man upon marriage, become "community" property of husband and wife; and upon a divorce between them the latter, if the children are with her, is entitled to two-thirds, which she can pursue into the equitable title to the donated land against the husband and against purchasers with notice.[160] The headright certificates issued by the republic were in so many cases fraudulent, several being issued to the same person, or family certificates to single men, or issued in fictitious names, that in 1838 means were already taken to sift them. A board of traveling commissioners was established, before whom all of these certificates had to be laid. Under an act of 1847 suit might be brought against the state for the confirmation of each certificate.[161] It has been expressly held that

to the heirs of those killed in battle. (4) Donation warrants for 640 acres to the participants in the battle of San Jacinto, etc., and to the heirs of those who fell at the Alamo, etc. (5) Land scrip, issued to certain agents conducting sales of public land. (6) Railroad certificates—i. e. of 640 acres—granted in aid of railroads generally; 640 acres to be located on the odd sections; international certificates issued to the international railroad exempted from taxes for 25 years. (7) River certificates, to be located. (8) Canal and ditch certificates for 640 acres if used in aid of such undertakings. (9) Indigent veteran certificates under an act of 1879. (10) Disabled confederate's certificates under an act of 1881. As to the Alamo donation certificates, see Todd v. Masterson, 61 Tex. 618, and Rogers v. Kennard, 54 Tex. 30. It seems that one certificate is due to the estate of the dead as a volunteer, which is assets. The donation certificate goes to the heirs as a gratuity. A certificate issued by competent authority cannot be collaterally assailed. Babb v. Carroll, 21 Tex. 766; Bradshaw v. Smith, 53 Tex. 474.

[159] Farris v. Gilbert, 50 Tex. 350. Compare Texas & P. R. Co. v. Thompson, 65 Tex. 186, as to use of two certificates on one survey; patent under one, the other not waived.

[160] Goode v. Lowery, 70 Tex. 150, 8 S. W. 73; Porter v. Chronister, 58 Tex. 53.

[161] McKinney v. Brown, 51 Tex. 94; Miller v. Brownson, 50 Tex. 583. See Const. 1845, art. 11 § 2. The unconfirmed certificate being void, a new one, granted by special act, is a mere gratuity, against which no equity can arise. Id. These provisions have led to the word "genuine" in later statutes.

these old headright certificates cannot be made good, so as to rank as "genuine," otherwise. If not approved by the "traveling board," they must be put in suit under the act of 1847.[162] Lost certificates have often been supplied by special act of the legislature; but it was held that, where a certificate had never issued, and the record does not show that it could have legally issued, the legislature cannot supply the defect retrospectively to the prejudice of third parties.[163] The title to land out of the republic begins in almost every case with a "certificate," which calls for land by quantity only, and is, before its location, a chattel interest. It passes by indorsement, or by a separate written instrument, or even by parol; but should be delivered to the assignee for the security of subsequent purchasers.[164] The holder of the certificate enters land with it, and under the older law pointed out the land to any lawful surveyor, whereupon it became the duty of the county surveyor to receive the field notes, and enter them on his book of surveys for the county. His right is then changed from a mere claim for an abstract quantity to an estate (though equitable) in the land on which he has located, and is no longer personalty. Yet the administratrix of the certificate holder is competent to enter land and locate the certificate,[165] and to withdraw the location, though by doing so she reconverts a landed interest into a chattel.[166] Before August 30, 1856, a location could be

[162] Miller v. Brownson, 50 Tex. 583.

[163] Holmes v. Anderson, 59 Tex. 481; Bacon v. Russell, 57 Tex. 415. Compare Hines v. Thorn, Id. 98.

[164] See 1 Pasch. Dig. arts. 4522, 4526; Johnson v. Newman, 43 Tex. 628, 642. It was conceded here that even the inchoate right of every married man residing in the republic to his league and labor, before certificate issued, was an object for contract, and that an assignee could have applied for the certificate; but that, the assignor having taken out his certificate, the assignee thereof was preferred. See Emmons v. Oldham, 12 Tex. 26. A deed of land, which is claimed under a certificate and location, works a transfer of the certificate. Gresham v. Chambers, 80 Tex. 544, 16 S. W. 326; Parker v. Spencer, 61 Tex. 155 (by parol; and under Spanish law husband's assent might be in parol).

[165] Poor v. Boyce, 12 Tex. 447; McGimpsey v. Ramsdale, 3 Tex. 344, and cases in next note. If the survey does not agree with the entry the location must be started afresh. Texas & P. R. Co. v. Thompson, 65 Tex. 186; Garza v. Cassin, 72 Tex. 440, 10 S. W. 539.

[166] Jones v. Lee, 86 Tex. 30, 22 S. W. 386, 1092 (at any time before merger in patent); Hollingsworth v. Holshausen, 17 Tex. 41; Johns v. Pace, 26 Tex. 270 ("provided he does not interfere with the rights of others").

abandoned at any time before the patent was issued. The holder would notify the surveyor for his county that he withdraws his certificate from the land, and this would restore it to the public domain, so that others might locate upon it. To do so was known as "floating" the location, and was fully approved by the courts.[167] Since the act of that date, which is prospective only, the locator cannot abandon his location, unless it turns out to have been appropriated before, either in whole or in part; in which case he may abandon the location as to such part; and "floating" locations is no longer allowed.[168] Under an act of 1852 a location made before that day is vacated unless the field notes are returned by August 31, 1853, and one that is made thereafter unless the field notes are returned within 12 months. But when the surveyor refuses to make the survey, the time during which a mandamus, or proceeding in the nature thereof, is pending, is not counted against a party who is not otherwise in default.[169] To prevent litigation between settlers and those seeking a location upon lands made valuable by improvement and a thickly-peopled neighborhood, the republic and state have from an early date forbidden any new surveys upon "titled or surveyed land." This law is laid down even in the first constitution of the state. A separate statute was made for the protection of the grants, which might be void for the want of assent of the national executive in the colonies of Austin, De Witt, and De Leon; and the courts will not allow these "laws of repose" to be evaded on the pretense that the former survey or grant was unlawful, and therefore null and void.[170] But there is one broad exception. Whenever the field notes showing the location

[167] Adams v. House, 61 Tex. 641 (floating and relocating); Satterwhite v. Rosser, Id. 166, 172.

[168] 1 Pasch. Dig. art. 4574.

[169] Edwards v. James, 13 Tex. 52; Booth v. Strippleman, 61 Tex. 379 (where the adverse claimant intervened and the irrigation lasted over 15 years).

[170] Const. 1845, art. 11 § 2; Act Feb. 5, 1850 (1 Pasch. Dig. art. 809); Truehart v. Babcock, 51 Tex. 169, applied in Summers v. Davis, 49 Tex. 541, where the grant had, in 1830, been annulled by the local ayuntamiento; Gunter v. Meade, 78 Tex. 634, 14 S. W. 562; Winsor v. O'Connor, 69 Tex. 571, 8 S. W. 519. Land for which suit has been brought successfully against the state or republic is "titled." Bryan v. Crump, 55 Tex. 1. Russell v. Randolph, 11 Tex. 460, holding that a grant fraudulently obtained does not sever the land from the public domain, can hardly, if ever, be applied.

are withdrawn from the land office, the location is abandoned, and the land is opened to a new entry, and it will be presumed that the person to whom the commissioner of the land office delivered the field notes, was the agent of the party in interest, unless the contrary appears.[171]

In Texas, as elsewhere, the patent can be set aside by direct proceedings on behalf of the state, or the patentee may be turned into a trustee for the person who has the better right to the land.[172] Where a suit is pending against the surveyor to compel him to make a survey, or to return the field notes, it is irregular to issue a patent to one who has the opposing interest, and he will not derive from it any advantage.[173]

There is no separate law for mines or mineral lands. By the constitution of 1866 the state relinquished all rights to minerals which it might have either under the Spanish or under the English common law to the owner of the soil.[174] The disposition of school lands, or of the alternate sections of lands in railroad grants, all of which are sold for money, do not present any questions peculiar to this state.

§ 74. "Office Found."

Having discussed the means by which title can be derived from the sovereignty of the soil, a few words should be added as to the means by which a title in land may revert to the sovereign. It is very common for the governments, both state and national, to buy land for the sites of public buildings in open market. And there is no doubt that the United States or any state may be the grantee in a deed, or a devisee in a will, where no statute intervenes. At any rate, he who sells land to the state or nation, and who receives

171 Atkinson v. Ward, 61 Tex. 383. Quaere, what is the effect of the field notes disappearing from the land office? Snider v. International & G. N. R. Co., 52 Tex. 306.

172 Adams v. House, 61 Tex. 641 (deed made before patent preferred to one made after); Satterwhite v. Rosser, Id. 166 (issued to holder of certificate, inures to assignee). But this would follow at law from the statute which makes a patent inure to the heirs or assigns of the person intended. And see cases in note 160; also section 66, note 24.

173 De Montel v. Speed, 53 Tex. 339; Booth v. Strippleman, 61 Tex. 379.

174 Rev. St. 4041, from Const. 1866. See State v. Parker, 61 Tex. 265.

the price demanded, would be estopped by his own deed from reclaiming it. If the authorities should buy land needlessly, the legislature alone could right the wrong by causing the excess to be sold or given away.[175] But, aside from the purchase of land in this narrower sense, it is a principle—and, as it has been often said, a highly-salutary principle—of the common law that the crown can neither part with an estate in land, nor acquire it, otherwise than by matter of record. The rule, mentioned in a former chapter, that a patent from the crown or commonwealth is good without delivery, follows naturally; for, if the delivery was needed, the title would pass ultimately by something done in pais.

"Office found" is the act by which the crown acquires an estate[176] upon a forfeiture, escheat,[177] or condition broken (Black-

[175] An act of May 1, 1820, now Rev. St. U. S § 3736, directs: "No land shall be purchased on behalf of the United States, except under a law authorizing such purchase." In Neilson v. Lagow, 12 How. 98, the supreme court first distinguished a deed by a debtor of the United States to a trustee, in trust to sell and pay the debt, from a direct deed; but next declares: "To deny to them [secretary of the treasury and comptroller] the power to take security for a debt on account of the United States according to the usual methods provided by law for that end would deprive the government of a means of obtaining payment, often useful," etc. "That such power exists," etc., "we consider settled by the cases of Dugan v. U. S., 3 Wheat. 172; U. S. v. Tingey, 5 Pet. 117," etc. U. S. v. Bostwick, 94 U. S. 53, 66 (the United States, taking a lease of land, stand on the same ground as any person or corporation).

[176] "Inquest of office, which is an inquiry made by the king's officers, his sheriff, coroner, or escheator, virtute officii, or by writ to them sent for that purpose, etc., concerning any matter that concerns the king, to the possession of land, etc., goods, etc. This is done by a jury of no determined number, being either twelve, etc. As to inquire whether the king's tenant for life died seised, whereby the reversion accrues, etc.; whether A., who held of the crown, died without heirs, etc.; whether B. be attainted of treason, whereby his estate is forfeited (though there must have been a grand jury to indict, and a petty jury to convict him); whether C., who has purchased land, be an alien, etc.; whether D. be an idiot, a nativitate, and therefore, together with his lands, appertains to the custody of the king; and other questions of like import concerning the value and identity of the lands." 3 Bl. Comm. 358.

[177] We have seen in the chapter on "Descent" (section 17) that in most states the commonwealth takes as ultimate heir, and its title vests "without office found." Under English authority the position of the crown taking by escheat is less favorable than that of an heir. In Taylor v. Haygarth, 14 Sim. 8, land was devised to trustees to sell for purposes to be disclosed thereafter

stone enumerates several other possible means of acquisition); and this, in its first meaning, implies the verdict of a jury; as where a man is convicted of treason or felony, when forfeiture of estate followed such a conviction (though this alone may not suffice). A proceeding leading to such a verdict, when the vesting of property in the crown was the only object, was known as an "inquest of office."

by codicil, but no codicil was made. It was held, there being no heir or next of kin, that the crown could not enforce the trust, and the trustees retained the land; and so held in Burgess v. Wheate, 1 Eden, 177; Perry, Trusts, § 327. In Indiana (Rev. St. § 2478), for lack of heirs, the state takes by escheat, not by descent, and the attorney general brings his information. See State v. Meyer, 63 Ind. 33; Reid v. State, 74 Ind. 255. Yet in the latter case the court does not admit that "office found" must be had first to entitle the state to possession, unless there is some one in lawful possession. Reference is here made to many cases, quoted in sections on "Aliens" and on "Escheat" in chapter on "Descent." It was held in this case that the state is not estopped from claiming the land by escheat by having caused it to be sold for taxes. In University v. Harrison, 90 N. C. 385, ejectment was brought without objection on the escheat. It only failed for lack of evidence. In South Carolina, the state, on lack of heirs, proceeds by inquest of office, and the result may be traversed; thus leading to an issue between the state and those in adverse interest. In re Robb's Estate, 37 S. C. 19, 16 S. E. 241. For the nature of the proceeding in this state, see Eason v. Witcofskey, 29 S. C. 239, 7 S. E. 291. In Texas, escheat is regulated by articles 1770–1788 of the Revised Statutes. The proceeding is against those in possession as well as against unknown heirs, and takes the place of an inquest; but there is no jury, unless an issue is made. See law applied in Newman v. Crowles, 8 C. C. A. 577, 60 Fed. 220. In Hanna v. State, 84 Tex. 664, 19 S. W. 1008, it was held that the comptroller, by having the land sold for taxes, does not estop the state from taking it by escheat. The history of the New York law of escheat is given in Johnston v. Spicer, 107 N. Y. 185, 13 N. E. 753; Rev. St. pt. 2, c. 1, tit. 1, art. 1, § 1, makes lands of one dying without heirs "revert and escheat" to the people. Section 2 says, subject to all trusts and charges. Section 1977 of the Code of Civil Procedure takes the place of the inquest. As to what facts must be found at the inquest on common-law principles, see Ramsey's Appeal, 2 Watts, 228. The nature of the proceedings in Oregon is discussed in Fenstermacher v. State, 19 Or. 504, 25 Pac. 142. In California the statutory proceeding by the attorney general cannot be begun where there is a nonresident alien heir before the five years given him to claim have expired. State v. Smith, 70 Cal. 153, 12 Pac. 121. Such proceeding against estate of alien intestate premature within the five years. People v. Roach, 76 Cal. 294, 18 Pac. 407. For a modern quite elaborate law of escheat, see Pennsylvania act of May 2, 1889.

Forfeitures of land for violation of the revenue laws of the United States can now be inflicted only for fraud on the revenue in the manufacture of tobacco or cigars.[178] The most frequent instance, in modern times, of an inquest of office, by which the sovereign gains the title to land, is the condemnation of a site or a right of way under the power of eminent domain,—a power which the sovereign shares very largely with corporations pursuing public ends.[179] This proceeding does not always involve a trial by jury; for the party in interest may waive it, or, at least, not demand it; and very often there is not even the judgment of any court. Thus, under the revenue laws of almost every state, when land delinquent for taxes is put up for sale, and no one else will bid the amount of taxes due, with interest or penalties and the costs of advertising and selling, an officer is authorized to bid the land off at that amount for the state. In some states, such land was ever said to be forfeited to the state. The books of the officials who assess the tax, and who conduct the sale, and the written returns made by them, are a sufficient public record to vest title in the state.[180]

Forfeitures have sometimes been imposed for a failure to list the land for taxation. It is apprehended that a law threatening such a forfeiture after a public proclamation, at a stated time and place, might be constitutionally valid, though not pronounced by a court

178 Rev. St. U. S. § 3400.

179 In modern times, land, or the right of way over land, is more frequently condemned for railroad purposes than for any other. The great question which confronts the lawyer who examines a title which has come by condemnation, is to see whether the fee in the land was taken and paid for, or only a right of way. If the latter, the abandonment of the right of way would restore the unincumbered ownership to the former owner; and the length of time during which the right of way was enjoyed could not prejudice him, as it was compatible with his title. Strictly speaking, no greater estate than necessary ought to be taken for the public use; but laws generally provide for taking the fee where a right of way would have sufficed. Sweet v. Buffalo, etc., R. Co., 79 N. Y. 294. The award for the right of way could be no less than for the fee, and to leave the latter in the owner might lead to much inconvenience. Compare Tennessee, Code, § 2659. See the Alabama statute, sections 19 and 20 of the Civil Code being lately so amended as to permit the United States to acquire land by condemnation.

180 Blackw. Tax Titles, § 1031; Wild's Lessee v. Serpell, 10 Grat. 405.

of justice. But the forfeiture should not be self executing, such that a failure to list, or to pay by a given time, should ipso facto divest the title and vest it in the commonwealth. It has been held that a legislative act directing such a result is unconstitutional, as taking the citizen's property without due course of law. There must be some act traceable in the public records from which the forfeiture dates.[181]

We have seen, treating of estates on condition, that a condition subsequent annexed to a freehold estate does not, when broken, put an end to the estate by its own force; but the grantor or his heirs must re-enter, or do some act equivalent to a re-entry. When the grant is by the sovereign, he must on condition broken re-enter by some act of record. This would naturally be an action resulting in a judgment for the land. But can such action be brought before the right of re-entry appears of record? The difficulty arises especially where the sovereign is the United States, having no "common law" as a guide, and gave great trouble in the matter of forfeited railroad land grants. Could the law officers of the United States enforce the forfeiture by suit, without an act or resolution of congress ordering such actions?[182]

[181] Marshall v. McDaniel, 12 Bush (Ky.) 378, 383. (See, for the contrary doctrine in Virginia and West Virginia, Wiant v. Hays, 38 W. Va. 681, 18 S. E. 807.) "But when such laws are enacted, the forfeitures prescribed must be regarded as penalties, and they cannot be inflicted until inquiry has first been made, and the commission of the offense ascertained by "due course of law." (We presume that other states would not go so far; but would, if the forfeiture had been proclaimed and put on record, allow it to be established afterwards, in case of dispute, by proof of a cause of forfeiture.) The clause of an act of 1825, passed on herein, and a similar and still more arbitrary clause, passed on in Buford v. Gaines, 1 Dana, 481, were parts of a childish attempt to cut off outstanding titles under Virginia patents by compelling men out of possession, and probably ignorant of their rights, to list and to improve land, in the adverse possession of others.

[182] Schulenberg v. Harriman, 21 Wall. 44, with other cases which follow it (some of these cited in a former section), only holds that third parties cannot take advantage of the breach of condition. But it also affirms the principle that the United States can regain the land by "office found," without indicating what it should be. Completion after the time limited, but before any attempt to enforce the forfeiture, is a good defense to a suit by the United States for repossession. U. S. v. Willamette Val. & C. M. Wagon Road Co., 54 Fed. 807. Congress has passed acts under which the executive can resume

Wherever an estate is forfeited to the sovereign, a legislative act, if not forbidden by a written constitution, is sufficient to constitute "office found,"[183] and even executive action by powers other than the United States, from whom the sovereignty is derived, may be sufficient.[184] The executive officers who, during the war, or during the provisional reconstruction of 1865 and 1866, wielded the powers of government in the eleven states "lately in rebellion," must in all their acts not in aid of the rebellion against the United States, or in support of the "Confederate States of America," be recognized as the legitimate authority, and as filling those offices to which the laws of those states assigned duties and powers over property. Hence a resumption of land by either "rebellious" or "provisional" officers is valid, just as the judgments which state courts within the Confederate lines pronounced in civil cases between man and man were valid.[185]

An example on a large scale of the forfeiture of lands belonging to a corporation, for violation of a mortmain law, was recently given in the judgment condemning the "endowment" of the Mormon Church in Utah, under a law of the United States applicable to all the territories, under which no religious corporation is permitted to own lands to a greater value than $50,000. The cause is, however, still subject to appeal to the supreme court of the United States.[186]

forfeited land grants by action; for instance, the act of March 2, 1889, to forfeit the lands given to Oregon for a wagon road.

183 City of Brownsville v. Basse, 36 Tex. 461 (legislative act of Texas, giving the ejidos or suburbs of Matamoras to the city of Brownsville).

184 U. S. v. Repentigny, 5 Wall. 211 (the action of the British crown in seizing the four leagues granted to De Repentigny in Canada, as abandoned by his departure, under the treaty of Paris of 1763).

185 Johnson v. Atlantic, G. & W. I. Transit Co., 156 U. S. 618, 645, 15 Sup. Ct. 520, referring to Horn v. Lockhart, 17 Wall. 570 (as to judicial acts).

186 U. S. v. Tithing Yard, 9 Utah, 273, 34 Pac. 55.

CHAPTER VII.

TITLE BY DEVISE.

(NOTE. In dealing with the requisites and effect of a will, and the capacity to make a will, we shall aim to omit everything in statutes and decisions which bears only on wills of personalty. For instance, where a state requires a higher age for capacity to devise lands, than to bequeath personalty, only such higher age will be stated, not the lower enabling the owner to make a will of goods and effects).

§ 75. The Devise—Capacity to Make and to Take.

At common law, every person not under disability, including boys over the age of 14 and girls over 12 years of age could make a will of personalty; but wills of land could be made only in a few places in England, under local customs.[1]

[1] This definition of a will is given by Jarman at the opening of chapter 2 of his treatise: "A will is an instrument by which a person makes a disposl-

The statute 34 & 35 Hen. VIII. c. 5, conferred the power of devising lands; those held in socage, without restriction, and two-thirds of those held by knight's service. When feudal tenures were abolished, during the commonwealth, and the parliament, in 1660, ratified the change, the power to devise lands away from the heir became unlimited in England,—in broad contrast to the jurisprudence of all other European countries, which to this day secure to the "necessary heirs" (children or descendants) a much larger share than the quarta Falcidia (one-fourth of the estate) of the Roman law. Only in very modern times some of the American states have restricted this full power of the testator in two directions. (1) By securing the homestead to wife and children; (2) by the introduction of the community property of husband and wife.[2]

The statute of wills of Henry the Eighth, by its fourteenth section, restrained all persons under the age of 21 years from disposing of their real estate. It went without saying that married women, who could not convey their lands, could not devise them. In fact, for almost 300 years a will was, as to lands, considered as only a species of conveyance, operating only on what the devisor had at the time of "publication." Persons of unsound mind, also, could not devise their lands any more than bequeath their personalty; and the silly conceit, that no man should stultify himself, could not be set up, as the contest of the will made by the non compos would always come from his heir or next of kin. Under the statute of uses, and the equitable doctrine of trusts, a system grew up afterwards under

tion of his property, to take effect after his decease, and which is in its own nature ambulatory and revocable during his life." Hence the popular name of "last will." The American editor of Jarman on Wills heads the book with the following definition from the opinion of Judge Johnson in Tompkins v. Tompkins, 1 Bailey (S. C.) 96: "The declaration of a man's mind as to the manner in which he would have his property or estate disposed of after his death." The Georgia Code (section 2394) says: "A will is the legal expression of a man's wishes as to the disposition of his property after his death,"—a rather odd statement for a code which allows boys and girls of 14 to make their wills. The appointment of executors in itself makes a will, but the mere exclusion of one of the heirs, without giving the estate to any one, does not. Coffman v. Coffman, 85 Va. 459, 8 S. E. 672; Boisseau v. Aldridges, 5 Leigh, 222; Wootton v. Redd's Ex'r, 12 Grat. 196,—all following Lord Mansfield's decision in Denn v. Gaskin, Cowp. 657.

[2] Stimson's Am. St. Law, p. 437.

which married women might devise and bequeath their separate estate in lands and goods.[3]

In modern times the law as to wills of realty and personalty has been, to a great extent, unified,—in England, wholly so, by the act of 1 Vict. c. 26; the same forms being prescribed for making and for revoking wills of each kind, and the same test of capacity, the age being 21 years in all cases. The incapacity of coverture has been since removed in England, and in nearly all states of America.

In this country the usual qualifications for making a will of either personal or real estate are two: Full age, which is always 21 years for males, and generally also for females, but in some states 18 years for the latter; and sound mind, or, as it is called in some states, "sound mind and memory." A few states still exclude married women, except as to their separate estates; but in some of these states the words "separate estate" mean practically all their property, or everything except community property. In a few states the capacity of married women is expressly affirmed. The laws of succession in some of our states—notably, those of Georgia—have been derived from those which in England governed the distribution or testamentary disposition of personalty. Hence we find that a lower age than 21, or full maturity, is deemed sufficient, in them, not only for the bequest of goods, but also for the devise of lands.

Confining ourselves only to the capacity of devising real estate,

[3] The English-American law takes a wholly different view of a will from that of the testamentum in the Roman law. In the latter it is supposed that all the rights and duties of the deceased at his death fall upon his heir (haeres), or, if there are more than one, upon his heirs in aliquot proportions. By making a will, the testator changes the order of succession; and one who, under the will, takes either the whole succession or an aliquot part of it, is an haeres factus, a "made heir,"—that is, an artificial heir; in German, "universal erbe." A legatum, under the Roman Law, is the gift by will, not of an aliquot share of the estate, but of some definite thing (be it land, movables, or effects), or of a sum of money. The distinction between a gift of lands and of personalty, like that between the devise and the legacy or bequest of the English-American law was unknown. The Roman testamentum always dealt with the estate (universitas) as it stood at the testator's death. The administrator and executor, in those states of the Union in which the control of the decedent's lands is left in their hands (such as New Hampshire and Georgia), are the nearest approach in American law to the haeres of the Roman law; especially when the latter is a mere trustee or fidei commissarius.

we find, aside from the qualification of sound mind, or "sound mind and memory," that the following states insist on the age of 21 years: Massachusetts, New Hampshire, Rhode Island, New York, Pennsylvania, New Jersey, Delaware, Virginia, West Virginia, North Carolina, South Carolina, Florida, Indiana, Michigan, Kentucky, Tennessee, Alabama, Mississippi, Arkansas, Texas, Wyoming, Oregon (though women are of age at 18),—and Wisconsin (where, however, married women have full capacity at the age of 18). In Maine 21 years is full age for men and women, but the "married women's act," in its first section, allows married women of any age to devise their lands without the joinder or assent of the husband. In Tennessee the statute is silent, but the general understanding requires of a testator full age. In the following states, males have capacity at 21; females at 18: Vermont, Maryland, Ohio, Illinois, Missouri, Minnesota, Kansas, Nebraska, Colorado; also in Iowa, where, however, all married women, and in Washington, where all women married to a man of full age, are deemed themselves of full age. In the following states every person can make a will of lands, as well as of goods, at or over 18: Connecticut, California, the Dakotas, Idaho, Montana, Nevada, and Utah. In Georgia, infants under 14 are excluded. The statute then proceeds to define, very much in detail, those who lack the proper powers of mind for making a will.[4]

As stated above, there are now but very few states in which the testamentary power is withheld from married women; and they have it even in most of those states in which they cannot convey their lands held as general estate otherwise than with the consent of the husband, and by means of a privy examination, as under the Public Laws of Maryland, and under the Kentucky married woman's act of 1893, even before the more sweeping act of 1894. In Virginia, and a few other states, the "married women's acts" are prospective only, (that is, they apply only to women marrying thereafter, and to property acquired thereafter), and the laws are passed so recently

[4] In the last note to section 76 references are given to the clauses in the statutes on the execution of wills. The measure of capacity to make a will is generally given in the same or in a preceding clause or section. In a few states it is "full age," and this may be modified by another statute on "majority," fixing full age otherwise than at common law. So it is, for instance, in Ohio, Iowa, and Wisconsin, each of which lowers the majority for females in a different way.

that much property may still be outside of their operation, and not "separate," in the statutory sense; and in Georgia a married woman could, until lately, devise even the estate limited to her separate use in the old manner only when made a sole trader according to statute, by decree of court, or when she had been abandoned by her husband.[5] Where the husband has curtesy, the wife cannot, by her will, deprive him of it, any more than the husband can devise away the wife's right of dower, except in Wisconsin, where curtesy, as regulated by statute, is given only in case of intestacy; and where the wife may dispose only of separate, in contrast to community, property, the restriction stands on the same ground as that a husband holding land by entireties with his wife cannot dispose thereof by will. These restrictions must be considered in connection with marital rights.

The requirement of a "sound mind," "disposing mind," "sound mind and memory," opens up the whole question of the mental condition of the testator at the time of making his will, which must arise very often, considering how many wills are made during the last sickness of the testator, or when his mind is enfeebled by extreme old age, and the weight of bodily infirmities. Closely bound up therewith is the question of undue influence, of fraud and duress, on the part of interested parties, in obtaining the will. Only a few states have legislated as to these,[6] but on the general principle of the common law that fraud taints and avoids even the most solemn acts, a will obtained by any such practices is deemed "not to be the will" of the testator. The reader must be referred to special treatises on wills, for the law on the lack of the needful mental capacity, and on undue influence, fraud, and duress, by any of which a will good in form may be rendered invalid.[7]

[5] Georgia, Code, § 2410; Virginia, Code, §§ 2284, 2286; Kentucky, St. 1894, §§ 2147, 4827. As to Virginia and other states, see section on "Statutory Separate Property" in chapter on "Title by Marriage," hereafter.

[6] The states which have attempted to some extent to codify the common law; that is, Georgia, California, the Dakotas, Idaho, and Montana, and with them Utah. Illinois also (chapter 148, § 2) directs that a will must not be procured by fraud; Ohio (section 5914) that it be not made under restraint.

[7] It is one of the disputed questions whether the propounder of a will must affirmatively show the sound mind of the testator, as the statute generally enumerates it among the qualifications for making a will. That this burden

Men and women, children and adults, the married or unmarried, those of sound or of unsound mind, may alike take by devise. Aliens were not disqualified at common law; only, after the estate had vested in them, it might be divested, going, upon office found, to the crown or state. But in New York the Revised Statutes, in 1830, made aliens incapable of taking by devise.[8] This has been greatly modified as to resident aliens, especially by acts of 1845 and 1857, which do, however, only exempt those who reside in the state, and seem to require a "deposition" to be filed both by those who wish to transmit by devise and by those who wish to hold land under it. But two decisions of the supreme court have rendered this requirement harmless. The last of these, moreover, points out that the act of 1845 leaves only the transmission or devise of descended land, but not that of purchased land, under the former restriction of the common law and the Revised Statutes. In Iowa an act of 1860 also rendered aliens incapable of taking land by devise, and it led to some harsh results, but it was wholly repealed by the revision of 1884. In Illinois, however, as late as 1887, a law was passed (referred to heretofore in the chapter on "Descent") which deprives nonresident aliens of the right to take by devise. The treaties enumerated in that chapter go far to counteract these illiberal state laws.

Corporations, however, were excepted out of the first English statute of wills, and the Revised Statutes of New York declare that no devise to a corporation shall be valid unless that body be expressly authorized to take by devise.[9] In most other states the statute is silent, but the result is nearly the same; for unless the corporation has, by the law of its creation, authority to receive land in this manner the devise would be as unavailing as if made to a being that never existed. In short, in this country a devise to a body politic, capable of taking, is valid, unless forbidden on special grounds,

rests on him was held in the very recent case of Prentis v. Bates, 93 Mich. 235, 53 N. W. 153.

[8] Wadsworth v. Wadsworth, 12 N. Y. 376; 2 Kent, Comm. 61.

[9] Rev. St. N. Y. pt. 2, c. 6, tit. 1, § 4; Acts 1845, c. 115 (especially sections 4, 5, 6); Acts 1857, c. 576; Dusenberry v. Dawson, 9 Hun, 511; Callahan v. O'Brien (Sup.) 25 N. Y. Supp. 410. In Iowa "charitable devises" are limited (if there is widow, child, or parent) to one-fourth of the net estate. Section 1101.

and when there is no mortmain law to prevent.[10] Such acts, drawn upon the lines of the mortmain act of 9 Geo. II., have been enacted in New York, Pennsylvania, Ohio, Georgia, California, and Montana. The New York act of 1848, which provides for the incorporation of benevolent, charitable, educational, literary, and missionary societies, in one of its sections lays down three restrictions: (1) The clear income from the devised estate shall not exceed $10,000; (2) no person, having a wife, child, or issue of a child, or parent living, can devise or bequeath to such an association more than one-fourth of his estate remaining after the payment of debts; (3) no devise to such an association can be made unless the will be executed more than two months before the testator's death. A number of acts have been passed since, bringing almost all eleemosynary corporations of New York which had been or were afterwards created by private charters within these provisions of the act of 1848. In 1860 another act was passed, enlarging the one-fourth limit to one-half.[11] It has been held that the latter act does not repeal the two-months clause of the former; that this clause applies when there are neither wife, husband, child, or parent; and that it reaches those corporations which, not being formed under the act of 1848, were subjected to its provisions by later statutes, and applies to "religious" societies, though these are not in terms mentioned in it, but not to charitable or other societies formed in other states; and that a disposition of too large a share of the estate may be declared void, at the instance of parties in interest other than the relatives for the protection of whom the law has forbidden it.[12] The Pennsylvania statute of April, 1855, requires any gift to "a body politic or a trustee" in trust for a religious or charitable use to be made by deed or will, attested by two witnesses, at least one month before

[10] 4 Kent, Comm. 507; Rev. St. N. Y. pt. 2, c. 6, tit. 1, § 3; Shipman v. Rollins, 98 N. Y. 311 (must be incorporated before devise vests).

[11] New York, Acts 1848, c. 319, § 6; Rev. St. p. 1923; Acts 1860, c. 360, § 1. Some of the acts extending the operation of the act of 1848 will be found in the cases infra. The object of the mortmain acts is well set forth by Lord Hardwicke in Attorney General v. Day, 1 Ves. Sr. 218.

[12] Lefevre v. Lefevre, 59 N. Y. 434; Kerr v. Dougherty, 79 N. Y. 327 (as to Union Theological Seminary); Marx v. McGlynn, 88 N. Y. 357; Stephenson v. Short, 92 N. Y. 433; Hollis v. Drew Theological Soc., 95 N. Y. 166 (a New Jersey institution).

the grantor's or testator's death; and "charitable" is taken in its widest sense, as embracing all gifts for the public good.[13] In Ohio a person having children (natural or adopted) or their issue cannot make a devise or bequest for a "charitable, religious, or educational use" within one year of his death; while in California he cannot make such a devise within 30 days of his death, whether he leave issue or not, and if he leaves any legal heirs the devise must not exceed one-third of the estate, though made sooner. A devise of a greater share is declared void.[14] The Georgia statute forbidding the devise has not been fairly enforced by the supreme court of that state.[15] Most radical of all is the mortmain law of Mississippi. The Code forbids all devises, and, in another section, all bequests of personalty, to any religious or charitable institution, or to any person for any religious or charitable purpose, directly or indirectly, openly or by way of secret trust. The language is so sweeping that charitably inclined Mississippians are most likely to lay out their means intended for charity during their own lifetime.[16] In Maryland a devise to a charitable society not incorporated at the time is deemed wholly void, and the land thus given goes to the heir, as undisposed of.[17]

With the exception above stated, a devise of land for a charitable purpose is valid, though it is to be administered by a corporation which is not in existence at the time of the testator's death. This doctrine was established at an early day by the supreme court of the United States, in a case arising in New York, where the statute of charitable uses (43 Eliz.) was not in force, and was fully conceded in the Case of the Tilden Trust.[18] But there has been, until lately,

[13] Pennsylvania, Dig. "Wills," 22; Price v. Maxwell, 28 Pa. St. 23; McLean v. Wade, 41 Pa. St. 266.

[14] Ohio, St. § 5915; California, Civ. Code, § 1313; Montana, Prob. Code, § 473.

[15] Georgia, Code, § 2384; Reynolds v. Bristow, 37 Ga. 283. The Western and Southern states generally have not yet felt the necessity for mortmain acts.

[16] Mississippi, Code, § 4500. Should cases arise in which it is attempted to circumvent this law by secret trusts, the English precedents under their law of superstitious uses might again be drawn from their obscurity.

[17] Rizer v. Perry, 58 Md. 127, and cases there quoted; the rule being fully conceded as the law of that state.

[18] Inglis v. Trustees of Sailors' Snug Harbor, 3 Pet. 99; Vidal v. Girard's

a wide discrepancy between New York, on the one side, and almost all the other states on the other, as to charitable[19] devises for objects not otherwise determined than by being subjected to the discretion of the executors, or of trustees appointed for that purpose.[20] In other states than New York, especially such as Massachusetts and Kentucky, where the statute of 43 Eliz. was either recognized as in force, or re-enacted, such devises were deemed valid; and on the great principle of equity, that a trust cannot fail for the want of a trustee, the charitable trust which becomes vested by the testator's death cannot be defeated by the death of the executors or trustees, nor by their refusal to qualify or to make any choice of a scheme at all, but in such case the power of executors will either pass, under the local law, to an administrator with the will annexed, or that of executor and trustee passes to a new trustee appointed by the court having general equity powers, or to such court itself.[21] The state

Ex'rs, 2 How. 127. In Tilden v. Green, 130 N. Y. 29, 28 N. E. 880, it is admitted that the "Tilden Trust," a corporation formed after the testator's death, in response to his wish, expressed in the will, was capable of taking; but the devise to the trustees was held void, because it gave them the power to divert the lands and funds to other educational or charitable purposes.

[19] For the distinction between "charitable" and "benevolent," see chapter on "Uses and Trusts."

[20] The Tilden Case, supra, was in line with Levy v. Levy, 33 N. Y. 97; In re O'Hara, 95 N. Y. 403; Read v. Williams, 125 N. Y. 560, 26 N. E. 730; and other cases in that state.

[21] Loring v. Marsh, 6 Wall. 337; Attorney General v. Wallace's Devisees, 7 B. Mon. (Ky.) 611; Curling's Adm'r v. Curling's Heirs, 8 Dana, 38 (where the cy pres doctrine was denounced, but carried into effect); Jackson v. Phillips, 14 Allen, 539 (a charity must not fail for want of trustee; cy pres doctrine applied, when needful); Bliss v. American Bible Soc., 2 Allen, 334 (St. 43 Eliz., in force in Massachusetts). Hunt v. Fowler, 121 Ill. 269, 12 N. E. 331, and 17 N. E. 491, decided in 1887, dealt with a residuary devise or bequest (it does not appear whether land was included), the income to be distributed annually among the worthy poor of the city of La Salle, in such manner as "court of chancery may direct," and sustained it. The court says that there is much diversity among the states; that in some the equitable system of charitable trusts is unknown, and the courts apply only the rules governing private trusts; in some the statute 43 Eliz. c 4, is adopted, in some it is repealed. The bequest in hand is not to charity generally, nor to the poor generally, but the class is definite, the individuals are uncertain; and, quoting 2 Redfield on Wills, 544, the court shows that such uncertainty distinguishes public charities. Further, it says that in charitable bequests it is immaterial how vague the objects are,

of New York has lately, through its lawmaking department, come over to this doctrine, in its most advanced form.[22]

The validity of a devise of land to a charity must generally depend on the lex rei sitæ; but it may happen that a state in which the

provided there is a discretionary power in some one to apply the fund to these objects (Domestic & Foreign Missionary Society's Appeal, 30 Pa. St. 425); and insists that White v. Fisk, 22 Conn. 31 (where a direction to expend was held void because the power to select was not expressly given), though approved in Grimes v. Harmon, 35 Ind. 198, stands, on the whole, disapproved, especially by Hesketh v. Murphy, 36 N. J. Eq. 304 (trustees to employ annual income for the relief of the most deserving poor of the city of Paterson, but none known as intemperate, lazy, etc., to receive any benefit). Here the court held that the power to select was implied in that to distribute. So it is said in Pickering v. Shotwell, 10 Pa. St. 23, the trustee's discretion may be implied from the nature of the trust; and Erskine v. Whitehead, 84 Ind. 357, does not quite follow the former Indiana decision. The court further quotes Pom. Eq. Jur. §§ 1025, 1026; also Brown v. Kelsey, 2 Cush. 243, and Washburn v. Sewall, 9 Metc. (Mass.) 280, to the effect that, if the devise be made to no certain trustee, a court of equity will carry the trust into effect, either by appointing a trustee or by acting itself in place of a trustee. For cases where a glaring indefiniteness of the object fell in with the lack of a trustee, and the devise or bequest was sustained nevertheless, the Illinois supreme court quotes McCord v. Ochiltree, 8 Blackf. (Ind.) 15; Bull v. Bull, 8 Conn. 47; Williams v. Pearson, 38 Ala. 299; Howard v. American Peace Soc., 49 Me. 288. However, a devise to those of the Society of Most Precious Blood "who are under my control" was held void for want of certainty. Society of Most Precious Blood v. Moll, 51 Minn. 277, 53 N. W. 648. In Gilmer v. Stone, 120 U. S. 586, 7 Sup. Ct. 689, the supreme court of the United States says that a legacy, and intimates that a devise, should be divided between two charities, if it cannot be ascertained which of the two was meant.

[22] May 13, 1893, an act to regulate gifts for charitable purposes was approved, which directs: "No gift, grant, bequest or devise to religious, educational, charitable, or benevolent uses, which shall in other respects be valid under the laws of this state, shall be deemed invalid by reason of the indefiniteness or uncertainty of the persons designated as the beneficiaries thereunder in the instrument creating the same. If in the instrument, etc., there is a trustee named to execute the same, the legal title to the lands, etc., devised, etc., for such purposes shall be vested in such trustee. If no person be named as trustee, then the title to such land or property shall vest in the supreme court." The next section makes it the duty of the attorney general to represent the beneficiaries. The insertion of the word "benevolent" is remarkable; for such were heretofore everywhere distinguished from "charitable," and uncertainty as to them could not be helped out by the discretion of a trustee. Quaere, would this act give effect to a devise made to persons, with this clause added:

land lies has enacted a mortmain law applicable to the corporations chartered by itself, in which case a foreign charitable corporation might fare better than a home institution.[23]

§ 76. Requisites of a Will.

While, in England before 1838, and in many American states until law reforms were introduced after the Revolution, the probate spoke only as to the personalty, as to which it was conclusive, but had no effect whatever on the lands, the rule is now different in all our states; only in New York and New Jersey the probate or rejection is not always conclusive as to land.[24] When probated the will becomes merged in the judgment or order of the probate court, at least in the great majority of cases; hence the knowledge of the older laws as to the execution of wills is not so important as the law at each period on the subject of deeds of conveyance. Yet, as a long number of years often intervenes between the execution of a will and the death of the testator, we may have to look up the law as to execution in force at the former date; for by that law the validity of the will is tested. If good then, a statute calling for additional formalities does not annul it. If bad then for lack of some formality, a subsequent statute dispensing with that formality, unless it contains retrospective words, will not cure it.[25]

A will in which land is devised must, as a rule, be executed according to the laws of the country in which the land is situate,—

"I have entire confidence that they will make such disposition of the residue as I would make myself," etc.? Such words were actually used before the act, and were in Forster v. Winfield, 142 N. Y. 327, 37 N. E. 111, held to render the devise void.

[23] Jones v. Habersham, 107 U. S. 174, 2 Sup. Ct. 336. Here a devise to a hospital was sustained, though no time for building it, or for obtaining a charter was limited. The Illinois statute of mortmain must lead to the opposite result. American & Foreign Christian Union v. Yount, 101 U. S. 352.

[24] See hereafter in section on "Effect of Probate."

[25] Powell v. Powell, 30 Ala. 697, and vice versa; Lane's Appeal, 57 Conn. 182, 17 Atl. 926. The statute dispensing with formalities is sometimes curative, as the Pennsylvania act of 1848, which allows a will to be signed with a mark, and was applied to a will already executed in Long v. Zook, 13 Pa. St. 400. See, also, against the rule, Grimes v. Norris, 6 Cal. 621.

according to the lex rei sitæ; but several states have carried comity so far as to give effect, upon land within their limits, to any will which is executed according to the law of the country in which it is made. Such, under various limitations, is the case in Massachusetts, Maine, Connecticut, New Hampshire, New York, Michigan, Maryland, Arkansas, California, and the Dakotas.[26]

It is no objection to a will that two persons, e. g. husband and wife, or two brothers, join in what may be called a "mutual will," each devising his or her property to the longest liver, or in a double will, disposing of the estates of both; provided, that the paper is

[26] Massachusetts, Pub. St. c. 127, § 5; Connecticut, Gen. St. § 538; New Hampshire, c. 186, § 5; Maine, c. 64, § 12,—all speak of wills "executed according to the law of the country (or state or country) where executed," etc., having full force in the state, and being admitted to probate. Michigan, by amendment of 1883 to section 5805 of her statutes (see supplement); Maryland, Pub. Gen. Laws, art. 93, § 319 ("will or testamentary instrument made out of the state" and valid "by the law of place where made or where such person was residing"); Arkansas, Dig. § 6531 (limited to citizen of the United States devising property in the state by will executed according to the law of this state or of any state or territory where it is made). In New York the Code of Civil Procedure (section 2611) grants probate to any will executed anywhere in the United States, in the United Kingdom, or in Canada, according to the law of the place. Another section of the Arkansas Revision (section 6513), gives force to the probate of any will made in the United States by recording it in the proper county of the state, and, if it passes land in the state where executed or the testator was domiciled, it will pass land in Arkansas. In this way also the California Code of Procedure (section 1324) gives force to wills executed in any other state or country, and they are admitted to probate. In Dakota, under sections 28–30, any will executed in any state, territory, or District of Columbia, or in any other state or country, either according to the law of Dakota or the law of the place, must be admitted to probate. The Wisconsin statutes (section 2283) give effect to foreign wills made according to the local law or the law of Wisconsin, excepting nuncupative wills; but it seems that the other statutes, which generally speak of "wills executed" elsewhere, would tacitly exclude them. The Minnesota statute (chapter 47, §§ 18–21) also recognize foreign wills, and provide for their being admitted to record in any county in Minnesota in which the decedent left property. See Doe v. Pickett, 5 Ala. 584, where a will made in Georgia did not, on the face of its home probate, pass land in Alabama; but additional proof was admitted there to show that the execution filled the requirements of the Alabama law. For the general principle, see, also, Story, Confl. Laws, §§ 474, 491; Lucas v. Tucker, 17 Ind. 41; Key v. Harlan, 52 Ga. 476 (Tennessee will, with only two witnesses, not provable in Georgia).

properly executed by the party as whose will it is to be established.[27] Nor is a paper which in its effect and purpose is a will defeated as such by having the outward form and language of a deed,—a seal, certificate of acknowledgment, words implying delivery, or even an apparent consideration,—as long as it is clear that the writing was intended to operate, and could operate, only as a will; that is, that the apparent grantor would retain possession and control during his life, and that, until the grantor's death, the grantee should have no estate, not even an estate in remainder, in the property granted.[28] In fact, a part of a written instrument may be provable as a will while another part operates as a binding contract or immediate conveyance.[29] And while the nondelivery of the apparent deed—the

[27] In re Diez's Will, 50 N. Y. 88; Schumaker v. Schmidt, 44 Ala. 454; Betts v. Harper, 39 Ohio St. 641; Evans v. Smith, 28 Ga. 98. The statutes of Georgia, California, the Dakotas, Idaho, Montana, and Utah expressly authorize these joint or mutual wills. See, contra, Rivers v. Rivers, 3 Desaus. Eq. (S. C.) 192; and Darlington v. Pulteney, Cowp. 260. After death of all testators, it may be proved as the will of all. Walker v. Walker, 14 Ohio St. 157.

[28] In re Diez's Will, supra; Reed v. Hazleton, 37 Kan. 321, 15 Pac. 177 (title "shall vest in said grantee" after the grantor) held to be a will merely, and invalid as a deed; Turner v. Scott, 51 Pa. St. 126 ("excepting the use and possession to J. S. and his assigns for life, and this conveyance not to take effect until after decease"); Sperber v. Balster, 66 Ga. 317 ("should have full effect at his death" held revocable); Leaver v. Gauss, 62 Iowa, 314, 17 N. W. 522 (grantee "is to take no estate during the life of" grantors). A very late English case—Re Slinn's Goods, 15 Prob. Div. 156—belongs here, where a deed of gift of stocks, signed by two witnesses (attesting "in presence of the grantor and of each other") to take effect after grantor's death, was proved as a will. So a sealed paper, beginning, "Know all men by these presents," in which the decedent orders his administrators to pay $75,000 to R. C., was probated in Pennsylvania (Frew v. Clarke, 80 Pa. St. 170); deed to a son in consideration of $200, witnessed and acknowledged before a justice, of all stock, wearing apparel, etc., which grantor may have at his death, held to be testamentary. Gage v. Gage, 12 N. H. 371. See, also, Morrell v. Dickey, 1 Johns. Ch. 153; Mosser v. Mosser's Ex'r, 32 Ala. 551; Symmes v. Arnold, 10 Ga. 506 ("thenceforth to be her property"). In Sharp v. Hall, 86 Ala. 110, 5 South. 497, all the circumstances are stated which the jury on trying the questions of will or no will may consider. See, also, the very late cases of Robinson v. Brewster, 140 Ill. 649, 30 N. E. 683; Crocker v. Smith, 94 Ala. 295, 10 South. 258. For cases in which the doubtful instrument was by the circumstances stamped as a deed which it was in form, see Hart v. Rust, 46 Tex. 556; Golding v. Golding's Adm'r, 24 Ala. 122.

[29] Kinnebrew v. Kinnebrew, 35 Ala. 628; Taylor v. Kelly, 31 Ala. 59, ap-

avowed purpose of the grantor to keep it in his possession until his death—has been one of the strongest marks of the testamentary character of a writing, a paper actually delivered to the nominal grantee has sometimes been treated as a mere will, where the intent not to raise an estate until the grantor's death clearly appeared on the face and no consideration was actually given at the time of delivery.[30] Though the principle "ut res magis valeat" has in some cases determined a court to admit the ambiguous paper as a will, yet in other cases a paper has been declared testamentary, though for want of proper attestation it could not be admitted to probate.[31] In these cases, not only the words of the instrument, but the surrounding circumstances, the relation of the parties, such as parent and child, the nature of the property conveyed,—that it comprised all the grantor's earthly possessions,—have been taken into consideration; and it has been said that "the form of the instrument is of little consequence, whether it is a will or a deed. If it is executed with the formalities required by the statute, and is to operate only after the grantor's death, it is a will." Perhaps an unhappy definition; for the very question to be decided is, do the words of the instrument raise an estate in remainder, to vest at once, but to come into operation only after the grantor's death?[32] The question

proved in Reed v. Hazleton, supra; 1 Jarm. Wills, 18, note 7; Rife's Appeal, 110 Pa. St. 232, 1 Atl. 226; Robinson v. Schly, 6 Ga. 515.

[30] Bigley v. Souvey, 45 Mich. 370, 8 N. W. 98 (held void as a deed, and its revocation not a good consideration for a promise). In the later case of Lautenshlager v. Lautenshlager, 80 Mich. 285, 45 N. W. 147, warranty deeds to sons held to be testamentary had been kept in the father's possession. In Nichols v. Chandler, 55 Ga. 369, the writings, though deeds in form, were neither recorded nor delivered. Rawlings v. McRoberts, 95 Ky. 346, 25 S. W. 601 (where the instrument says that it is to be recorded, it implies a conveyance).

[31] McKinnon v. McKinnon, 46 Fed. 713; Comer v. Comer, 120 Ill. 420, 11 N. E. 848; Cover v. Stem, 67 Md. 449, 10 Atl. 231. "Ut magis valeat" was applied in Gage v. Gage, supra, and in Attorney General v. Jones, 3 Price, 379, and, in effect, in Re Slinn's Goods, supra. However, if the apparent deed is not executed with the forms of a will, it gains no force by the grantor's failure to revoke it. McCarty v. Waterman, 84 Ind. 552. A deed or declaration of trust does not become a will by reserving in it a power of revocation. Van Cott v. Prentice, 104 N. Y. 45, 10 N. E. 257.

[32] See Georgia Code, § 2395, passed on in Bright v. Adams, 51 Ga. 239. It is difficult to account for or to classify the case of Lungren v. Swartzwelder,

whether a writing is intended for a will, or is not intended to have any operation on the writer's estate, is most fitly treated under the head of holographic wills.

A will may be written in any language. German, French, and Spanish wills have often been admitted to probate; and on account of the usage of continental Europe, where a court official or notary retains a will which has been reduced to writing before him, some states have made provision for establishing such wills without obtaining the original, while other states have provided for recording, along with the instrument in the foreign tongue, an English translation.[33] And, as thus the writing may be in a foreign character, it may also be in pencil, instead of ink; a position which was established at an early day under the statute of frauds, and, after some struggle, also in the United States; the only objection to pencil writing or to the use of some unusual writing material being the suspicion that the instrument was intended only for a rough draft.[34] Wills of land may be made in one of three forms. The most usual is that of a writing signed or subscribed by the testator, and attested and subscribed by witnesses. The laws regulating such wills are derived from the English statute of frauds;[35] and, with some

44 Md. 482; an inventory and a number of memoranda naming persons and sums of money, written by the testator with pencil in a memorandum book, followed by the appointment of administrators, the writer's signature, and those of two witnesses. The writing was held not to be a will, and was refused probate.

[33] In re Diez's Will, 50 N. Y. 88; Younger v. Duffie, 94 N. Y. 535.

[34] Knox's Estate, 131 Pa. St. 220, 18 Atl. 1021 (arguendo); Patterson v. English, 71 Pa. St. 454. The cases go back to Merritt v. Clason, 12 Johns. 102 (case of pencil memorandum of contract for sale of goods), and to the English will case, In re Dyer, 1 Hagg. Ecc. 219.

[35] 29 Car. II. c. 3, § 5: "All devises," etc., "of any lands," etc., "shall be in writing and signed by the devisor, or by some other person in his presence, and by his express direction, and shall be attested and subscribed in his presence by three or four credible witnesses, or shall be utterly void." The act of 1 Vict. c. 26, § 9, in force since January 1, 1838, requires all wills to be "in writing and executed in the manner hereafter 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

variation as to the mode of signing and the number and qualification of witnesses, are to be met with in all the states.[36] The "holographic" or "olographic" (wholly written) will is borrowed from the French law,[37] and has been adopted into the jurisprudence of about one-fourth of the states and territories. The "nuncupative" will was borrowed from the testamentum in præcinctu of the Roman law, but more directly from England, where they were in vogue as to personalty until 1838, though under heavy restrictions. Only four American states, as will be shown, allow lands to be thus devised.

The same rules which govern the validity of an entire will also govern a codicil, that is, an instrument which, like a will, is changeable and revocable until death, and which limits, enlarges, or modifies a preceding will, without revoking or supplanting it altogether. These rules apply to some extent also to a "writing declaring the revocation of a will"; but such writings, though authorized in most states, are unknown in practice.[38] But a paper which does not give any part of the maker's estate to anybody, and does not appoint an executor or testamentary guardian, but only excludes the heir, or some of the heirs, from his or their shares, is not a will, and cannot be admitted to probate.[39] And what is true as to the whole

necessary." This act seems to have been prompted by the New York Revision, but has in its turn been followed by Virginia. An act of 15 Vict. relaxes somewhat the requirement of signing at the foot, which had defeated a number of wills.

[36] As to following the construction of the English statute, see Armstrong v. Armstrong, 29 Ala. 538; Bailey v. Bailey, 35 Ala. 687. In Virginia it was followed quite reluctantly.

[37] Code Civil, art. 970: "Le testament olographe ne sera pas valable s'il n'est écrit entier, daté et signé de la main du testateur; il n'est assujetté á aucune autre formalite." The same provision is found in the Revised Civil Code of Louisiana, art. 1588.

[38] 1 Jarm. Wills, 89, 90; section 19 of statute of frauds.

[39] The more elaborate chapters on "Wills" set out with some such statement as section 1 of chapter 113 of the General Statutes of Kentucky: "Except where it would be contrary to the manifest intention, the word 'will,' as used in this chapter, shall signify a last will or testament, codicil, appointment by will or writing in the nature of a will in exercise of a power, and also any other testamentary disposition." Thus a request that a former will be destroyed, that the estate may go by the law of descent, was proved as a will. Bayley v. Bailey, 5 Cush. (Mass.) 245. As to codicil, see, also, Garcia Perea v. Barela (N. M.) 23 Pac. 766.

will is also true as to each part or devise. The only effect of the devise is to disinherit the heir to some extent; either taking from him the whole or a part of the lands which would otherwise descend to him, or clogging his title to the land with some condition, or charge, or limitation. But this can be done only in one way; that is, by giving such lands, or some interest therein, to others, or imposing the condition, charge, or limitation in some one's favor. The fullest and clearest declaration that the heir shall have nothing, or shall have only a named share, smaller than that due him by the laws of descent, unless what is taken from him is given to another, is wholly ineffectual. And a void devise does not disinherit the heir, for it amounts to no devise. The cases referred to in the preceding section, under the mortmain laws, are the readiest examples of this doctrine.[40]

How far other instruments can be included in a will, so as not to require a separate execution, and especially how far the execution of a codicil will give life to a defectively executed will, to which it refers, is a delicate and important question. In a late case a will was defectively executed, in this, that one of the attesting witnesses, being a devisee, was not "competent"; but a codicil written on the same sheet, reciting and modifying the will, was properly executed. The whole will was admitted; and if the codicil clearly referred to a will written on a separate sheet of paper, and ratified it, the result would, according to the weight of authority, have been the same.[41]

[40] Chamberlain v. Taylor, 105 N. Y. 185, 11 N. E. 625, where the principle is announced; also, Haxtun v. Corse, 2 Barb. Ch. 506, 521; Bowles v. Winchester, 13 Bush, 1. But courts have sometimes construed out of the exclusion of one heir, and other words not really giving anything, a devise to his coheirs. Clarkson v. Clarkson, 8 Bush, 655, limited in Phillips v. Phillips, 93 Ky. 500, 20 S. W. 541. Mr. Jarman says (1 Jarm. Wills, 294): "Negative words do not amount to a gift, and the only mode of excluding the title of whomsoever the law, in the absence of disposition, constitutes the successor of the property, is to give it to some one else." See, also, Cole v. Wade, 16 Ves. 27. When a limitation over of land is made on the occurrence of events which do not come to pass fully, the land goes to the heir ab intestato. So in McGurry v. Wall, 122 Mo. 614, 27 S. W. 327, where the widow took, as heir of the only son and heir of the testator, at her remarriage. The result often runs counter to the presumable wishes of the testator.

[41] In re Will of Murfield, 74 Iowa, 479, 38 N. W. 170; Loring v. Sumner, 23 Pick. 102; Thayer v. Wellington, 9 Allen (Mass.) 292; Jackson v. Babcock, 12

Thus, a conveyance actually made, but invalid, may be ratified by a will; and descriptions of property may be furnished or devisees may be identified by reference to maps or written documents, public or private, just as it may be done in a deed.[42] But a reference to a conveyance said to have been made by the testator, but actually not made, does not amount to a devise of the subject of such supposed conveyance, when it has in fact not been executed; as such nonexecution may have resulted from the testator's change of mind.[43] On the other hand, the recital of a former part of the will as devising a certain estate to a named person amounts to such a devise, if it is not found in the will before.[44] When a devise is made subject to further directions of the testator theretofore given or yet to be given, and the persons or purposes of the devise cannot be understood or carried out without looking into these directions, the devise is void, and the land or estate embraced in it is undisposed of, and goes to the heirs, unless, indeed, these directions are in writing, which is identified according to the rules given above; for otherwise an important part of the will would be unwritten, or, at any rate, not executed according to law. And, where property is devised to a named person in trust to apply it according to directions that have been or may thereafter be given to him by the testator, the trust is void, and the devisee takes nothing; for, if nothing else is expressed, the intent that he shall not take beneficially is plainly expressed; and the thing devised goes to the heirs.[45] Where, on the face of the

Johns. 394; Chambers v. McDaniel, 6 Ired. (N. C.) 226; Harvy v. Chouteau, 14 Mo. 587, 592; Stover v. Kendall, 1 Cold. (Tenn.) 557; Smith v. Puryear, 3 Heisk. 708. See Jarm. Wills, 79; De Bathe v. Lord Fingal, 16 Ves. 167; Storms' Will, 3 Redf. (N. Y.) 327. But the witnesses of will and codicil cannot be added together to make one good attestation. Dunlap v. Dunlap, 4 Desaus. Eq. (S. C.) 305.

[42] Tonnele v. Hall, 4 N. Y. 140, relying on Habergham v. Vincent, 2 Ves. Jr. 204, 228 ("paper already written" may be made part of will by reference), and on Bond v. Seawell, 3 Burrows, 1775. Compare recital of deeds in deeds, Crane v. Morris' Lessee, 6 Pet. 611.

[43] Benson v. Hall, 150 Ill. 60, 36 N. E. 947; Hunt v. Evans, 134 Ill. 496, 25 N. E. 579, relying on Harris v. Harris, 3 Ir. Eq. 610; Stover v. Kendall, supra; and see Bamfield v. Popham, 1 P. Wms. 54; Right v. Hamond, 1 Strange, 427.

[44] Harris v. Harris, and Hunt v. Evans, supra.

[45] Heidenheimer v. Bauman, 84 Tex. 174, 19 S. W. 382; Nichols v. Allen, 130 Mass. 211 (and the heirs have also a resulting trust, if the purpose be

will, the trusts are not expressed, land being devised absolutely, but the devisee has obtained such absolute devise by holding out to the testator that he would give the proceeds to another beneficiary, he is guilty of a fraud. And some courts have gone so far as to allow such fraud to be proved by parol, and to declare the devisee a trustee for those to whom he had promised to turn over the benefit; a rather dangerous encroachment on the statute of frauds and perjuries.[46] Sometimes a date later than the testator's death has been found in a will. If the date was set down correctly, the will must be forged; but the propounders may show that the will was published by the testator in his lifetime, and that the wrong date was put in by mistake.[47]

We refer below to the Codes or compilations of the several states and territories for the sections in which the formal requisites in the execution of wills are prescribed.[48]

§ 77. Signature or Subscription.

The first requisite of the written will, whether attested or holographic, is the signature or subscription of the testator; and as to this the laws of the several states and territories differ greatly.

certain enough, but illegal,—Olliffe v. Wells, Id. 224); Sears v. Hardy, 120 Mass. 524, 542.

[46] Stickland v. Aldridge, 9 Ves. 519. Compare Graham v. Burch, 53 Minn. 17, 55 N. W. 64.

[47] Doran v. Mullen, 78 Ill. 342. See next section for further illustration.

[48] The following statutes are referred to in the sections as to the formal execution of wills: Alabama, Civ. Code, §§ 1966, 1967; Arkansas, §§ 6492, 6493; California, Civ. Code, §§ 1278, 1288, 1289; Colorado, Gen. St. § 3482; Connecticut, § 538; Dakota Territory, Civ. Code, §§ 688, 691, 693; Delaware, c. 84, § 3; Florida, § 1795; Georgia, §§ 2414–2418, 2479, 2482; Idaho, §§ 5727–5729; Illinois, c. 148, § 2; Indiana, Rev. St. § 2576; Iowa, §§ 2325, 2326; Kansas, § 7206; Kentucky, c. 113, § 5 (not touched by the Statutes of 1893); Maine, c. 74, § 1; Maryland. Pub. Gen. Laws, art. 93, § 310; Massachusetts, c. 127, §§ 1–7; Michigan, § 5789; Minnesota, c. 47, §§ 5, 6; Mississippi, §§ 4488, 4492; Missouri, § 8870; Montana, Probate Code, §§ 438–440; Nebraska, §§ 1186, 1187; Nevada, §§ 3002, 3004, 3005; New Jersey, "Wills," § 6; New Hampshire, c. 186, § 2; New York, Rev. St. pt. 2, c. 6, §§ 40, 41; North Carolina, § 2136; Ohio, § 5916; Oregon, §§ 3069, 3070; Pennsylvania, Dig. "Wills," § 6; Rhode Island, c. 182, § 4; South Carolina, § 1854 (copied from 29 Car. II.); Tennessee, §§ 3003, 3004;

It were well if the law everywhere demanded that the will should be "subscribed," or, what is the same, "signed, at the end." Just as in the execution of deeds, so for the "publication" of a will, a number of states require only that the writing shall be "signed" by the testator; and the name of the testator in any part of a paper may, under circumstances, count as a signature. In the following states the will need only be "signed": Alabama, Illinois, Iowa, Maine, Maryland, Michigan, Mississippi, South Carolina, Rhode Island, North Carolina, Tennessee, Washington, New Hampshire, Missouri, Oregon, Vermont, Indiana, Nebraska, Wisconsin, Florida, Georgia, Massachusetts, Colorado, New Jersey, Texas, Arizona; and so in Nevada. But in that state alone the will must be sealed, a rule abolished in New Hampshire only in 1891. In Virginia and West Virginia the instrument must be signed in such a manner as to make it manifest that it was intended as a signature. The statutes of New York, California, the Dakotas, Montana, Idaho, Arkansas, and Utah provide that the will must be "subscribed at the end thereof"; the lawmaker not being satisfied with the first word, which in itself denotes a signature at the end. The Pennsylvania act demands signing the will at the end, "unless the person making the same shall be prevented by the extremity of his last sickness." Ohio demands signing at the end in all cases. So do Kansas and Minnesota. Kentucky and Connecticut direct that the will must be "subscribed"; and the Delaware statute ("signed by the testator or by some person subscribing the testator's name") either implies that the word "signed" is meant as the equivalent of "subscribed," or that the testator himself may write his name in the body, but another must put that name at the end of the instrument. In most of the statutes, after the requirement that the will should be signed or subscribed by the testator, words are added to this effect: "Or by some other person in his presence and by his express direction." The word "express" is left out in some states, and seems to be immaterial; and a few states have the word "request," instead of "direction," which is an equivalent.[49] But the Indiana statute says "in his

Texas, arts. 4859, 4860; Vermont, §§ 2042, 2045; Virginia, § 2514; Washington, §§ 1459, 1460; West Virginia, c. 77, cl. 6; Wisconsin, § 2282; Arizona, §§ 3234, 3235.

[49] Mere acquiescence by the testator in the signing of his name by another is not enough. Waite v. Frisbie, 45 Minn. 361, 47 N. W. 1069.

presence and with his consent," which is certainly broader than "by his direction"; and the Arkansas law says nothing about the testator's presence. In New York, the clause above given had been in the act of 1787, and in the Revised Laws of 1813, but was omitted in the Revised Statutes; but the section next following recognizes that the signature may have been made by another person in the old way.[50] The statutes of New Jersey and of Connecticut also demand the signature or subscription of the testator, and say nothing about any "other person." In Oregon and Washington, the "other person" who writes the testator's name for him must state this fact in writing, and sign his own name as a witness to the will. This seems to be mandatory, while the corresponding provision in New York is only a regulation, enforced by the threat of a small fine.

The provision found in many of the statutes that the testator may acknowledge his signature before the attesting witnesses, who thus need not see him, nor any one for him, sign the will, withdraws the facts as to the signature from the court or jury trying the question of "will or no will"; but, when the facts are brought out, they control.[51] In accordance with the English decisions under the statute of frauds, it has been held that, where the statute does not direct the contrary, the testator, or another person for him, may sign his name in any part of the will. Thus, where the testator has a will drawn up in his presence, with his name in the opening clause, and asks the subscribing witnesses to attest it, he thereby adopts his name, as it stands written at the top, as his signature; and the will is complete.[52] A mark is a sufficient signature, if it appears to be intended as such; and it is immaterial that the testator knew how

[50] Robins v. Coryell, 27 Barb. 558, though not in the court of appeals, has ever since been acquiesced in.

[51] Chaffee v. Baptist Missionary Convention, 10 Paige (N. Y.) 85. The will was acknowledged before two witnesses, but rejected, as it seemed probable that it was not signed either by the testatrix or in her presence, and she did not acknowledge that it was so signed.

[52] Lemayne v. Stanley, 3 Lev. 1; Morison v. Turnour, 18 Ves. 176; Miles' Will, 4 Dana, 1 (not law in Kentucky now); Armstrong v. Armstrong, 29 Ala. 538. This course of decision is in Robins v. Coryell, 27 Barb. 558, called a "preposterous misconstruction"; and the statute of 1 Vict., as well as the statutes of New York, Pennsylvania, Kentucky, Virginia, etc., which require "subscribing" or signing at the foot or end, or signing so as to show the intent

to write, and was even at the time of executing the will capable of writing.[53] But where he starts out to write his name, and from weakness or other cause stops before he has written enough to be read for his name, the strokes made cannot be considered as "his mark"; for they were not intended as such. The will is incomplete.[54] Where the testator, being feeble, allows some one to guide his hand in tracing his signature, this is sufficient, either as made by him or "by some other person in his presence and by his express direction."[55] The testator may request a bystander to steady or to guide his hand while he is signing his name; and this, where the law does not allow him to direct another person to sign for him.[56] As a will may be written in a foreign language, it may, of course, be signed in its characters; and just as it may be written, so it may also be signed, in pencil.[57] The testator need not sign the full name. The given name alone, or initials, if he were in the habit of using

of signing, were enacted to remedy the mischief of these decisions. We have shown the same diversity of views under the head of "Deeds, Signature or Subscription."

[53] Adams v. Chaplin, 1 Hill, Eq. (S. C.) 265; Flannery's Will, 24 Pa. St. 502; Chaffee v. Baptist Missionary Convention, 10 Paige (N. Y.) 85; Pridgen v. Pridgen, 13 Ired. (N. C.) 259; Den v. Mitton, 12 N. J. Law, 70; Den v. Matlack, 17 N. J. Law, 86; Rosser v. Franklin, 6 Grat. (Va.) 1. Pennsylvania Acts of 1848 (section 7 of chapter on "Wills") and 1887 (as to married women) expressly authorize the use of a mark or cross. See, also, Bailey v. Bailey, 35 Ala. 687. The testator may direct another to sign his name, though he could sign it himself. Taylor v. Dening, 3 Nev. & P. (Q. B.) 228. In re Guilfoyle, 96 Cal. 598, 31 Pac. 553; Herbert v. Berrier, 81 Ind. 3. Where the testator's name is written by one of the attesting witnesses,—as it may be,—he still counts as a witness. Herbert v. Berrier, 81 Ind. 1; In re Stevens' Will, 6 Dem. Sur. (N. Y.) 262.

[54] In re Plate's Estate, 148 Pa. St. 55, 23 Atl. 1038; In re O'Neill's Will, 3 Dem. Sur. (N. Y.) 427.

[55] Trezevant v. Rains (Tex. Sup.) 19 S. W. 567.

[56] Fritz v. Turner, 46 N. J. Eq. 515, 22 Atl. 125, following Stevens v. Vancleve, 4 Wash. C. C. 262, Fed. Cas. No. 13,412, where Mr. Justice Washington says that otherwise a person of sound mind, but feeble body, might be unable to make a will in New Jersey. The clause allowing another person to sign was stricken out intentionally. In re McElwain's Will, 18 N. J. Eq. 499; McMechen v. McMechen, 17 W. Va. 683; Watson v. Pipes, 32 Miss. 451.

[57] In re Knox's Estate, 131 Pa. St. 220, 18 Atl. 102. See note 34 to preceding section.

the one or the other, would at least be a good mark; and the full name need not even occur in the will, if the testator be therein otherwise fully identified.[58] Where the testator uses a mark, and some one else puts his name at the side of it, without his direction, or not in his presence, such improper conduct cannot defeat the act of the testator, which was sufficient in itself.[59] The statutes of California, the Dakotas, Idaho, Montana, and Utah define a signature as embracing a mark when the party "cannot write," and require the signer's name to be near it. It has been held that a person knowing how to write, but physically too weak, may use a mark, and that the testator's name at the top of a short will is near enough; for it clearly shows what the mark was intended for.[60] The requirement of the Virginia and West Virginia law that the signature must be so placed as to show an intent to sign has been construed to mean in effect the same as if the statute required it to be put at the end of the will; for, in truth, this in ordinary language is meant by "signing."[61]

Under the Pennsylvania statute which requires that the will be signed at the end, the question has arisen, where independent clauses followed the signature, whether so much of the instrument as is above it can be proved as a valid will, rejecting what follows it as surplusage; and it has both times been decided in the negative, and the wills were rejected in toto.[62] In New York, on the other hand,

[58] In re Knox's Estate, supra, where the testatrix signed only "Harriet," but was identified by the names of her father and mother, which she wished to have put on her tombstone. The given name is at least a mark.

[59] Pool v. Buffum, 3 Or. 438. St. Louis Hospital Ass'n v. Williams, 19 Mo. 609, does not decide the contrary. And an error in the name put by the scrivener against the testator's mark is immaterial (Long v. Zook, 13 Pa. St. 400), at least under the Pennsylvania statute. See, also, Hartwell v. McMaster, 4 Redf. Sur. (N. Y.) 390; Bailey v. Bailey, 35 Ala. 687 (incorrect name).

[60] California, Civ. Code, § 14; Montana, § 539; Idaho, § 16; In re Guilfoyle, 96 Cal. 598, 31 Pac. 553.

[61] Warwick v. Warwick, 86 Va. 596, 10 S. E. 843, following Roy v. Roy, 16 Grat. 418. Older Virginia cases point out how ill the old English notion of signature at the top fits a holographic will, which takes the attestation of witnesses to mark its end. A label signed by the testator, and mentioning his will on the back of the paper or on an envelope, does not help out a will signed at the top.

[62] Appeal of Wineland, 118 Pa. St. 37, 12 Atl. 301, following Hays v. Harden, 6 Pa. St. 409.

the question came up three times before the court of appeals, whether clauses written on another page of the sheet—the will being subscribed by testator and witnesses at the bottom of the first page (under a printed testimonium clause)—could be considered as belonging to the first page, either by a reference forward and backward on the two pages, or because the matter on the second page was obviously the close of a paragraph begun on the first page. Here, also, both wills were rejected; although a will had been sustained in which maps and descriptions referred to in the will were stitched and sealed to it at the end.[63] But the testator's name is "subscribed" or signed at the end, though it be followed by the date, which is not in fact a part of the will.[64] The clause in the Pennsylvania statute which dispenses with the testator's signature when he is prevented by the extremity of his last sickness is strictly pursued. If he dies before he has given even an oral assent to the will in its final shape, the instrument is not completed, and without force.[65] The statutes do not demand of the testator any other act or mode of making his wishes known, except by signing his will. He need not have read it. Nor is it necessary that it should have been read to him, nor that it should have been written in a language which he understands. That he has not read the will, that it has not been read to him, that he does not understand the language in which it is written, may all be proof of want of capacity, of fraud, or of undue influence, but not of defective execution.[66]

[63] In re O'Neil, 91 N. Y. 516; In re Hewitt, Id. 261; In re Conway, 124 N. Y. 455, 26 N. E. 1028, reversing same case in 58 Hun, 16, 11 N. Y. Supp. 606. In Sisters of Charity v. Kelly, 67 N. Y. 409, the testator's name thrown at random in a clause near the end of the will was held ineffectual. Contra, Tonnele v. Hall, 4 N. Y. 140.

[64] Flood v. Pragoff, 79 Ky. 607. However, by reference in the body of the will, such as "all acquisitions up to this date," or "land held at this date," the date might become a very important part of the instrument. Date and testimonium clause no part of the will. Younger v. Duffie, 94 N. Y. 535.

[65] Wall v. Wall, 123 Pa. St. 545, 16 Atl. 598.

[66] Worthington v. Klemm, 144 Mass. 167, 10 N. E. 522; Pettes v. Bingham, 10 N. H. 514; Doran v. Mullen, 78 Ill. 342. The signature is presumed to be made understandingly (Parker v. Felgate, 8 Prob. Div. 171, will made according to instructions good, though testatrix too far gone to listen to it; even in the case of a testator who signs by mark,—Robinson v. Brewster, 140 Ill. 649, 30 N. E. 683; In re Smith's Will [Sup.] 15 N. Y. Supp. 425, just and simple

Yet, where a will is written directly against the testator's instructions, and not read to or by him, the signature is so thoroughly obtained by fraud that it may be deemed null.[67] It is not necessary that each separate sheet of a will be signed by the testator. Where a subscription or signing at the end is required, he must sign the last sheet, and the witnesses will subscribe it with him. Even where the different sheets are not stitched together, or otherwise in bodily connection, one signature is enough; perhaps an unfortunate rule, as it may give rise to much uncertainty and fraud, but fully established.[68]

§ 78. Attestation.

The will in the ordinary form, having been signed, is "attested and subscribed" by witnesses. "Attested" means that the witnesses see the testator sign, or hear him acknowledge the signature;[69] "subscribed," that these same witnesses put their own names at the end of the will, with or without an attestation clause. In only one state (Pennsylvania) no such form is required. The statute of 1833, still in force, demands that a will shall "in all cases be proved by the oath or affirmation of two or more competent witnesses." These witnesses need not even be present at the execution. They need not have heard an acknowledgment by the testator. If two or more witnesses prove the handwriting of the deceased, the law is complied with.

will; Keithley v. Stafford, 126 Ill. 507, 18 N. E 740, presumption that testator understood the will to be signed); but it yields to proof to the contrary. Jury trying a will must believe that the testator knew the contents, but may infer this from circumstances. Cheatham v. Hatcher, 30 Grat. 65; Montague v. Allen, 78 Va. 592.

[67] Waite v. Frisbie, 45 Minn. 361, 47 N. W. 1069, and Id., 48 Minn. 420, 51 N. W. 217; Day v. Day, 3 N. J. Eq. 549; In re Hoover's Will, 19 D. C. 495, where testator is unable to speak; Rollwayen v. Rollwayen, 63 N. Y. 504. For the details and further authority on this question, involving the questions of fraud, undue influence, and testamentary capacity, we must refer the reader to works on Wills.

[68] Wikoff's Appeal, 15 Pa. St. 281. In Tonnelle v. Hall, 4 N. Y. 140, the sheets were bound by a ribbon. 1 Jarm. Wills, p. 70; Winsor v. Pratt, 2 Brod. & B. 650, there quoted. The parts of the will ought to be together when they are attested. See Gass v. Gass, 3 Humph. (Tenn.) 278.

[69] The distinction between attestation and subscription is well stated in Swift v. Wiley, 1 B. Mon. (Ky.) 117.

But two must agree. If each of two testifies to a different manner in which the will was executed, it cannot be said to be proved by the oath of two witnesses.[70]

The following states adhere to the old rule that three witnesses have to attest a will of real estate: Maine, New Hampshire, Massachusetts, Vermont, Connecticut, South Carolina, and Georgia. In the other states and territories the law requires "two or more," or "at least two," or simply "two," witnesses. In all the states the statute, like the English statute of frauds, requires these witnesses to "attest and subscribe" the will in the testator's presence, except in Texas and Iowa, where the statute speaks of attesting only, and leaves the rest to inference, and in Georgia and Arkansas where they are to subscribe, but are not required to do so in the testator's presence.

Again, while in most of the states the statute does not define what knowledge about the execution of the will the witnesses shall gain, it is more definite in not a few of them. In New York,[71] Arkansas, the Dakotas, Idaho, Montana, California, and Utah, it is plainly said that the subscription must be made before, or acknowledged to, the witnesses, an acknowledgment of the will generally not being enough. In these states, and in New Jersey, the testator must declare to the witnesses that the instrument is his will, which is known as the "publication" of the will. In Ohio and Kansas the witnesses must see the testator subscribe, or hear him acknowledge the will. In Virginia, West Virginia, and Kentucky, the signature or subscription must be made, or the subscription acknowledged, before them. In New Jersey the signature is made, or the making thereof is

[70] In re Knox's Estate, 131 Pa. St. 220, 18 Atl. 1021; Jones v. Murphy, 8 Watts & S. 295; Carson's Appeal, 59 Pa. St. 493. Before 1887, the will of a married woman had to be subscribed by two witnesses, neither of them her husband. As to disagreement of witnesses, see Derr v. Greenawalt, 76 Pa. St. 239, 254.

[71] The part of the New York law relating to the attesting witnesses reads as follows: "(2) The subscription must be made in the presence of the attesting witnesses, or be acknowledged by the testator to them to have been made by him or by his authority. (3) The testator must, at the time of subscribing or acknowledging the same, declare to the attesting witnesses that the instrument is his will; and (4) there must be two attesting witnesses, each of whom must sign his name as a witness at the end of the will, at the testator's request and in his presence." The same language is used in the other states named with New York, except as to the changes in Arkansas noted in the text.

acknowledged, before them. In Illinois, as it is rather awkwardly said, they must have been present and "seen" the testator sign the will or "acknowledge" it. Where the word "attest" or "witness" is left undefined, the witnesses must either have seen the act of signing or subscription, or must have heard him acknowledge the signature, implying that it was made by him, or in his presence and by his authority.

After gaining the proper knowledge of the will, the witnesses are to subscribe it. While, with the exceptions already stated, this is required to be done in the testator's presence, only Vermont and South Carolina require them to do it in the presence of each other, in accordance with the time-honored phrase of the scriveners, which would also be the safer course in New Jersey, Virginia, and West Virginia, where they are to be present at the same time. In New York, Arkansas, the Dakotas, Montana, Idaho, California, and Utah, each of them must sign his name at the end of the will, at the testator's request. In Iowa and Texas the inference has been drawn that the attesting witnesses must subscribe the will in the accustomed manner;[72] but in Arkansas and Georgia the witnesses need only sign the will within a reasonable time, as part of the same occasion, and while the testator is alive.[73]

Where an acknowledgment is permitted, it has generally been held insufficient when the testator showed the will, ready written, to the witnesses, without declaring that he had signed it.[74] An acknowledgment can be made by a nod of assent as well as by words.[75] In like manner, the declaration to the witnesses that the

[72] In re Boyeus, 23 Iowa, 354.

[73] Huff v. Huff, 41 Ga. 696.

[74] In re Mackay, 110 N. Y. 611, 18 N. E. 433 (in New York, the witnesses must see the signature which is acknowledged); Mitchell v. Mitchell, 16 Hun, 97, affirmed 77 N. Y. 596 (note the pointed language of the New York statutes); Ludlow v. Ludlow, 36 N. J. Eq. 597. The decisions in other states are under statutes more loosely worded. A general acknowledgment of the will, not mentioning the signature, is deemed good in Rhode Island (Sprague v. Luther, 8 R. I. 252), and in Massachusetts (Dewey v. Dewey, 1 Metc. 349; Hogan v. Grosvenor, 10 Metc. 54; Ela v. Edwards, 16 Gray, 91); in Illinois (Yoe v. McCord, 74 Ill. 33); in Delaware (Rash v. Purnel, 2 Har. 448),—all relying on White v. British Museum, 6 Bing. 310.

[75] Denton v. Franklin, 9 B. Mon. (Ky.) 28, overruling Griffith v. Griffith, 5 T. B. Mon. 511. A request to attest has been held an acknowledgment. Tu-

instrument before them is the testator's will may be indicated by an almost silent assent; the scrivener, or some other party making the statement in the testator's presence.[76] But, when he is so feeble as to speak with difficulty only, such a presumption cannot be indulged, and mere acquiescence on his part to the words of another would not prove a voluntary publication.[77] The request to the witnesses, where required, is often made by the testator's handing the instrument to the witnesses, or the pen with which they are to sign it, and may always be given as well by acts as by words.[78] It may also take place before the will is completed; that is, when the testator sends for a friend to witness his will, while it is being prepared.[79] Where the statute says nothing about request, none need be shown, though it would be fatal to the will, if the subscription had been made without the testator's consent.[80] In the states in which the

dor v. Tudor, 17 B. Mon. 383 (handing pen to the witness); Allison v. Allison, 46 Ill. 61. Any implication is enough. Nickerson v. Buck, 12 Cush. (Mass.) 342; Moale v. Cutting, 59 Md. 510 (where a premature acknowledgment was in a way ratified). But there must be some word or sign by the testator. Ludlow v. Ludlow, 36 N. J. Eq. 597.

[76] In re Austin's Will, 45 Hun, 1; In re Hunt's Will, 110 N. Y. 278, 18 N. E. 106; Denny v. Pinney's Heirs, 60 Vt. 524, 12 Atl. 108 (under Vermont ruling, infra, that there must be a publication); Lane v. Lane, 95 N. Y. 494 (a mere "Yes" in presence of the witnesses); In re Johnson's Estate, 57 Cal. 529. Contra, in Baker v. Woodbridge, 66 Barb. 261, the declaration was not full enough; in Re Dale, 56 Hun, 169, 9 N. Y. Supp. 396, the knowledge that the instrument was a will, being withheld from the witnesses, defeated it. The declaration need not be made at the very moment of witnessing, yet during the same meeting. In re Collins, 5 Redf. Sur. (N. Y.) 20. "Is this your work? Yes,"—held no publication in Larabee v. Ballard, 1 Dem. Sur. (N. Y.) 496. The declaration that the paper is a will may be made before its execution (Errickson v. Fields, 30 N. J. Eq. 634), or while it is being prepared (Turnure v. Turnure, 37 N. J. Eq. 629). The knowledge of the witnesses as to the nature of instrument does not dispense with publication. Gilbert v. Knox, 52 N. Y. 125.

[77] Heath v. Cole, 15 Hun, 100.

[78] Cheatham v. Hatcher, 30 Grat. (Va.) 56 (request by third party). See, for sufficient request, Ehle v. Trustees of Village of Canajoharie, 62 N. Y. 654.

[79] Peck v. Cary, 27 N. Y. 9; Brady v. McCrosson, 5 Redf. Sur. (N. Y.) 431.

[80] Dyer v. Dyer, 87 Ind. 17; Mulligan v. Leonard, 46 Iowa, 692. The "conscious presence" of the testator is enough. In re Allen's Will, 25 Minn. 39. The doubt was suggested by the old form used by scriveners, "in his presence, and at his request." Huff v. Huff, 41 Ga. 696 (request is presumed).

statute does not require a publication, the witnesses are supposed to put their hands to the will only to identify it, and need not be told, and need not even know or believe, that the instrument attested by them is a last will.[81] In Vermont, however, though the statute is silent, the law is understood to demand a publication.[82]

The presence of the testator, in which the witnesses have to set their names to the will, does not imply that the testator must see them while they perform this act. It is enough that they should be at a spot where he can see them from the spot at which he then is, in the same room, or even in an adjoining room, with the doors open, and in the line of sight. A subscription in the testator's absence is not cured by his subsequent assent.[83] And a subscription by the witnesses after the testator has become unconscious cannot be said to take place in his presence.[84] Where the statute does not direct

As to unlawfulness of a clandestine attestation, see 1 Jarm. Wills, p. 75, quoting Longford v. Eyre, 1 P. Wms. 740.

[81] Dickie v. Carter, 42 Ill. 376; In re Hulse's Will, 52 Iowa, 662, 3 N. W. 734; Flood v. Pragoff, 79 Ky. 607; Canada's Appeal, 47 Conn. 450; Osborn v. Cook, 11 Cush. (Mass.) 532; Allen v. Griffin, 69 Wis. 529, 35 N. W. 21; Dewey v. Dewey, 1 Metc. (Mass.) 349; Turner v. Cook, 36 Ind. 129; Brown v. McAlister, 34 Ind. 375. Older cases hold that the witnesses need not know the contents of the paper. Higdon's Will, 6 J. J. Marsh. (Ky.) 444; Riley v. Riley, 36 Ala. 497. It was held in McBride v. McBride, 26 Grat. (Va.) 476, that the testator need not know that the instrument is a will, though he must know and intend that the paper shall have force in some way.

[82] Roberts v. Welch, 46 Vt. 164 (the witnesses must sign animo testandi). The New Jersey law as to publication is enforced in Elkinton v. Brick, 44 N. J. Eq. 154, 15 Atl. 391.

[83] In re Howard's Will, 5 T. B. Mon. (Ky.) 199 (in the same room); Orndorff v. Hummer, 12 B. Mon. 619; Ambre v. Weishaar, 74 Ill. 109; Hill v. Barge, 12 Ala. 687; In re Allen, 25 Minn. 39 (testator need not see witness); In re Meurer's Will, 44 Wis. 392 (in adjoining room). Contra (door half open, and testator unable to see the witness), Mandeville v. Parker, 34 N. J. Eq. 211; (in next room, within sight and hearing, is enough) Riggs v. Riggs, 135 Mass. 238; (subscribing in testator's absence and ratifying before him afterwards is not) Chase v. Kittredge, 11 Allen (Mass.) 49; Duffie v. Corridon, 40 Ga. 122; Town of Pawtucket v. Ballou, 15 R. I. 58, 23 Atl. 43. The witnesses must sign in testator's presence, so they cannot complete the will without his consent; hence the phrase "in his presence, and with his consent." Testator must know of their nearness. Baldwin v. Baldwin's Ex'r, 81 Va. 405. As to blind testator, see 4 Kent, Comm. 516; Reynolds v. Reynolds, 1 Speers (S. C.) 256; Ray v. Hill, 3 Strob. (S. C.) 297.

[84] Right v. Price, Doug. 241, stated in Kent's Commentaries to be the

that the witnesses shall attest at the same time, or subscribe in the presence of each other, they need not do either.[85]

As it happens, in an emergency, that unlettered witnesses have to be called in, the draftsman alone being able to write, wills have been subscribed by one or even by two of the witnesses by a mark, and such an attestation has been sustained.[86] Strictly speaking, the subscription by the witnesses ought in all cases to be made after that of the testator; for they are by subscribing the will to bear witness, that it is already executed. And this rule is sternly enforced in New York, and in some other states,[87] but has been relaxed in Kentucky and in New Jersey.[88] At all events, the presumption will be indulged, unless the contrary clearly appears, that the signatures were made in the order which is both natural and directed by law.[89] That a needless signature intervenes between the names of the witnesses, in a state not requiring the witnesses' names at the end, or that they signed somewhere across the instru-

American law. "Conscious presence" is the test. Watson v. Pipes, 32 Miss. 451.

[85] Maupin v. Woods, 1 Duv. (Ky.) 223; Gaylor's Appeal, 43 Conn. 82; Flinn v. Owen, 58 Ill. 111; Johnson v. Johnson, 106 Ind. 477, 7 N. E. 201; In re Smith's Will, 52 Wis. 543, 8 N. W. 616, and 9 N. W. 665; In re Bogart, 67 How. Prac. (N. Y.) 313. Even where the statute says "in presence of each other," they need not be all three in sight of each other. Blanchard v. Blanchard, 32 Vt. 62.

[86] Jackson v. Van Dusen, 5 Johns. 144 (where one of the three witnesses signed, as he was wont to do, with initials only); Upchurch v. Upchurch, 16 B. Mon. (Ky.) 102 (a very strong case, where an illiterate witness allowed a devisee to write down his name, not even making a mark). In Montgomery v. Perkins, 2 Metc. (Ky.) 448, both attesting witnesses were unable to write, and the draftsman wrote their names; the will was sustained. Davis v. Semmes, 51 Ark. 48, 9 S. W. 434 (subscription by mark good, though person writing the name does not add his own, under the local statute); Thompson v. Davitte, 59 Ga. 472; Lord v. Lord, 58 N. H. 7; Stover v. Kendall, 1 Cold. (Tenn.) 557.

[87] Sisters of Charity v. Kelly, 67 N. Y. 409 (an unfortunate case in which one signature of the testator was too high up, the other too far down); Chase v. Kittredge, 11 Allen (Mass.) 49.

[88] Swift v. Wiley, 1 B. Mon. (Ky.) 114; Mundy v. Mundy, 15 N. J. Eq. 292. Witnesses and testator signed within a short time of each other.

[89] Allen v. Griffin, 69 Wis. 529, 35 N. W. 21; Hallowell v. Hallowell, 88 Ind. 251 (position of names of witnesses to the left does not indicate their signing first).

ment, is immaterial.[90] But a signature by one or both of the witnesses on the envelope enclosing the will, though under the testator's signature, is wholly insufficient.[91]

The attestation clause, when written out in full, would state all the facts which the witnesses would have to prove and to do, e. g. under the statute of frauds: "Signed in our presence by the above J. S., and subscribed by us in his presence;" in New York, moreover, "and at his request, as his last will;" in Vermont and South Carolina, "in his presence, and in the presence of each other." But the law does not require that these facts should appear on the will. They are no part of it. The simple word, "witnesses," or "attest," is more than enough. The signatures of the witnesses even without such a word satisfy the law.[92] But a full attestation clause may become very important; for it is prima facie evidence of the material facts which it recites, and may be the only proof when the witnesses are dead, or for other reasons not within reach, or when they have forgotten the details of the execution; and these recitals have even

[90] Fowler v. Stagner, 55 Tex. 393; Potts v. Felton, 70 Ind. 166; Murray v. Murphy, 39 Miss. 214. Even in New York an attestation on blank second page, the will being finished and signed on the third page, was held good. Hitchcock v. Thompson, 6 Hun, 279.

[91] Vogel v. Lehritter, 64 Hun, 308, 18 N. Y. Supp. 923; Soward v. Soward, 1 Duv. 126 (in both of these an attestation on the outside was deemed bad, under the local law requiring the witnesses to subscribe, or sign at the end); Patterson v. Ransom, 55 Ind. 402.

[92] In re Phillips, 98 N. Y. 267, word "witnesses" followed the names. Virginia and West Virginia say, in the statute, "No form of attestation shall be necessary. Allaire v. Allaire, 37 N. J. Law, 312. Law prescribes no attestation clause; signatures alone are sufficient. Hence the attestation clause may follow the names of witnesses, though the law says they should sign at the end. Jackson v. Jackson, 39 N. Y. 153; Moale v. Cutting, 59 Md. 510; Ela v. Edwards, 16 Gray (Mass.) 91; Eliot v. Eliot, 10 Allen (Mass.) 358; Nickerson v. Buck, 12 Cush. 342; Pollock v. Glassell, 2 Grat. (Va.) 439; Fry's Will, 2 R. I. 88; Dean v. Dean, 27 Vt. 746 (where the attestation clause did not state that the witnesses did, as in Vermont they must, sign in each other's presence),—all going back to Croft v. Pawlet, 2 Strange, 1109. Fatheree v. Lawrence, 33 Miss. 585. Witness, being a magistrate, writing out an acknowledgment like that for a deed over his name, does no harm. Murray v. Murphy, 39 Miss. 214. But a signature made, by the person who wrote the testator's name, only to identify the writer, does not count as that of a subscribing witness. Peake v. Jenkins, 80 Va. 293.

been held sufficient to sustain a will against the recollection of a subscribing witness.[93] On the presumption of omnia esse rite acta, it has been held, where the attestation clause of a will made in a sister state showed that the testator signed and published it in the presence of the witnesses, and the probate in that state showed the will to have been proved by these witnesses, but did not recite that they had subscribed it in testator's presence, that this fact should be presumed;[94] as it is always presumed by the court of probate when the witnesses are dead, and proof of their handwriting is used to establish the will.[95]

§ 79. Competency of Witnesses.

The statute of frauds required "three credible witnesses" to attest the will; that is, three witnesses who are competent to testify as to its execution. If they are not so competent, the will is not well executed. The question whether they testify at all, when the will comes into question before a probate court, or, formerly, on an ejectment, has nothing to do with the more important question, whether or not, by reason of one of the three not being a "credible" witness

[93] In re Alpaugh's Will, 23 N. J. Eq. 507, where the attestation clause was in the testator's handwriting. The chancellor quotes approvingly the decision of Lord Penzance in Wright v. Rogers, 1 Prob. Div. 678, sustaining the will on the strength of the attestation clause, against the testimony of the only surviving witness that the execution was defective. Rugg v. Rugg, 83 N. Y. 592 (attestation clause useful when the witnesses are forgetful); Peck v. Cary, 27 N. Y. 9; or when they are dead, Taylor v. Brodhead, 5 Redf. (N. Y.) 624; Mundy v. Mundy (supra, note 88); Patton v. Hope, 37 N. J. Eq. 522. See, for case of attesting witnesses successfully contradicting the attestation clause, Brinckerhoff v. Remsen, 8 Paige, 489. Contra, Webb v. Dye, 18 W. Va. 376.

[94] Carpenter v. Denoon, 29 Ohio St. 379.

[95] Price v. Brown, 1 Bradf. (Sur.) 291; Moore v. Griswold, 1 Redf. (Sur.) 388 (quoting Hands v. James, Comyn, 531; Croft v. Pawlet, 2 Strange, 1109; Sampson v. White, 1 McCord [S. C.] 74; Jackson v. Le Grange, 19 Johns. 386). Turner v. Turner, 1 Litt. (Ky.) 101, there cited, only dispenses with one witness if he cannot be found. In Michigan it is provided that, when none of the witnesses reside in the state, the court may cause the sanity of the testator and the execution of the will to be proved by other witnesses. Section 5803. And in this state (as we have seen in section 75) the burden to prove sanity is on the propounders. See, also, Beaubien v. Cicotte, 8 Mich. 9, 13.

at the time of execution, the will was ill-executed and of no effect.

A person was not a "credible witness" if at the time of attestation (1) he lacked the needed intelligence, either from extreme youth or unsoundness of mind; (2) he had been convicted of an infamous crime; (3) he was beneficially interested in establishing the will. And the wife or husband of the testator or testatrix would be incompetent, this last objection being, of course, the most frequent and the most important.[96]

To relieve against the hardships arising from this rule, one of the three witnesses being often disqualified by a small legacy, parliament in 1750 directed that "if any person shall attest the execution of any will," etc., "to whom any beneficial devise," etc. (other than charges on lands, etc., for payment of debts), "shall be thereby given, such devise shall so far only as concerns the person so attesting be utterly void, and such person shall be admitted as a witness."[97] Taking the two acts together, the devisee is a competent witness as to the will outside of the devise in which he is interested.

The American statutes on the competency of attesting witnesses, and on the result of a devisee attesting a will, have been drawn from these two provisions, however, with some notable exceptions and modifications. Leaving out of consideration Pennsylvania, where attesting witnesses are unknown, we find that the statutes of New Jersey, Connecticut, Rhode Island, Florida, and Alabama have omitted the word "credible" altogether in the description of witnesses. In Alabama, at least, a will is well executed for every purpose though it be attested only by devisees.[98] In New York, Arkansas, California, the Dakotas, Montana, Idaho, and Utah, no mention of competency or credibility is made in the clause requiring witnesses; but by another section of the law a devise to a subscribing witness is rendered void, unless there are enough witnesses, without him, to complete the execution of the will. In Maine the witnesses must have no "beneficial interest" in the will; hence an heir receiving a trifling legacy, less than his share,[99] or a mere trustee might be a

[96] 1 Jarm. Wills, p. 78, referring back, as to interest, to page 62.

[97] St. 25 Geo. II., c. 6.

[98] Kumpe v. Coons, 63 Ala. 448. It will be seen that in other states the witness loses any devise he may have under the will.

[99] Smalley v. Smalley, 70 Me. 545.

witness. In Tennessee and North Carolina the witness must not be "entitled to a devise." But the North Carolina law declares at once that only the devise to the witness is rendered void. "Competent witnesses" are called for by the statutes of Iowa, Michigan, Virginia, West Virginia, Oregon, Washington, Ohio, Indiana, Kansas, Nebraska, Minnesota, Nevada, Missouri, Wisconsin, Georgia, and Massachusetts; while the older word "credible" is retained in Texas, Maryland, Mississippi, South Carolina, Vermont, New Hampshire, Delaware, Illinois, Colorado, and Arizona. In Texas and Arizona the witnesses must be at least 14 years of age. But it seems that the meaning of the two words is the same, and that the bad character of the witness, or even his pleading guilty of an infamous crime, if he be not sentenced at the time of executing the will, does not make him any less a credible witness, in the meaning of the statute.[100]

Many of the states provide that if the witness be competent at the time of execution it is enough; in other words, that if a will be once well executed, it is not revoked by such an event happening thereafter as that a witness becomes insane, or is convicted of crime, or marries the testator, or becomes, by marriage with a devisee, or by the death of a devisee who is his parent, interested in the establishment of the will. But such is the law even in the absence of such a provision.[101]

As lands are subject to the payment of debts in the hands of an heir and devisee, a devise charging them with debts does not dis-

[100] "Credible" and "competent" mean the same. Brown v. Pridgen, 56 Tex. 124; Robinson v. Savage, 124 Ill. 266, 15 N. E. 850. And the word "credible," in Illinois, excludes a devisee. Crowley v. Crowley, 80 Ill. 469. See, also, Rucker v. Lambdin, 12 Smedes & M. (Miss.) 230.

[101] The statutory provisions go hand in hand with the word "competent" in place of "credible," as in Michigan, Indiana, Nebraska, Minesota, etc.; also in Maine, where a beneficial interest disqualifies. In the absence of such provisions, see Fellows v. Allen, 60 N. H. 439; Warren v. Baxter, 48 Me. 193; Rucker v. Lambdin, 12 Smedes & M. (Miss.) 230; Nixon v. Armstrong, 38 Tex. 296. The modern doctrine, that the time of attesting the will and not that of proving the will in court determines the competency of witnesses, is based on the decision of Lord Camden in Doe v. Hersey, 4 Burn, Ecc. Law, 47, as against the views of Lord Mansfield in Windham v. Chetwynd, 1 Burrows 414, and adopted finally in England in Brograve v. Winder, 2 Ves. Jr. 636; 1 Jarm. Wills, pp. 63, 64.

qualify a creditor. An executor is not disqualified by his right to commissions. Neither is the inhabitant of a town, or the member of a charitable corporation, by a devise to the town or charity.[102]

Between the years 1850 and 1875 all the states enacted laws doing away with the disqualification of witnesses on account of interest; and though almost every statute on the subject provides that a party cannot testify on his own behalf against the estate of a dead man, yet interested parties have generally been admitted to prove or disprove a will, on the ground that its allowance or rejection does not lessen the decedent's estate. Thus it happens that persons whom the law means to exclude from attesting the will by their subscription are deemed "credible" and "competent" to prove it in open court. The courts might have held that the change in the law of evidence has made a devisee a credible or competent witness for attesting and subscribing a will. They have not gone to that extent.[103] But only a direct and certain interest is now held to disqualify. Thus, where land was to be sold, the devisee's wife was held competent to attest; for she has only an expectancy in her husband's personalty.[104] In some states there is a somewhat ca-

[102] Hawes v. Humphrey, 9 Pick. 350 (inhabitants of South Boston); Jones v. Habersham, 63 Ga. 146 (poor of county or church); Quinn v. Shields, 62 Iowa, 129, 17 N. W. 437 (corporators of charity); In re Marston, 79 Me. 25, 8 Atl. 87 (executor and his wife); Stewart v. Harriman, 56 N. H. 25 (executor); Jones v. Larrabee, 47 Me. 474 (same); though under the South Carolina statute an executor or trustee, if an attesting witness, must give up his commissions. As to creditors provided for in the will, the statute in Delaware, Missouri, and some other states needlessly relieves them. In Georgia, the husband may attest a will devising to his wife a separate estate (Code, § 2417). Several states also make the taxpayers who might be relieved by a charitable devise competent.

[103] Sullivan v. Sullivan, 106 Mass. 474. Yet the word "disinterested" (afterwards, "not beneficially interested") was placed in the Maine law, to avoid all doubt. See Jones v. Larrabee, supra. Attesting and proving in court are such different things that a will may be established against the evidence of the attesting witnesses. Trustees of Auburn Theological Seminary v. Calhoun, 25 N. Y. 425; Nixon v. Armstrong, 38 Tex. 296, supra.

[104] Hawkins v. Hawkins, 54 Iowa, 443, 6 N. W. 699; Warren v. Baxter, supra; Lord v. Lord, 58 N. H. 7. But in some states the wives and husbands of witnesses are named in the statute along with those whose devises are void (e. g. in Connecticut, Virginia, West Virginia, North Carolina, and South Carolina); that is, a devise to the husband or wife of the witness is declared void.

pricious distinction between the effect of a devise and that of a bequest.[105]

The American statutes which allow a will to stand upon the attestation of a devisee, but which, following the English act of 1736, take from the witness (unless there be enough attesting witnesses besides him) all devises or bequests under the will, declaring these null and void, are drawn in three distinct forms: They either stop, like the English act of Geo. II., at the general proposition, avoiding the devise to the witness (this is the case in Rhode Island, New Jersey, North Carolina, and Georgia), thus working great hardship on a coheir, who gets neither his devise nor his proper share;[106] or they exempt a witness who is an heir, assuming that his interest is against the establishment of the will,—a rather violent assumption, as the very object of the will may be the increase of his share (such is the law in Vermont and Connecticut); or, more logically, they allow to the devisee or legatee who loses his devise or bequest, and who would get some share of the testator's property if such will or codicil should not be established, such share as he would thus receive, not to exceed, however, the devises or bequests of the will. The introduction of the word "codicil" makes it very clear that the persons so protected are not heirs and distributees alone, but those,

[105] In Tennessee and North Carolina the statute disqualifies only one who has a devise in the will. The supreme court of Tennessee said in Walker v. Skeene, 3 Head, 1, and the supreme court of North Carolina held in Winaut's Heirs v. Winaut's Devisees, 1 Murph. 148, that a bequest of personalty does not disqualify. In New Jersey and Missouri a legatee becomes competent by either refusing the legacy, or by receiving it before the will is established. Rev. St. Mo. § 8907.

[106] The English act was passed with the view to an heir at law, who, in England, is oftenest a single person. Should he be a witness, and the devise to him fail, he would take by intestacy, and lose nothing. But if a coheir, entitled say to one-third, witnesses a will which gives him a share of like value, and he loses his devise, that share would be undisposed of, and he would get only one-third of it, or one-ninth of the estate, unless where the law of advancement comes to the aid of a child or grandchild, by making him even, out of the undevised estate, for the devises to the other children or grandchildren. Mr. Stimson, in section 2650 of his American Statutes, notices that by the statutes of Rhode Island, New Jersey, North Carolina, South Carolina, and Georgia, the devise to a witness is rendered void, without excepting the case of there being enough competent witnesses aside of the devisee. Would the statutes be harshly enforced, or would the letter yield to the reason?

also, who would take under a previous will, which would be revoked or modified by the instrument in question. Such is the law in New York, followed pretty literally in Arkansas, California, the Dakotas, Idaho, Montana, and Utah; also in Virginia, West Virginia, Kentucky, Michigan, Minnesota, Texas (where the word "bequest" is evidently used in the sense of "devise"), and in Missouri. In Maine, Delaware, Maryland, Tennessee, and Alabama the act of 25 Geo. II. has not been re-enacted in any form. In all but the last named state a will attested by an interested witness, and having no sufficient attestation without him, is void in toto.

§ 80. Holographic Wills.

Aside of Louisiana, the laws of which we do not discuss, holographic wills are known only in the following states: Virginia and West Virginia (having the same statute), North Carolina and Tennessee (with the same statute), California, the Dakotas, Idaho, Montana and Utah (with the same statute), and Arkansas (where the law differs but in one or two important points from that of California), Mississippi, and Kentucky. In Virginia, West Virginia, Mississippi, and Kentucky, wills of this class are introduced into the statute, by the words, "Moreover, if not wholly written by the testator," preceding the requisite of attesting witnesses. It follows that the signature or subscription must be made as in the case of ordinary wills, and that no formality is required which does not belong to the latter. In North Carolina and Tennessee, on the contrary, the name of the testator may be signed to or "inserted" in the will; in other words, the law here expressly recognizes the position that the testator's name written in any place in the document is a good signature. On the other hand, the instrument must be "found among the valuable papers and effects of" the decedent, or "shall have been lodged in the hands of some person for safe-keeping." In these two states and in Arkansas the handwriting of a holographic will must be proved by three witnesses. In California and the states sharing in its statute law, the "olographic" will must be "wholly written, dated, and signed" by the testator, while in an ordinary will a date is not required.[107]

[107] The clauses in the California Civil Code, § 1277, and Dakota Territory Civil Code, § 691, etc., are taken literally from the French Code. See section 76, note 37.

In Arkansas, it must, moreover, be written in decedent's "proper handwriting"; and, lastly, in this state, such a will does not operate as a revocation of a prior will which is attested in the ordinary way.[108]

We have seen already that in Pennsylvania wills, whether written by the testator or not, need no attestation, while one so written has the advantage of greater ease in proving the testator's handwriting. An instrument written by another, and only signed by the decedent, indicates more clearly that it is written to have some legal effect. The difficulty oftenest met in wills of this sort is that the document may be quite informal,—a letter[109] or a memorandum, with nothing to show that it was meant to have any legal operation. This is a different question from that heretofore discussed, whether a paper is to take effect as a will or as a deed. Thus, a letter addressed to a lawyer, giving instructions as to the drawing of a will, which contains a full disposition of the writer's property, may become his will. That the paper contains much that does not bear on the disposition of his property is immaterial; in fact, such matter occurs in most formal wills.[110] An inventory of the decedent's property written in pencil in the writer's business books, with a signed memorandum at the foot, naming certain persons for "administrators," would seem to be a will; but it was held to the contrary. And often it is hard to answer the question, did the decedent intend that the writing should have any effect?[111] Under the words of the Virginia and Kentucky statute, "if not wholly written by the testator," a paper written even in a disguised hand is a good holograph, if the fact that the testator wrote it can be proved otherwise.[112]

An unsigned attestation clause at the end of a holographic will, or the signature of one witness, when two are needed for an attested

[108] Arkansas, Dig. § 6492.

[109] In re Richardson's Estate, 94 Cal. 63, 29 Pac. 484.

[110] Barney v. Hayes, 11 Mont. 571, 29 Pac. 282; In re Scott's Estate, 147 Pa. St. 89, 23 Atl. 212 (s. p., though the name of "holograph" is not used).

[111] E. g. In re Richardson's Estate, 94 Cal. 63, 29 Pac. 484, where a letter was not regarded as testamentary in character, though containing the clause, "you and your children get everything," after expressing a desire to anticipate possibilities.

[112] Hannah v. Peake, 2 A. K. Marsh. 135. Compare statutes in Arkansas, North Carolina, and Tennessee.

will, do not prove that the will is incomplete; while, on the other hand, the signature of the single witness does not strengthen the presumption that the paper was intended as a will.[113] The words "wholly written" are taken strictly. Thus, where the testator wrote his dispositions on a printed blank for wills, the paper was held not to be holographic.[114] But a codicil, as well as an independent will, may be holographic, and the former is not the less valid if written, signed, and dated by the testator, because it cannot be understood without the previous will to which it refers.[115] In determining whether a paper written out by the testator was intended to operate, or was meant simply as a memorandum for himself, or a piece of information to a friend, not only the contents, but also his conduct and surrounding circumstances,—even his declarations by word of mouth,—may be considered. An element of uncertainty is thus introduced. But that the writing is found on a fly leaf, or on the back of a printed leaf, is hardly to be taken as a point against its testamentary character.[116]

The requirements in North Carolina and Tennessee, that the will must be found among the valuable papers of the decedent, or must be lodged by him with some person for safe-keeping, have been pretty strictly insisted on. Thus, a letter written by a soldier to his friend at home, asking him to pay his debts, and leaving him all the rest of what he has, was held not to come within the law, though the person receiving such a letter would be sure to keep it safely.[117] The word "found" is held to mean that the position of the paper must indicate that the testator has put it there.[118] "Valuable papers" need not be those which have a pecuniary value, like deeds, bonds, or notes, but any which the testator regards of importance. Thus, entries made

[113] Perkins v. Jones, 84 Va. 358, 4 S. E. 833, rather in conflict with the principle of Waller v. Waller, 1 Grat. (Va.) 454; Devecmon v. Devecmon, 43 Md. 335 (see Tennessee case infra); Toebbe v. Williams, 80 Ky. 661, where the questionable position is taken that the testator need not know that the will is complete.

[114] In re Rand's Estate, 61 Cal. 468.

[115] In re Soher, 78 Cal. 477, 21 Pac. 8.

[116] Atkinson's Appeal (Fouche's Estate), 147 Pa. St. 395, 23 Atl. 547. And see Tennessee and North Carolina cases infra.

[117] McCutchen v. Ochmig, 1 Baxt. (Tenn.) 390.

[118] Crutcher v. Crutcher, 11 Humph. (Tenn.) 383, and Marr v. Marr, 5 Sneed (Tenn.) 385.

in a diary kept by him, and separately signed, are among his "valuable papers." [119] In these states, the reason for admitting outside facts or declarations as proof for or against the intent of the writer to publish his last will is stronger than elsewhere; for the acts of placing it among his valuable papers, or of lodging it for safe-keeping, require intention.[120] And, as this act is necessary to complete the testamentary disposition, it must be performed while the testator is of sound mind and free from undue influence.[121] The requirement in California and the states sharing in its law (copied from the French code) as to dating, is so strictly enforced that a will has been rejected because the testator availed himself of a letter head on which the Anno Domini was printed.[122] In Kentucky, a decision has been rendered as to the re-execution of a married woman's holographic will, after her becoming discovert, which is hardly in line with the Pennsylvania decisions in the case of changes or insertions. The lady having, as a widow, made erasures in the will in her own hand, and openly recognized the writing thus changed as her will, it was considered her holograph, although she had neither written nor signed it, except at a time when, by reason of coverture, she was incapable of making a devise.[123] No law authorizes an unattested will in Wyoming, though a clause has crept into the act on probate proceedings directing how a holographic will may be proved.[124]

§ 81. Nuncupative Wills.

The statute of frauds does not allow lands, in any case, to be devised by word of mouth; and if the American states had, in this re-

[119] Reagan v. Stanley, 11 Lea (Tenn.) 316 (will being inclosed in envelope backed "Will of A. B.," not enough); St. John's Lodge v. Callender, 4 Ired. (N. C.) 335. See, also, Hooper v. McQuary, 5 Cold. (Tenn.) 129, as to "valuable papers," and Marr v. Marr, supra.

[120] Outlaw v. Hurdle, 1 Jones (N. C.) 150; Douglass v. Harkrender, 3 Baxt. (Tenn.) 114.

[121] Porter v. Campbell, 2 Baxt. (Tenn.) 81.

[122] In re Martin's Estate, 58 Cal. 530; In re Billings' Estate, 64 Cal. 427, 1 Pac. 701.

[123] Porter v. Ford, 82 Ky. 192.

[124] Neer v. Cowhick (Wyo.) 31 Pac. 862. See Wyoming Territory Code, § 2237.

spect, kept up the old line of division between wills of realty and of personalty, the subject of "Nuncupative Wills" might be wholly excluded from this work. The American tendency to bring lands and personalty under the same law is the cause of the statutes which have, in a few states, subjected the former kind of property to verbal wills. Nearly every state allows personalty of a limited amount to be thus disposed of, under some circumstances; at least, by soldiers in active service, and mariners at sea. In only four states is the law broad enough to reach devises of land. Where the statute says that a nuncupative will may be made as heretofore, or as at common law, it can operate only on personalty; but statutes in North Carolina, Georgia, Tennessee, and Mississippi [125] seem to authorize a nuncupative will of lands, under given circumstances.

The statute of frauds, by its nineteenth section, provided that no nuncupative will bequeathing more than £30 should be good, unless it is proved by the oaths of three witnesses present at the making, nor unless it is proved that the testator, at the time of pronouncing it, bid the persons present, or some of them, to bear witness that such is his will, or to that effect; nor unless such nuncupative will be made in the last sickness of the deceased, and in the house of his dwelling or habitation, or where he had been resident for 10 days or more next before making such will, except where such person was surprised or taken sick, being from his own home, and died before he returned to the place of his dwelling. The American statutes, in the main, follow these rules, substituting two witnesses for three where two only are needed for a written will (or, to be more precise, in North Carolina, Tennessee, and Mississippi), while Georgia requires three witnesses for both kinds of wills. These four are the only states we have here to deal with. Soldiers, and seamen or mariners in merchant vessels, as well as on men-of-war, are put on the same footing with those in their last sickness. Another section of the statute of

[125] Mr. Stimson, in his American Statutes, puts Maine, Texas, and some other states in this list. But in these states (other than Texas) the statute names the value of the estate which may be bequeathed, and this language seems to confine the nuncupative will, as it was under the English law, to personalty. In Texas it was held in Lewis v. Aylott's Heirs, 45 Tex. 190, that lands cannot be thus devised; and in Furrh v. Winston, 66 Tex. 521, 1 S. W. 527, that houses built on a "right of way" partake too much of realty for such a disposition.

frauds requires every nuncupative will to be reduced to writing within six days, in default whereof it must be proved within six months from the testator's death. This rule is also followed in the above-named states, for the statutes further prescribe that two disinterested witnesses must prove the will, and that it must be reduced to writing, in a given number of days,—being, for the states which allow nuncupative wills of land, either 6 (in Mississippi), or 10 (in North Carolina and Tennessee), in default of which prompt reduction to writing the will must be proved in court within 6 months from its enunciation; while in Georgia it must, at all events, be reduced to writing in 30 days, and proved within 6 months.[126] It should be noted that in North Carolina and Tennessee the above restrictions are imposed, respectively, only when the estate given exceeds the value of $200 or $250, and it is hard to say what would suffice to devise or bequeath a smaller estate.

In North Carolina and Tennessee a nuncupative will cannot operate to revoke one that is written, unless it be reduced to writing in the testator's lifetime, and be read over to and approved by him, and proved by two witnesses, which would never happen, as it would be just as easy to get his signature or mark to the writing. We will see hereafter that this provision serves the turn of section 6 of the statute of frauds, which limits the manner of revoking wills.[127]

Both the English and the American authorities have construed the words "in his last sickness" as meaning neither more nor less than "in extremis"; that is, when all hope of recovery is given up, and when the will is made in the nuncupative form because the testator has no time left, or at least believes that there is no time left, to reduce the will to writing. The nuncupative will should be a matter of necessity, not of choice.[128]

[126] North Carolina, Code, § 2148, subd. 3; Georgia, Code, §§ 2479–2482; Tennessee, Code, §§ 3006–3008; Mississippi, §§ 4492, 4495.

[127] Cases quoted under next section will show that this provision of the North Carolina and Tennessee law has been put only to the use of forbidding oral revocations.

[128] Scaife v. Emmons, 84 Ga. 619, 10 South. 1097; Johnson v. Glascock, 2 Ala. 519; Harrington v. Stees, 82 Ill. 50; Nolan v. Gardner, 7 Heisk. (Tenn.) 215; Ellington v. Dillard, 42 Ga. 361. See O'Neill v. Smith, 33 Md. 569 (a consumptive slowly failing held not to be within the law). See, also, Bundrick v. Haygood, 106 N. C. 468, 11 S. E. 423. See, also, In re Haygood's Will, 101

Most difficulty has arisen about the rogatio testium; that is, the fact that the testator "bid those present, or some of them, to bear witness." No formal words are necessary. It is not to be expected that a man or woman in extremis would comply with forms.[129] But those present—those who are expected to testify—must be informed that what the testator says about the disposition of his property is his last will.[130] The main object of the rogatio testium is to distinguish between the testament and mere loose talk.[131] Closely connected herewith is the animus testandi. Though the very words "last will" or "testament" need not be used, it must be clear that the sick man is conscious of making his will. Indeed, a rogatio testium is only possible if he is.[132] Often the facts show that the animus testandi was absent; e. g. when the sick person expresses his belief that it is too late, or his ignorance of the law which allows a disposition of his estate by word of mouth.[133]

The two or three witnesses required by the law must not only agree fully as to the disposition made (which is generally very simple), but they must testify to the same set of words, which they heard at one time, and not each to another set of words, spoken at a different time.[134]

N. C. 574, 8 S. E. 222. One who is near dying from a wound is in his "last sickness." Sampson v. Browning, 22 Ga. 293.

[129] Baker v. Dodson, 4 Humph. (Tenn.) 342 ("I wish to make disposition of my effects" is enough); Hatcher v. Millard, 2 Cold. (Tenn.) 30 (asking the witnesses to stay alone in the room, and telling them the disposition then, good); Gwin v. Wright, 8 Humph. (Tenn.) 639 ("Inform my friends," etc., a good rogatio); Smith v. Smith, 63 N. C. 637; where testator sent for one friend, and, at his suggestion, for another. Similar is Harden v. Bradshaw, 1 Winst. (N. C.) 263; Burch v. Stovall, 27 Miss. 725.

[130] Garner v. Lansford, 12 Smedes & M. (Miss.) 558; Broach v. Sing, 57 Miss. 115; Woods v. Ridley, 27 Miss. 119; Brown v. Brown, 2 Murph. (N. C.) 350 (testator speaks in answer to proposed devisee, there is no rogatio testium); Andrews v. Andrews, 48 Miss. 220.

[131] Parkisson v. Parkisson, 12 Smedes & M. (Miss.) 672.

[132] Gibson v. Gibson, Walk. (Miss.) 364; Ridley v. Coleman, 1 Sneed (Tenn.) 616; Bundrick v. Haygood, 106 N. C. 468, 11 S. E. 423, where a strict compliance with the law in all its parts is insisted on.

[133] Lucas v. Goff, 33 Miss. 629.

[134] Wester v. Wester, 5 Jones (N. C.) 95; Tally v. Butterworth, 10 Yerg. (Tenn.) 501.

Often an effort is made to execute a written will, but it fails either by the too early death of the testator, or by misapprehension about the forms necessary to that end. There may be written instructions to the draftsman, or an instrument not properly signed, or not attested by enough witnesses. Such a writing cannot be proved as a nuncupative will, for it was not intended to operate as such.[135]

The probate of a nuncupative will must, under the statutes of North Carolina and Tennessee, be made upon notice to the widow and next of kin, "if it can be done conveniently." Should a proceeding in the nature of review or appeal be taken, the propounders should, it seems, be allowed to prove the will again when this proceeding comes to trial; and so it was held in Mississippi, but the contrary result was reached in Georgia.[136] Where the law requires notice to be given to the widow or next of kin, an order of probate, given ex parte, or "in common form," is not binding upon them, but stands on the footing of a judgment rendered without service of process.[137]

Altogether, the courts have done their best to discourage this irregular mode of disposing of lands, even in the few states which permit it at all.[138] Yet a court in Ohio, a state in which land cannot be devised by word of mouth, in one case subjected it indirectly to the effect of a nuncupative will.[139]

§ 82. Revocation.

It is of the very essence of a will that it may be revoked at any time while the testator is of sound and disposing mind. He can revoke any devise: (1) By making a new will covering the same ground, or which expressly revokes the former will; or he can by a codicil

135 Ellington v. Dillard, 42 Ga. 361 (a will made in Prussia, and attested by two witnesses, but a third witness was present); s. p., in Stamper v. Hooks, 22 Ga. 603. See In re Hebden's Will, 20 N. J. Eq. 473.

136 George v. Greer, 53 Miss. 495. Contra, Newman v. Colbert, 13 Ga. 38, where the propounder appealed.

137 Rankin v. Rankin, 9 Ired. (N. C.) 156.

138 Cases arising in other states on nuncupative wills of personalty are often cited in argument in the courts of the "four states"; but it will be found that they are almost always less favorable to the validity of the disposition by spoken words than the decisions of these states.

139 Skinner v. Blackburn, 4 Ohio Cir. Ct. R. 325.

revoke a part of the previous devises, or of any of them; or he may make a testamentary declaration for no other purpose and to no further effect than to revoke a previous will. (2) He can by a conveyance, executory contract, declaration of trust, or incumbrance dispose of the land or other thing devised, thus taking it, in whole or in part, or sub modo, from the devisee. (3) He may revoke the will containing the devise by "burning, tearing, canceling, obliterating," or otherwise destroying it; and this either by his own hand, or through the hands of another doing so in his presence and by his direction or consent.[140] (4) The will is revoked, by operation of law, either upon the marriage alone of the testator or testatrix, or upon marriage and the birth of a child; and a will is also revoked, in whole or in part, by the birth after its execution of another child, as to its proper share, subject to many modifications and exceptions. We treat here of revocation in the first and third modes above indicated, both of which address themselves to the court of probate. The second mode will be discussed separately under the head of "Alteration of Estate." The fourth opens a still wider field, through the diversity of legislation.

I. We have seen that an instrument revoking a former will may be in itself testamentary, and is admitted to probate like a will. On the other hand, when an instrument is not executed as a will is required to be by law, or when for any other reason it cannot be established as

[140] Section 6 of the statute of frauds provides: "No devise in writing of lands," etc., "nor any clause thereof, shall be revocable otherwise than by some other will or codicil in writing, or other writing declaring the same, or by burning, canceling, tearing, or obliterating the same, by the testator himself or in his presence and by his directions and consent, but all devises and bequests of lands shall remain in force till burnt," etc., "by the testator or his direction, in manner aforesaid, or unless the same be altered by some other will or codicil in writing of the devisor, signed in presence of three or four witnesses declaring the same." Some of the American statutes add or substitute the words "cutting, destroying," or "destroying or mutilating," and, instead of naming the number of witnesses by which the new will or codicil shall be signed, they direct that the writing by which the will is revoked shall be "executed in the manner in which a will is required to be executed." The clauses on revocation will be found following very near after those named in the last note to section 76 of this chapter; except in North Carolina, Tennessee, and Oregon, in which section 6 of the statute of frauds has not been re-enacted.

a will or codicil, it cannot take effect as a revocation.[141] There are, however, both real and apparent exceptions to this rule,—the former when the revoking will has been lost or destroyed; the latter when the devises of the revoking will are void because the devisees are incapable of taking. Moreover, the statutes of New York and those borrowed from them in Arkansas, California, the Dakotas, Idaho, Montana, and Utah, also those of Ohio, Missouri, Kansas, Georgia, Alabama, Oregon, Washington, and Nevada, direct that the destruction, canceling, or revocation of the second will shall not revive the first, "unless it appear by the terms of the revocation that" such was the intent, or "unless the first will shall be duly re-executed." These statutes in many cases cannot and ought not to be enforced,—that is, whenever the testator without much publicity makes his second will, and quietly burns it again, leaving the first will uncanceled among his papers; which he can do with the fullest privacy, not only where holographic wills are permitted, but in all states in which the witnesses need not be told what sort of an instrument they are about to attest. And wherever the statute speaks of "another writing," not exactly a will or codicil, by which a revocation may be wrought, the effect would follow instantly; but such writings, properly attested, have never been executed in American practice, as far as known from any American case. The same principle of instant action was, in an early case, applied to the revocatory clause of a second will, and has lately been followed in Maryland, Michigan, Mississippi, and Texas; while the supreme court of Massachusetts leans strongly in

141 See section 76, note 38. Reese v. Court of Probate, 9 R. I. 434 (revocation in will must fall with the will); Boylan v. Meeker, 28 N. J. Law, 474; Reid v. Borland, 14 Mass. 207; Stickney v. Hammond, 138 Mass. 116; In re Noyes' Will, 61 Vt. 14, 17 Atl. 743 (under sections 2042, 2047, of Vermont statutes). The new will may be opposed to probate of old will without being first established. In re Voorhees' Will, 6 Dem. Sur. (N. Y.) 162; Id. (Sup.) 7 N. Y. Supp. 596; Sewell v. Robbins, 139 Mass. 164, 29 N. E. 650. The leading case on this subject (often quoted for points never decided in it) is Laughton v. Atkins, 1 Pick. 536, where a second will with an express revoking clause had been disallowed in a contest between its propounders and the devisees in the first will, and was ruled out on that ground when the heirs sought to set it up in order to annul the probate of the first will. Dower v. Seeds, 28 W. Va. 113, is on all fours with it. See, also, Barksdale v. Barksdale, 12 Leigh (Va.) 535.

the same direction.[142] In New Jersey, Connecticut, and South Carolina the modern rule is that the revoking will is ambulatory, and takes effect only at the testator's death, and when canceled or destroyed by him can no more take away than it can give a devise.[143] It is certainly so in Pennsylvania, also, when the revocation is only implied by the inconsistency of the two wills.[144] But when the revoking will is destroyed by a stranger, or is accidentally lost, and its contents, aside of the revoking clause, are unknown or forgotten, such will may, without being itself offered for probate, be opposed to the establishment of the older will.[145]

[142] James v. Marvin, 3 Conn. 576. The same effect is claimed for a will with a revoking clause as for the "declaration in writing." It is quoted in Re Cunningham, infra, and followed in Hawes v. Nicholas, 72 Tex. 481, 10 S. W. 558. Suppose the revoking will had been burnt, instead of merely canceled? To same effect, Scott v. Fink, 45 Mich. 241, 7 N. W. 799; Stevens v. Hope, 52 Mich. 66, 17 N. W. 698; Colvin v. Warford, 20 Md. 363; Harwell v. Lively, 30 Ga. 315 (cases of express revocation). Under the Georgia Code (sections 2471, 2472), an express revocation works instanter. An implied one is ambulatory. In Pickens v. Davis, 134 Mass. 252, the history of the dispute both in England and America is given, and the conclusion is to allow circumstances to determine. That the testatrix did not destroy the first will, when she had the custody of it, is not enough circumstance in its favor to revive it. Virginia, under its statute, excludes proof of revivor by circumstances. Rudisill v. Rodes, 29 Grat. 147. Such is also the course of English decision under the corresponding clause of 1 Vict. c. 26. The Kentucky statute (chapter 113, § 10) simply forbids the revivor of a will "once revoked," except by re-execution; but is probably intended to meet the point in dispute. The decisions under it (Maxwell v. Maxwell, 3 Metc. 101; Dougherty v. Dougherty, 4 Metc. 25), however, do not touch it.

[143] When the second will cannot be found, and its destruction by the testator is thence presumed, there is no circumstance from which an intent to revive the first will can be inferred. Banks v. Banks, 65 Mo. 432.

[144] Peck's Appeal, 50 Conn. 562; Randall v. Beatty, 31 N. J. Eq. 643. A will of 1873 revoking all prior wills being found canceled, and one of 1870 well preserved, the latter stood good. Flintham v. Bradford, 10 Pa. St. 82. This doctrine has the high authority of Professor Greenleaf. 2 Greenl. Ev. § 683. An express revocation which is part of a will is invalid unless the will can be probated. Rudy v. Ulrich, 69 Pa. St. 177.

[145] Wallis v. Wallis, 114 Mass. 510; In re Cunningham, 38 Minn. 169, 36 N. W. 269 (quoting Comyn, Dig. "Estate by Devise," F, 1); Quinn v. Butler, L. R. 6 Eq. 225. Under the statute of frauds, "another writing" for purpose of revocation was executed nearly the same, but is not really a will, and is not

Where the devises of the second will cannot take effect,—for instance, because they are in favor of a charity and void for uncertainty, or under the mortmain laws,—the will can and must be admitted to probate, but the effect will inure only to the heirs at law by the revocation of the first will, and this even where the last will revokes the first, not by any express words, but only by devising the property to other parties; a doctrine which defeats the intent of the testator as expressed in either will, but is supported by an unbroken line of authorities.[146]

Though it has been said that a man cannot die leaving more than one will, yet the last will revokes those preceding it only as far as it is inconsistent; i. e. as far as it disposes of the same property or confers powers over the same subject-matter. If the first will omits any property, or fails to confer any powers which the testator may confer, or if the second will fails to cover the whole ground, the two may be proved together; the second being in fact a codicil to the first.[147]

to be probated; and a clause to that effect is retained in most American statutes. By the Maryland statute (article 93, § 311), no attestation is required for the "other writing"; but it seems that no one has availed himself of this omission.

[146] Hairston v. Hairston, 30 Miss. 276. The last will gave the whole estate to a slave, and contained no clause of revocation. Though void under the law of Mississippi, it was allowed to revoke the former will. The court refused to let the jury try the issue whether the testator did not make the last will under a mistake of law, taking the ground that the revocation of the old devises did not depend on his intention. Somewhat similar is Gossett v. Weatherly, 5 Jones, Eq. (N. C.) 46. For the common case of a revoking clause, see Laughton v. Atkins, 1 Pick. (Mass.) 535; Jones v. Murphy, 8 Watts & S. (Pa.) 300; while the leading British case is Roper v. Radcliffe, 10 Mod. 230, where the second will devised the lands to two Papists, who were by statute disabled from taking. The doctrine rests on the ground that the heir cannot be disinherited unless there be a valid devise to another. In Carpenter v. Miller's Ex'rs, 3 W. Va. 174, the second will was for a charity, and void for uncertainty. It does not appear that it contained a revoking clause. It was deemed a good revocation. A will void under the mortmain act, being made too near the testator's death, works a revocation. Appeal of Home for Aged and Infirm Colored Persons, 153 Pa. St. 219, 25 Atl. 1135; Burns v. Travis, 117 Ind. 44, 18 N. E. 45.

[147] 1 Jarm. Wills, 160; Goodright v. Harwood, 3 Wils. 497 (second will must be shown inconsistent with first, which was not always to be presumed when a

Where two persons join in a will, each has the power to revoke his own dispositions, either before or after the death of his companion, without prejudice to any contractual rights between the parties.[148]

The revocation is governed by the law in force when the act of revoking takes place, not by that which governed the execution of the will or in force when the testator died.[149]

We come now to revocation "by burning, tearing, canceling, or obliterating." Under all the statutes this must be done with the intent to revoke (animo revocandi). Hence the act of doing so must flow from a sound, disposing mind, free from undue influence, very much as if the revocation had been effected by a new will.[150] Hence, also, the acts and declarations of the testator at the time of the mutilation are admissible, especially when they are parts of the res gestae, both on the side of and against the intent to revoke.[151] But the details of this doctrine lie outside of the scope of this work.

The distinction sometimes drawn between obliterating and canceling, to the effect that the former renders the writing illegible, and

will passed only lands held by the testator at its date); Brant v. Willson, 8 Cow. 56; Pickering v. Langdon, 22 Me. 430; Bosley v. Wyatt, 14 How. (U. S.) 390; Kane v. Astor, 5 Sandf. (N. Y.) 467; Rife's Appeal, 110 Pa. St. 232, 1 Atl. 226; Rodgers v. Rodgers, 6 Heisk. (Tenn.) 489 (codicil revokes no more than the ground it covers); Sturgis v. Work, 122 Ind. 134, 22 N. E. 996 (codicil made three days after a will, and revoking all former wills, did not mean the one three days old); Gelbke v. Gelbke, 88 Ala. 427, 6 South. 834; Allen v. Jeter, 6 Lea (Tenn.) 673 (if subsequent lost will is set up as a revocation, it must be shown to be inconsistent).

148 In re Cawley's Estate, 136 Pa. St. 628, 20 Atl. 567.

149 Welsh v. Pounders, 36 Ala. 668.

150 Rich v. Gilkey, 73 Me. 595; Smith v. Wait, 4 Barb. (N. Y.) 28; Idley v. Bowen, 11 Wend. 227; Nelson v. McGiffert, 3 Barb. Ch. 158; Allison v. Allison, 7 Dana (Ky.) 94; Rhodes v. Vinson, 9 Gill (Md.) 169; Forbing v. Weber, 99 Ind. 588; Mercer's Adm'r v. Mackin, 14 Bush (Ky.) 434. Some English cases take the ground that where a will is destroyed by mistake, the testator believing that he had made another valid will, the destroyed will may be set up when the new will appears incomplete. Hyde v. Hyde, 1 Eq. Cas. Abr. 409. But where the first will is destroyed, and the second fully executed, but rejected on other grounds, this is no reason for reviving the first will. Beaumont v. Keim, 50 Mo. 28 (and see English authorities there discussed).

151 Collagan v. Burns, 57 Me. 452; Doe v. Perkes, 3 Barn. & Ald. 489; Smock v. Smock, 11 N. J. Eq. 157; Smiley v. Gambill, 2 Head (Tenn.) 164.

the latter does not but only indicates the intent by cross lines, has been repudiated in other cases, and is rather unimportant. But there is a more important distinction between the great majority of the states, which, following the statute of frauds, speak of either a bodily destruction of the instrument like burning, and one that is only symbolical, like canceling, in equal terms: and, on the other hand, Iowa, where canceling (that is, a symbolical destruction) must be attested by two witnesses, like a codicil; not, however, Indiana, where the only words used are, "destroy or mutilate," but where the omission of "tearing, obliterating, or canceling" has not been noticed.[152]

While a mere intent of the testator, expressed in words,—even in words of command to those around him that the will be burned or canceled,—is insufficient when his intent or command has not been carried out, or even when his attempt to destroy the will has been foiled,[153] yet when the testator has actually mutilated the will, with

[152] Evans' Appeal, 58 Pa. St. 238. See Iowa Code, § 2330; Gay v. Gay, 60 Iowa 415, 14 N. W. 238; and for construction of 1 Vict. c. 26, see In re Horsford, 3 Prob. Div. 211. Rev. St. Ind. § 2559, construed otherwise. Woodfill v. Patton, 76 Ind. 579. The editors of the annotated Minnesota statutes have referred to the Iowa decision; but it is by no means certain that it applies to the Minnesota statute.

[153] Graham v. Burch, 47 Minn. 171, 49 N. W. 697 (will thrown by testator into a stove, taken out unsinged by devisee, and saved). The probate court can take no notice of the propounder's fraudulent conduct. Quaere: Can a court of equity, as was intimated in Blanchard v. Blanchard, 32 Vt. 62? Hylton v. Hylton, 1 Grat. (Va.) 161, where the will was stolen from the testator. Hise v. Fincher, 10 Ired. 139. Graham v. Burch came before the court again in 53 Minn. 17, 55 N. W. 64, and it was there announced, "where a devisee by fraud or force prevents the revocation of a will, he will in equity be considered a trustee for those who would be entitled to the estate in case the will was revoked"; citing Gains v. Gains, 2 A. K. Marsh. 190, and Riggs v. Palmer, 115 N. Y. 506, 22 N. E. 188 (where a legatee poisoned the testator). But it was said that if the testator learns of the fraudulent act in time, and acquiesces, the heirs cannot complain. See, also, Clingan v. Mitcheltree, 31 Pa. St. 25; Boyd v. Cook, 3 Leigh (Va.) 32, where testator was blind, and legatee had admitted that she disobeyed his command to destroy it, and the court of appeals said: "No direction given by the testator to another to destroy her will amounts to a revocation." In Kent v. Mahaffy, 10 Ohio St. 204, also, a blind testator was disobeyed and successfully deceived. In Doe v. Harris, 6 Adol. & E. 209, the king's bench held in like manner where the devisee had, according to the testimony, used great artifice in retaining the will which the

the evident intent to revoke it, it matters not that he has left enough of it to constitute a valid instrument. Thus, tearing off the seal, though a will needs no seal, has been deemed sufficient; or part of the signature, though what is left might have constituted a sufficient signing.[154] Writing the word "obsolete" against a devise, or even the words, "I revoke this will," with signature but without attestation upon its back, is not canceling, and does not revoke it.[155] And where the will is destroyed by a stranger, without the testator's consent, it is an act of spoliation; and the contents of the will may be proved, unless the destruction has been unequivocally ratified, the testator's mere acquiescence not being deemed sufficient: though herein the authorities are not well agreed.[156]

Where the will is so canceled or torn or obliterated by the testator as to deprive it of the needful signatures, his own or that of the witnesses, the animus revocandi must of course be presumed, unless it be repelled by proof either of accident and mistake or of an insane delusion;[157] and if a will which is known to have been last in the testator's possession cannot be found among his papers at his death, it must be presumed (subject to parol evidence for or against) that he purposely destroyed it.[158]

testator wanted burned, saying that he might have revoked it in writing, and that to hold otherwise would defeat the statute of frauds. Also, Malone v. Hobbs, 1 Rob. (Va.) 346; Hise v. Fincher, 10 Ired. (N. C.) 139. In New York, California, etc., the testator's "direction and consent" to another for destroying or canceling the instrument must be proved by two witnesses. Runkle v. Gates, 11 Ind. 95, another case to the same effect, is remarkable because the court in a land suit tried the question of revocation. See, contra, Pryor v. Coggin, 17 Ga. 444, which would probably not be followed under the present very explicit statute.

[154] Avery v. Pixley, 4 Mass. 460; Dan v. Brown, 4 Cow. (N. Y.) 483; Bibb v. Thomas, 2 W. Bl. 1043. Where a will thrown by the testator into the fire was scorched in places, but still legible, when secured without his knowledge, it stood revoked. White v. Casten, 1 Jones (N. C.) 197.

[155] Lewis v. Lewis, 2 Watts & S. (Pa.) 455; In re Ladd's Will, 60 Wis. 187, 18 N. W. 734.

[156] Mills v. Millward, 15 Prob. Div. 20. Contra, Estate of Deaves, 140 Pa. St. 242, 21 Atl. 395 (will lost or destroyed in testator's lifetime, with his knowledge, stands revoked).

[157] White's Will, 25 N. J. Eq. 501.

[158] Newell v. Homer, 120 Mass. 277; Smock v. Smock, 11 N. J. Eq. 156; Baptist Church v. Robbarts, 2 Pa. St. 110; 4 Kent, Comm. 532; Weeks v.

It sometimes happens that a will is written out in duplicate, to guard against "spoliation" or accidental loss. The statutes in some of the states give to the testator the power to revoke the will by burning, canceling or obliterating the part which is in his possession.[159] If of two counterparts one is found among the testator's papers after his death, the presumption is that he did not wield this mode of revocation, and the will thus found may be proved.[160]

The lack of any statute in North Carolina and Tennessee corresponding to the sixth section of the statute of frauds is supplied by a provision according to which a written will is not to be revoked in whole or in part by a nuncupative will unless the latter be made and reduced to writing with certain named solemnities. The mere declarations of the testator are, therefore, not sufficient to work a revocation;[161] yet the courts have not gone so far as to sustain a will which the testator ordered to be destroyed, and which he believed to the hour of his death was actually destroyed.[162]

In connection with this subject, some very late English decisions on revocation by codicil may be mentioned, which have not yet been followed in America: That a revocation clause in a codicil may be rejected, as having been inserted per incuriam, for instance where the instrument is written on a printed blank containing such a clause.[163]

§ 83. Alteration of Will.

The statute of frauds, in section 6, ordains that "no devise in writing," etc., "nor any clause thereof, shall be revocable, except," etc.,

McBeth, 14 Ala. 474; Behrens v. Behrens, 47 Ohio St. 323, 25 N. E. 209; Foster's Appeal, 87 Pa. St. 67; Minkler v. Minkler, 14 Vt. 125 (not a legal presumption).

159 California, Civ. Code, § 1295; Georgia, § 2475; Dakota, Civ. Code, § 705; Montana, "Probate Practice Act," c. 16, § 455; and some other states.

160 Snider v. Burks, 84 Ala. 53, 4 South. 225.

161 Rodgers v. Rodgers, 6 Heisk. (Tenn.) 490 (holographic will cannot be revoked by parol); Allen v. Huff, 1 Yerg. (Tenn.) 404; Allen v. Jeter, 6 Lea (Tenn.) 675 (the revocation must be of equal dignity with the will; i. e. in writing).

162 Smiley v. Gambill, 2 Head (Tenn.) 164. Yet, if the testator finds that the will is not destroyed, and recognizes it as valid, he need not re-execute it. Ford v. Ford, 7 Humph. (Tenn.) 92.

163 In re Goods of Moore [1892] Prob. 378; In re Goods of Oswald, 3 Prob. & Div. 162.

"or by burning, canceling," etc. The modern English statute (1 Vict. c. 26, § 20) in like manner says that "no will or codicil, or any part thereof, shall be revoked otherwise," etc., "or by burning," etc. Many of the American statutes now in force have copied the wording of one or the other of the English acts, and thus recognize the power of the testator to revoke one clause, or one part of the will, by canceling it, obliterating it, or cutting it out. In New York and the states which have borrowed its more carefully worded language, after the first clause of the section which allows the will or any part thereof to be revoked by a new will, etc., another clause begins with the words "or unless such will be burnt," etc. Thus the bodily destruction or cancellation of one part of the will is not recognized. The New Jersey statute of wills, on the other hand, as enacted in 1846 and amended in 1851, is worded nearly like the English act, and seems to admit that a part of the will may be canceled or obliterated or torn away without affecting the rest. It is therefore quite natural that the courts of these states should differ. In New York, the court of appeals held [164] that a part of a will could not be revoked by canceling without defeating the whole; but as the testator showed no intention to do so, the court said there was no animus revocandi, and admitted the whole will to record, including the clauses through which the testator had drawn black lines. And like decisions were rendered in Alabama and in Ohio under similar statutes; while in New Jersey the chancellor, as ordinary, following the lead of the probate and divorce court, under the statute of 1 Vict.,[165] admitted only so much of the will as had not been stricken out.[166] Now, if this distinction was carried through by the courts of all the states, it would only be necessary to refer to their statutes. Many of these, in the words of the sixth section, speak, not of the will, but of a devise; and there is no reason why one devise should not be torn or stricken out, and another allowed to stand. Many refer the words "burning, tearing,"

[164] Lovell v. Quitman, 88 N. Y. 377. The court quotes English decisions, but not In re Goods of Woodward, infra. Law v. Law, 83 Ala. 432, 3 South. 752.

[165] In re Goods of Woodward, 2 Prob. & Div. 206 (Lord Penzance); a strong case, for the part torn from the will and lost contained the opening words declaring the nature of the instrument. Giffin v. Brooks, 48 Ohio St. 211, 31 N. E. 743.

[166] In re Kirkpatrick's Will, 22 N. J. Eq. 463. The canceled clauses were legible.

etc., to the "will or any part," or to "the devise or any clause thereof." Such are the statutes of Rhode Island, New Hampshire, New Jersey, Delaware, Maryland, Virginia, West Virginia, South Carolina, Mississippi, Kentucky, Indiana, Michigan, Wisconsin, Iowa ("in whole or in part"), Minnesota, Missouri, Texas, Nebraska, and Washington.

The New York chapter on wills is copied substantially in Arkansas, California, the Dakotas, Idaho, Montana, and Utah; and the statutes in the following states do not use the word "part" or "clause" at all, when directing how a will may be revoked by burning, tearing, etc., viz.: Maine, Massachusetts, Vermont, Connecticut, Pennsylvania, Ohio, Illinois, Kansas, Colorado, and Nevada. The Revisions of North Carolina, Tennessee, and Oregon contain nothing which corresponds to section 6 of the statute of frauds. But, unfortunately, the decisions of the courts do not fall in with this classification. In Massachusetts, a will was admitted to record without the devises that were stricken out by the testator, though the word "part" or "clause" is not in the statute, on the somewhat fanciful reasoning that the same section allows a will to be revoked by a codicil, which is necessarily only a partial revocation;[167] while the language of the courts in some states of the other class, though the point did not fairly arise, seemed rather hostile to any mode of dealing with a will which would let its contents depend on parol evidence.[168] In an early South Carolina case it was held that a clause can only be separately revoked if thereby a devise is defeated, but not an exception to a devise, so that by expunging it a devise would be increased,—though such would always be the case as to the residuary devise,—and, rather than let the excepting clause be stricken out, the court disregarded the canceling of both, as there was certainly no intent to revoke the one without the other.[169] And in Maryland, where the English doctrine was recognized as in force, the court would not give effect to the act of the testator in drawing black lines through two names, when the effect would have been to turn the life estates given to other devisees into a fee simple; as the statute speaks only of "any clause," and not of single words, the omission of which would alter

[167] Bigelow v. Gillott, 123 Mass. 102. The canceled devises fell into the residuary.

[168] See infra cases of erasure and interlineation.

[169] Pringle v. McPherson, 2 Brev. (S. C.) 279.

the estates bestowed.[170] In Kentucky, in 1840, a partial revocation was sustained, where the testator cut from his will everything but a clause freeing his slaves, adding a written memorandum that he would, when he found time, make a further will.[171]

There are cases in Pennsylvania where the testator changed his will after execution; but, as no attestation by witnesses is needed in that state, a mere reacknowledgment of the altered paper by the testator, in any manner, is sufficient to give it new life. It was said in that state that a careful erasure of a clause or a name, or of amounts and interlineation of other amounts, in a will, does not operate as a revocation, as it is manifestly not made animo revocandi. If the paper is after such erasure and interlineation reacknowledged by the testator, to the knowledge of two witnesses, or referred to in a codicil, it must go to record in the new shape; otherwise, it seems, in its original form.[172] In New York, New Hampshire, Illinois, Minnesota, Tennessee, Massachusetts (alteration, not cancellation), North Carolina, Indiana, and Iowa, interlineations and erasures, made after execution, which leave the old text legible, neither defeat the will nor change its effect as it stood at the time when it was executed; and these changes so made can become parts of the instrument only by a formal re-execution, either of the will as changed, or by way of a codicil setting forth the changes. A mere attestation by witnesses, without the testator's own signature, is insufficient.[173]

[170] Eschbach v. Collins, 61 Md. 478. In the English court of appeals and the house of lords, in Swinton v. Bailey, 1 Exch. Div. 110. 4 App. Cas. 70, the cancellation of the words "and her heirs and assigns," turning a fee into a life estate, was sustained as a "partial revocation," reserving, however, the point whether they could have allowed a devise to be thus increased instead of diminished.

[171] Brown's Will, 1 B. Mon. 56. A rejection of the remaining clause was the only alternative, as the revoked clauses were lost.

[172] Dixon's Appeal, 55 Pa. St. 424; In re Tomlinson's Estate, 133 Pa. St. 245, 19 Atl. 482. Here a will written in ink was partially canceled in pencil. Evans' Appeal, 58 Pa. St. 238; Linnard's Appeal, 93 Pa. St. 313. Though a clause may be canceled, a single word cannot be changed by the testatrix after execution. Id. It will, however, be seen hereafter that a will revoked by operation of law cannot be revived in Pennsylvania by anything less than a new signature.

[173] Jackson v. Holloway, 7 Johns. 394; Stevens v. Stevens, 6 Dem. Sur. 262, 3 N. Y. Supp. 131 (where a clause on another paper was pasted over the will);

Where interlineations or erasures are found in a will, with no indications that they were made after its execution, with a view to change it, or to revoke it in part, the presumption in modern times is that they were made before execution; though it is still the safer practice to make a note of them before the will is signed and attested.[174]

§ 84. Implied Revocation.

The ecclesiastical courts of England, at an early day, in accordance with the teachings of the civil law, held that the will of an unmarried man, as to personalty (and they could not decide as to anything else), is revoked by his subsequent marriage and the birth of children, the two circumstances concurring. The statute of frauds deals only with devises of lands, tenements, and hereditaments, and does not hamper the action of these courts.[175] But section 6 of that

Gardiner v. Gardiner, 65 N. H. 230, 19 Atl. 651 (a devise giving one-fourteenth part was changed by drawing a line through "14" and interlining "12"); Eschbach v. Collins, 61 Md. 478; Wolf v. Bollinger, 62 Ill. 368; In re Penniman, 20 Minn. 246 (Gil. 220) (two witnesses insufficient); Stover v. Kendall, 1 Cold. (Tenn.) 557; Wheeler v. Bent, 7 Pick. (Mass.) 61 (alteration not properly executed does not defeat the will); Bethell v. Moore, 2 Dev. & B. (N. C.) 316; Wright v. Wright, 5 Ind. 389; In re Prescott's Will, 4 Redf. Sur. (N. Y.) 178. In Iowa the statute requires changes to be attested like an original will. Chief Justice Kent, in the first-quoted case, says: "The obliterations of the will were made, not with an intent to destroy the devise already made, but to enlarge it, by extending it to lands subsequently acquired. The testator, however, failed in making interlineations and corrections which could operate, from not having the amendments attested according to law. The obliterations cannot, therefore, destroy the previous devise, for that was not the testator's intention. The mere act of canceling is nothing, unless it be done animo revocandi. It is therefore very clear, from all the authorities, that the first devise must stand good. The case of Onions v. Tyrer, 1 P. Wms. 344, note 1, and the case of Short v. Smith, 4 East, 419, are decisive."

174 Dyer v. Erving, 2 Dem. Sur. (N. Y.) 160, 182, referring to Wetmore v. Carryl, 5 Redf. Sur. (N. Y.) 544; Martin v. King, 72 Ala. 354.

175 Kent in his Commentaries (volume 4, p. 521), quotes the two passages from Cicero de Oratore to which the law is traced back,—liber 1, c. 38, as to setting aside a will made under the mistaken belief of a child's death; the other, liber 1, c. 57, on the very point in question, which is expressed, "Testamenta rumpuntur agnatione." He refers for it also to 2 Inst. tit. 13, Prooem. He also shows the line of the ecclesiastical decisions, as they came before the common-law courts under writs of prohibition or otherwise, in Overbury v.

statute clearly forbids the revocation of a written devise of lands, except by a new will or codicil, or by a "writing" executed very nearly like a will, or by burning, canceling, etc.; and, literally construed, it forbids the revocation which is implied from the new ties of marriage and paternity as much as one expressed in spoken words, or in words written and signed, but not lawfully attested. But the reason of a statute for the prevention of frauds and perjuries could not be alleged against a revocation which rests on facts that are seldom disputed, and which, when in dispute, are easily and unmistakably proved. And thus, after a long struggle, first the court of chancery, and at last, in 1771, the court of king's bench, adopted the rule of the civil law and of the ecclesiastical courts, and it became a maxim of the "common law" (so it is denominated in some of our American statutes) that the marriage of the testator and the birth of a child (it may be a posthumous child) are together an implied revocation of a will of real estate.[176] The other implied revocation takes place when an unmarried woman, whether spinster or widow, who has, as such, made a will, marries. While with a man who, after the execution of the will, becomes both husband and father, the revocation is implied from his new duties, and his presumed new wishes, to provide for those who stand nearest to him, the will of a woman fails, upon her marriage, on the technical ground that she has lost her testamentary capacity. She can no longer modify or revoke the will. It is no longer ambulatory, and therefore no longer a "last will." And such an instrument is not revived by the death of the husband, or the dissolution of the marriage.[177] The law of implied revocation, as belonging to these two changes in the circumstances of the testa-

Overbury, 2 Show. 253, Lugg v. Lugg, 1 Ld. Raym. 441, and Shepherd v. Shepherd, 5 Term R. 51, note.

[176] The first cases are Brown v. Thompson, 1 Eq. Cas. Abr. 413, pt. 15; same case in note to 1 P. Wms. (Cox's Ed.) 304; Parsons v. Lanoe, 1 Ves. Sr. 189; Spraage v. Stone, Amb. 721; Jackson v. Hurlock, 2 Eden, 263; Wellington v. Wellington, 4 Burrows, 2165 (Lord Mansfield); finally culminating in Christopher v. Christopher, 4 Burrows, 2182, cited in 1 Dick. 35, which settled the matter. See, also, Doe v. Lancashire, 5 Term R. 49.

[177] 4 Kent, Comm. 527. He quotes, for the modern doctrine that the death of the husband does not revive the will, Hodsden v. Lloyd, 2 Brown, Ch. 534, and Doe v. Staple, 2 Term R. 684. See, also, 1 Jarm. Wills, p. 106, quoting Forse v. Hembling, 4 Coke, 61, and Cotter v. Layer, 2 P. Wms. 624.

tor and testatrix, and to no other changes, is recognized in a number of American cases as being the common law on the subject.[178]

As the revocation of a man's will was based on his presumed intent, it seemed to follow that facts might be shown to rebut the presumption. If the will contained a provision for the future wife and children (as it well might, if made on the eve of marriage), the intention to revoke it could not well be presumed.[179] The words "provision" and "provided for" became themselves subjects for construction both in England and in this country, where they have been used in statutes. A reversionary interest, whether vested or contingent, which would fall to after-born children after the death of their mother or of any other person, is not a provision;[180] and such it certainly is not, in the ordinary sense, though it might show that the prospect of after-born children was not overlooked in the will. It was held in Pennsylvania, at one time, that appointing a testamentary guardian for after-born children was a provision, but this view was afterwards abandoned.[181]

Whether other evidence than the contents of the will can be adduced to show that the future wife and her children were in the testator's mind when he published the instrument, and whether this

[178] Goodsell's Appeal from Probate, 55 Conn. 171, 10 Atl. 557; Brush v. Wilkins, 4 Johns. Ch. 506; Card v. Alexander, 48 Conn. 504 (marriage alone not enough). Long lapse of time (over 40 years) and changes in family and estate do not bring about a revocation, Warner v. Beach, 4 Gray (Mass.) 162. The adoption of a child is not equivalent to a birth, Davis v. Fogle, 124 Ind. 41, 23 N. E. 860.

[179] Kenebel v. Scrafton, 2 East, 530. Revocation, when the wife and children are unprovided for, and the will disposes of the whole estate.

[180] The old case of Lamplugh v. Lamplugh, 1 P. Wms. 111, in which a remainder interest given to a child was said not to be a provision, and which is relied on in the American cases, has no bearing on the revocation of wills. Such cases are: Coudert v. Coudert, 43 N. J. Eq. 407, 5 Atl. 722; Edwards' Appeal, 47 Pa. St. 144; Willard's Estate, 68 Pa. St. 327; Rhodes v. Weldy, 46 Ohio St. 234, 20 N. E. 461. Find a sufficient provision in Stevens v. Shippen, 28 N. J. Eq. 487.

[181] Hollingsworth's Appeal, 51 Pa. St. 518; Walker v. Hall, 34 Pa. St. 483 (an expression of "utmost confidence" in the mother), overruling Jackson v. Jackson, 2 Pa. St. 212. In McKnight v. Read, 1 Whart. (Pa.) 218, there was a provision for the children "that may live at the time of my death." It was held not to reach a posthumous child, and the testator was held to be intestate as to his share.

fact, when established, would save the will from revocation, was a vexed question in England,[182] and was only finally settled in the negative by a judgment of the exchequer chamber [183] after a section of the will act (1 Vict. c. 26) had changed the law, and had made marriage alone, under all circumstances, an act of revocation of any will made by either man or woman.[184] In recent times this matter has, in most of the states, been regulated by statute, and on very divergent lines; and, even where the courts proceeded without the aid of statute, they differed widely from each other. Thus, in Pennsylvania and in Michigan the rule has been enlarged, and the birth of children, even to a married man, or to a married woman who had reserved to herself the testamentary power by a deed of trust, was held a revocation "at common law," while in Delaware it is so by statute.[185] In the treatment of the American statutes and decisions, it is not easy to keep the case of the man marrying and having children, and that of the woman simply marrying, apart from each other; and the two subjects have, moreover, been complicated with that of "pretermitted children," born either before or after the execution of a will, but not named in it. Of these we shall speak in another section.[186]

A number of states have not enacted any statutory law on implied

[182] Brady v. Cubitt, 1 Doug. 31 (in favor of outside facts and declarations), doubted in Gibbons v. Caunt, 4 Ves. 848; Ex parte Earl of Ilchester, 7 Ves. 348. No revocation, if wife and children are provided for by family settlement. All now obsolete except in some American states, where the latter rule is established by statute.

[183] Marston v. Roe, 8 Adol & E. 14, where Chief Justice Tindal says the exclusion of all other facts is the only course compatible with the statute of frauds.

[184] "That every will made by a man or woman shall be revoked by his or her marriage, except a will made in the exercise of a power of appointment, when the real estate thereby appointed would not, in default of such appointment, pass to his or her heir," which is section 18, followed by section 19: "No will shall be revoked by any presumption of an intention on the ground of an alteration in circumstances." Section 18 is substantially copied in the statutes of Virginia (section 2517) and West Virginia (chapter 77, § 6).

[185] The birth of a posthumous child revokes the devise of a reversion, though the child dies before the reversion falls in. Wilson v. Ott, 160 Pa. St. 433, 28 Atl. 848; Laws of Delaware, c. 84, § 11.

[186] See section 85 of this chapter.

revocation, but add to their re-enactment of the sixth section of the statute of frauds words like these: "Nothing herein contained shall prevent the revocation implied by law from subsequent changes in the condition or circumstances of the testator." This has been done in Massachusetts, Maine, Vermont, Michigan, Wisconsin, Minnesota, and Wyoming, while Iowa, New Jersey (which legislates on pretermitted children), and Maryland have no statute on the subject.[187] The Iowa courts have worked out their own doctrine, that the birth of a child (including an illegitimate child which is recognized so as to make it an heir) revokes the prior will, though the testator may have had children before, not pro tanto, so as to give to the newly-born child its share, but in toto.[188]

The laws which confer the power of devising or conveying land on married women have removed the main ground for letting marriage revoke a woman's will; but the courts differ in working out the result. In Maine, Michigan, New Jersey, and in Illinois (the marriage taking place while that state had no statute on the subject), it was held that with the cause for the law the law itself ceased, and the will was upheld, while in Rhode Island the revocation would depend upon the intention of the testatrix.[189] In Massachusetts and Pennsylvania, however, the old rule was held to have received the force of a statute, and in the former state a precedent was taken from New York, where a statute expressly enacting the same rule was followed by that which gave to married women testamentary capacity, and the woman's will was held revoked.[190] In Delaware the question is

[187] In most of these states the section of the law which disallows revocation otherwise than by "burning, tearing," etc., winds up: "Nothing contained in this section shall prevent the revocation implied by law from subsequent changes in the condition or circumstances of the testator." Vermont simply says, "Except by implication of law."

[188] Ware v. Wisner, 50 Fed. 310 (the probate does not affect the rights of the afterborn heir); Fallon v. Chidester, 46 Iowa, 588; Carey v. Baughn, 36 Iowa, 540 (the will thus revoked can only be revived by fresh execution); Negus v. Negus, 46 Iowa, 487; as to illegitimate child, Milburn v. Milburn (Dec. 8, 1882) 60 Iowa, 411, 14 N. W. 204.

[189] In re Hunt's Will, 81 Me. 275, 17 Atl. 68; In re Tuller's Will, 79 Ill. 99; Noyes v. Southworth, 55 Mich. 173, 20 N. W. 891; Webb v. Jones, 36 N. J. Eq. 163; Miller v. Phillips, 9 R. I. 141.

[190] Swan v. Hammond, 138 Mass. 45; Blodgett v. Moore, 141 Mass. 75, 5 N. E. 470; In re Fransen's Will, 26 Pa. St. 202. So, also, in New York,

still open. The only thing decided is that a marriage before the married women's act of 1875 was a revocation, and remained such notwithstanding that act.[191] In Mississippi it arose when the powers of married women had been but slightly enlarged by statute. The marriage of the testatrix was then held a revocation, but might not be so considered now.[192] In Connecticut marriage alone annuls a will of either man or woman; also the birth of a child, if no provision is made in the will for such contingency, and this though the testator had children before. In New Jersey a woman's will is revoked by marriage. The will of a childless testator "becomes void" by the birth of a child.[193] The statutes of Virginia, West Virginia, and Kentucky follow the modern English rule. Marriage avoids a man's as well as a woman's will, unless it be made under a power of appointment, and unless, for want of appointment, the estate would not go to the heirs. In Illinois and in North Carolina, also, marriage alone is a revocation by itself.[194] These statutes, at least in Virginia and Kentucky, are rigidly enforced; and though a will be made on the eve of marriage, with the full consent of the other spouse, it falls to the ground.[195] But where the will is made in connection with a marriage settlement, and in part for the benefit of the other spouse, it stands on different ground. In Massachusetts, as well as in Kentucky, such a will has been held to remain unrevoked.[196] There are also cases reported under the statutes of Illinois and North Carolina, which, however, present no special points. The will is not revoked pro tanto, so as to satisfy the rights of the spouse, but in toto.[197] Connecticut has enlarged the old rule by re-

Brown v. Clark, 77 N. Y. 369 (spinster); In re Kaufman's Will, 131 N. Y. 620, 30 N. E. 242 (widow remarrying).

[191] Smith v. Clemson, 6 Houst. (Del.) 171.

[192] Garrett v. Dabney, 27 Miss. 335.

[193] New Jersey, c. "Wills," 18.

[194] Kentucky, Gen. St. c. 113, § 9.

[195] Phaup v. Wooldridge, 14 Grat. (Va.) 332; Ransom v. Connelly (Ky.) 18 S. W. 1029. The reason here assigned for the revocation is the danger of fraud upon marital rights.

[196] Osgood v. Bliss, 141 Mass. 474, 6 N. E. 527 (decided under an Indiana statute which makes the marriage of a woman an act of revocation); Stewart v. Mulholland, 88 Ky. 38, 10 S. W. 125.

[197] American Board Com'rs v. Nelson, 72 Ill. 564; Byrd v. Surles, 77 N. C. 435; McAnnulty v. McAnnulty, 120 Ill. 26, 11 N. E. 397 (in accordance with

voking the will of either man or woman as well upon marriage alone as upon the birth of a child. In South Carolina, if a person making a will shall afterwards marry, and dies, leaving his widow, or leaving issue, unless the will be made in contemplation of marriage, and provide for wife and issue on its face, it stands revoked in toto.[198] This limitation, that wife or issue must survive, is also found in the Revised Statutes of New York, and has, in the main, been copied into the laws of Missouri and Arkansas. In these states it is provided that if, after making a will disposing of the whole estate of the testator, he shall marry, and have issue of his marriage, born either in his lifetime or after his death, and the wife or issue shall survive him, unless such issue be provided for by some settlement or in the will, or an intent be shown therein not to make any provision, no other evidence against the presumption shall be received, these limitations being in accord with the law as previously held by the courts. The marriage, also, of an unmarried woman revokes her will at once.[199] The "Field Code states" (i. e. California, the Dakotas, Idaho, Montana, and Utah) have adopted these provisions, and enlarged them—First, by leaving out the limitation that the will must dispose of the whole estate; second, by adding a clause that when the wife alone survives the will is revoked, unless she is provided for by marriage contract, or in the will, or an intent be shown to the contrary. This is also the statutory rule in Alabama.[200] In Nevada the will of a man is revoked by marriage, if the wife survives, unless the contrary intention appears on the face of the will (other evidence being excluded), by a provision for her, or otherwise. An unmarried woman's will is revoked by marriage, at all events. After-born children are otherwise taken care of. That is, unless provided for or mentioned in the will, they get the same share as they would have

the English decisions under 1 Vict. c. 26, § 16); Missouri, Rev. St. §§ 8872, 8873; Arkansas, Dig. §§ 6495, 6496. The Arkansas and Missouri acts leave out the proviso, "or unless an intention be shown not to make any provision."

[198] Connecticut, Gen. St. § 542; South Carolina, § 1860, re-enacted from a law of 1789.

[199] New York, Rev. St. pt. 2, c. 6, tit. 1, §§ 47, 48; Missouri, §§ 8871, 8872; Arkansas, §§ 6494, 6495.

[200] California, Civ. Code, §§ 1298, 1299; Dakota Territory, Civ. Code, §§ 708, 709; Alabama, Civ. Code, §§ 1953, 1954 ("unless provided for by gift or settlement," etc.).

gotten in case of intestacy.[201] In Ohio the rule as to the revocation of a woman's will by marriage has been expressly repealed,[202] while in Indiana it has been made into statute law.[203] Whether a divorce a vinculo should revoke a will in which the testator's wife is provided for is not so clear, unless it be followed by a remarriage, for it is easy for the testator to change his disposition. It was, however, lately so held in Michigan, in a case where the divorce was preceded by a conveyance of a tract of land to the wife; such conveyance did not revoke a will made in the wife's favor, but the divorce did.[204]

The statutes which give to after-born children simply their shares as in case of intestacy must be treated with those on pretermitted children. They do not address themselves to the probate court. And the Pennsylvania courts, forgetful that this whole doctrine of implied revocation came in originally from the Roman law, through the spiritual courts, in the rejection of wills offered for probate, insist that the will is, by marriage and the birth of children, revoked only as to the property devised or bequeathed, but that the appointment of executors or testamentary guardians, and the power of sale conferred on executors, stand unaffected.[205]

§ 85. Pretermitted Children.

Closely connected with revocation by marriage or birth of child is another topic, the total or partial intestacy which, under the laws of many of the states, is worked out for a pretermitted child or grandchild, whether such child be born before or after the execution of the will, whether in the lifetime of the father or after his death. "Children," says Kent, "are deemed to have sufficient security in the natural affection of parents that the unlimited power of disposition will not be abused. If, however, the testator has not given the estate to a competent devisee, the heir takes, notwithstanding the tes-

201 Nevada, §§ 3009, 3010, 3014.

202 Ohio, Rev. St. § 5958.

203 Vail v. Lindsay, 67 Ind. 528; Indiana, Rev. St. § 2562.

204 Lansing v. Haynes, 95 Mich. 16, 54 N. W. 699.

205 Coates v. Hughes, 3 Bin. (Pa.) 498, an old case, but apparently not yet overruled. See, for the contrary effect on powers of sale, section on "Pretermitted Children."

tator may have clearly declared his intention to disinherit him." [206] This remark, however, applies as well to collateral heirs as to children. The estate must descend, when there is no devise.

But the doctrine of pretermitted children rests on the supposition that a parent would have left something to each of his children, if he had only thought of him at the time of making his will. Hence the old English custom and phrase of "cutting a child off with a shilling,"—that is, showing by a small bequest that he was not forgotten,—though the law on the subject is mainly of American growth.[207]

The narrowest rule on this head, agreeing with that of the English courts in matters of personalty, and handed down in the Roman law, may be expressed thus: If the testator has a child or grandchild living at the time of his death, whom, then and at the time of making his will, he believes to be dead, or if a child dies out of the state to the testator's knowledge, but leaves issue unknown to the testator, and such child or issue is neither provided for nor excluded, such child or issue will take its intestate share as a "pretermitted child," unless the presumption that the omission arose from mistake is rebutted by parol or other proof. Such is the statute in Kentucky; [208] and such would probably be considered the law as to land as well as to personalty, not only in the states which thus provide by statute, but in all others as well, provided the will shows on its face that the testator entertained the mistaken belief as to the death of the child or the failure of issue, but not otherwise.[209]

But in many states the rule is much wider, and is expressed thus: "When any testator omits to provide in his will for any of his children, or for the issue of any deceased child, unless it appears that such omission was intentional, such child, or the issue of such child, must have the same share of the estate of the testator as if he had died intestate." [210] It is such in Massachusetts, Maine, New Hamp-

206 4 Kent, Comm. p. 525.

207 See section 76 of this chapter, note 40, as to "cutting off." Case v. Young, 3 Minn. 209 (Gil. 140).

208 Kentucky, Gen. St. c. 113, § 19; St. 1894, § 4842.

209 4 Kent, Comm. p. 521; Gifford v. Dyer, 2 R. I. 99, referring to Campbell v. French, 3 Ves. 321.

210 Massachusetts, c. 127, § 21; Maine, c. 74, § 9; New Hampshire, c. 186, § 10; Montana, Prob. Code, § 467; Vermont, § 2242; California, Civ. Code, § 1307;

shire, Rhode Island, South Carolina, Michigan, Wisconsin, Minnesota, the Dakotas, Idaho, Montana, Missouri, Wyoming, California, Oregon, Washington, and Utah. Nothing is said, in the statutes of these states, how it is to be made to appear that the omission was intentional, and the natural import is that it must so appear from the very words of the will.[211]

Where a codicil following the will, or another instrument referred to in the latter, gives a devise or bequest to the child, it cannot be considered as pretermitted.[212] But in the absence of all reference the statute is imperative, and not only where one child has a devise and another remains unnamed, but where the whole estate is given to the testator's wife, or to a perfect stranger, and where actually there is no ground to assume forgetfulness as the cause, the pretermitted child comes in; so that when the whole estate is given to strangers, without words excluding the children, the former get nothing, the latter everything.[213]

It seems the better opinion, that the rights of the pretermitted children cannot be set up in opposition to the probate, the will being good at any rate as to the appointment of executors; perhaps, also, as to their powers to sell real estate for the payment of debts.[214] One Wisconsin decision stands out alone,—a case of a single child

Oregon, § 3075; Michigan, § 5810; Wisconsin, § 2287; Minnesota, c. 47, § 23; Dakota Territory, Civ. Code, § 715; Missouri, § 8877. In some of the states these provisions are found under the "Laws of Descent"; in others, in the chapter on "Wills." It has, under such a law, been decided, in Rhoton v. Blevin, 99 Cal. 645, 34 Pac. 513, that a will devising everything to the testator's wife, as she would do best for the children, when there were grandchildren by deceased children, cut them off too.

211 And so held in all the Western states having such statutes; perhaps, in all states other than Massachusetts. See below; also, Rhoton v. Blevin, supra; Burns v. Allan, 93 Tenn. 149, 23 S. W. 111. In Prentiss v. Prentiss, 11 Allen, 47, it was held that limiting a life estate to a child who died before the testator was sufficient proof of an intention to give nothing to that child's children.

212 Gerrish v. Gerrish, 8 Or. 351; Payne v. Payne, 18 Cal. 291.

213 Bradley v. Bradley, 24 Mo. 311; Burch v. Brown, 46 Mo. 441; Pounds v. Dale, 48 Mo. 270 (where other children were provided for); In re Stevens' Estate, 83 Cal. 322, 23 Pac. 379; Wilson v. Fritts, 32 N. J. Eq. 59.

214 McIntire v. McIntire, 64 N. H. 609, 15 Atl. 218; Doane v. Lake, 32 Me. 268; In re Barker's Estate, 5 Wash. 390, 31 Pac. 976.

who had allowed a will in favor of a stranger to go to probate.[215] The pretermitted child should make his claim good against the devisees by partition suit or ejectment.[218]

In California, in Missouri, and probably in most other states in which the statute reads substantially as above stated, forgetfulness is conclusively presumed, when a child is not named, no evidence outside of the will being permitted.[217] It has been held in Michigan that some trifling bequest, like the family Bible or a choice of books left to a child, is not conclusive as to the intention to exclude, but that the question of intention or forgetfulness may in such case be left to the jury as one of fact.[218] And in Massachusetts outside evidence is allowed in all cases, including the intelligence and state of mind of the testator or testatrix, and as well where a living child as where an after-born child has been omitted.[219] Where it was allowable to aid or to repel the presumption, and the testator, through mistake of law (or, perhaps, of fact), thought the child was provided for, for that reason intentionally omitting him from the will, such child cannot claim as heir under the statute.[220] The mention of a dead child seems to indicate that its children have not been forgotten, but speaking of a grandchild does not amount to a mention of his parent, the testator's child.[221]

After-born children, including those born after the father's death, cannot well be described as forgotten or omitted by mistake. Where a statute does not make the birth of a child the revocation of the previous will, but gives to the child his share as in intestacy, apart from pretermitted children living at the time of the will, it imposes

215 Newman v. Waterman, 63 Wis. 612, 23 N. W. 696.

216 Thomas v. Black, 113 Mo. 66, 20 S. W. 657 (referring to a summary remedy given by statute); Gage v. Gage, 29 N. H. 533; Schneider v. Koester, 54 Mo. 500 (will not to be set aside).

217 In re Garraud's Estate, 35 Cal. 336; Wetherall v. Harris, 51 Mo. 65; Pounds v. Dale, supra.

218 In re Stebbins' Estate, 94 Mich. 304, 54 N. W. 159.

219 Wilson v. Fosket, 6 Metc. (Mass.) 400; Converse v. Wales, 4 Allen, 512; Ramsdill v. Wentworth, 101 Mass. 125; Peters v. Siders, 126 Mass. 135 (where the testatrix made her will in favor of the husband shortly before her confinement); Buckley v. Gerard, 123 Mass. 8. An interest contingent upon the death of another is not a provision. Potter v. Brown, 11 R. I. 232.

220 Hurley v. O'Sullivan, 137 Mass. 86.

221 Guitar v. Gordon, 17 Mo. 408; Gage v. Gage, 29 N. H. 533.

the condition which we have already met with, that such child has no provision in the will; and this is, as in the case of "implied revocation," construed to mean only a present gift, not a future or contingent interest, arising after the death of the mother or of another child.[222]

Many statutes direct that the share of the pretermitted child is to be taken first out of such property as is undisposed of by will, and that the residue is to be made up by the devisees and legatees pro rata; but this would probably be the law, without such a statute, unless the will itself should indicate another rule for making up deficiencies.[223] The pretermitted child takes his share in land as heir, under the law of the situs, though the will have been made elsewhere by the resident of a state or country in which the rights of pretermitted children are unknown.[224]

The pretermitted children may, it seems, waive their right by written petition to the probate court in which the will is established, and are thereby estopped from setting up their rights as heirs.[225]

In several states the statute limits the effect of the birth of a child after the publication of the will, or of a pretermission of a living child, in two ways: First, the appointment of executors and all the provisions as to the payment of debts, which would include a power of sale given to the executors for such purpose, remain good at all events; secondly, even as to the share of the pretermitted child the will is only suspended, and should such child die under the age of 21, and without issue, the will revives as to this share also.[226]

222 Potter v. Brown, 11 R. I. 237; Talbird v. Verdier, 1 Desaus. Eq. (S. C.) 592; Waterman v. Hawkins, 63 Me. 156; Holloman v. Copeland, 10 Ga. 79 (under an act of 1834 declaring intestacy as to share of unprovided after-born child); Bowen v. Hoxie, 137 Mass. 527. And see section on "Implied Revocation," note 180; also, Haskins v. Spiller, 1 Dana (Ky.) 170. It has been held in Kentucky, that a testator, having one child, and leaving his whole estate to his wife, indicates an intent to disinherit all his children, and a posthumous child cannot claim its share as pretermitted. Leonard v. Enochs, 92 Ky. 186, 17 S. W. 437.

223 The section generally follows that which gives to the pretermitted child its intestate share.

224 Eyre v. Storer, 37 N. H. 114.

225 Farnum v. Bryant, 34 N. H. 9.

226 Kentucky, Gen. St. c. 113, § 25; St. 1894, § 4848. "But if such after-born child * * * dies under the age of 21 years, unmarried and without issue,

In Mississippi we find no statute reserving their shares to pretermitted children, but there is an enactment for the benefit of a pretermitted wife or husband and raising the same presumption in their favor, a provision which would be wholly useless in those states in which the share coming to such consort by descent, dower, or curtesy cannot be diminished by will.[227]

§ 86. Alteration of Estate.

As a devise is never binding on the testator, he may at any moment, by conveyance or incumbrance, lessen or destroy the estate devised, and thus, in effect, revoke the devise, in whole or in part. The same course in case of a legacy of goods or effects is called "ademption,"—a word which may conveniently be used as to the conveyance of lands devised. Where a father, or other person standing in loco parentis, after he has published a will containing a bequest to a child, gives to it the thing bequeathed, or things of equal or greater value, this may amount to a "satisfaction" of the legacy, or, if the thing given was of lesser value, a satisfaction pro tanto. There may also be a satisfaction of a devise, either under a statute regarding advancements among children, or, in a few cases, by judicial decision, though the use of this word "satisfaction" in such cases is not quite correct.[228] Under the old law, by which a will carried only such lands as the testator owned at its date, the effect of a conveyance was much broader than merely to take from the devisee that which must needs go to the grantee. If the seisin in fee was broken but for a moment, the land would come back to the testator as after-acquired land, and, as such, could not pass by the will. Thus, where a freehold lease was devised, and thereafter the testator accepted a renewal, the devise was gone. And, as

his portion of the estate, or so much thereof as may remain unexpended in his support and education, shall revert to the" devisees.

227 Section 4497. The effect is the same as if an unsatisfactory provision had been made and renounced.

228 In Thomas v. Capps, 5 Bush (Ky.) 273, the principle is conceded, under a statute concerning "provisions or advancements," though the case was decided otherwise on proof of intent. The present statute (Gen. St. c. 31, § 15; St. 1894, § 1407) speaks of "real or personal property given," etc.

Jarman says, "where the conveyance of a freehold estate has no limited or definite object, or is made for a mistaken or unnecessary purpose, and though its whole effect is instantly to revest the property in the testator himself, yet the momentary interruption produces a complete and total extinction of the previous devise."[229] An estate granted by the testator subject to a subsequent event, on the happening of which it would revert, could not go by the previous devise, for the reason given.[230] And some written conveyances would have this effect, though ineffectual to pass the estate; and equity helped to extend this doctrine by treating a contract to sell as an equitable conveyance, thus giving to the heir the right to the purchase money, or in some cases to the residuary devisee, against the devisee of the very land thus contracted for sale.[231] Both in England, by the statute of 1 Vict. c. 26, and by the statutes of most of the United States, this law has been changed; and, generally speaking, a conveyance revokes a devise only so far as it is effective at the time of the testator's death. But even under the old system there were two exceptions,—partition and mortgage.[232] If the testator was a parcener or tenant in common, and devised his share, and afterwards made partition, either in pais or by judgment of a court, so as to become the owner of a smaller tract in severalty, the devise

[229] 1 Jarm. Wills, 130; Marwood v. Turner, 3 P. Wms. 163 (renewal of freehold lease). But a lease of fee-simple lands only subverts the devise pro tanto. Hodgkinson v. Wood, Cro. Car. 23; Parker v. Lamb, 3 Brown, Parl. Cas. 12. Limitation in fee to testator. Goodtitle v. Otway, 2 H. Bl. 516; Cave v. Holford, 3 Ves. 650, 7 Brown, Parl. Cas. 593.

[230] The American leading case on the old doctrine is Walton v. Walton, 7 Johns. Ch. 258. See, also, Bosley v. Wyatt, 14 How. 390; Adams v. Winne, 7 Paige, 97.

[231] "Not only contracts to convey, but inoperative conveyances, will amount to a revocation of a devise, to the extent of the property intended to be affected, if there be evidence of an intention to convey, and thereby to revoke will. A bargain and sale without enrollment, feoffment without livery of seisin, a conveyance upon a consideration which happened to fail, or a disability in the grantee to take, have all been admitted to amount to a revocation, because so intended." 4 Kent, Comm. 528, 529. It is evident that to allow a deed which does not operate as a conveyance, and is not attested by three witnesses, to revoke a written devise, is in open defiance of the statute of wills.

[232] 4 Kent, Comm. p. 430, notices only the more important exception of mortgages.

would attach to that tract;[233] and if the testator mortgaged devised lands the devisee might nevertheless claim them, and might even insist on the discharge of the incumbrance out of the personal estate.[234]

Pennsylvania, Tennessee, Mississippi, and a few other states have not adopted any statute to lessen the force of conveyance or executory contract. In the former state it has been held that the conversion of a fee in lands into a ground rent, or of realty into personalty, is a complete revocation of a specific devise; and it was recognized that, for want of a reforming statute, the law of the state differs from that of England under the act of 1 Vict., and from that of most American states.[235] In Tennessee a written contract of sale, enforceable in equity, though possession has not been taken, and nothing has been paid thereon, is sufficient to let the heir into the place of the devisee;[236] but when the title bond is void on its face, for want of a description, or otherwise, and cannot be enforced, it does not adeem the devise.[237] But neither in these nor in other states can the alteration of estate arising from a conveyance be set up against the probate of the will which contains the revoked devises, even though such conveyance should cover the whole estate.[238] The will takes effect, at any rate, in the appointment of

[233] 1 Jarm. Wills, p. 135, quoting Luther v. Kidby, quoted 3 P. Wms. 170; Brydges v. Duchess of Chandos, 2 Ves. Jr. 417; Barton v. Croxall, Tam. 164.

[234] 1 Jarm. Wills, 135 et seq., quoting Hall v. Dench, 2 Ch. R. 154; Warner v. Hawes, 3 Brown, Parl. Cas. 21; Tucker v. Thurstan, 17 Ves. 131; Rider v. Wager, 2 P. Wms. 334; including mortgage to devisee, Peach v. Phillips, Dickens, 538; Baxter v. Dyer, 5 Ves. 656; deed of trust for creditors generally, Vernon v. Jones, Freem. Ch. 117; or assignment in bankruptcy, Charman v. Charman, 14 Ves. 580.

[235] Skerrett v. Burd, 1 Whart. 246; s. p., in Pleasants' Appeal, 77 Pa. St. 356; In re Cooper's Estate, 4 Pa. St. 88 (the sale of lot A, which was charged with the payment of debts, was held to revoke the devise of lot B, as the legacies could not otherwise be paid). See, on the Pennsylvania doctrine, also, Marshall v. Marshall, 11 Pa. St. 430, and Wogan v. Small, 11 Serg. & R. 141.

[236] Donohoo v. Lee, 1 Swan (Tenn.) 119 (in this case for the benefit of the residuary devisee).

[237] Blair v. Snodgrass, 1 Sneed (Tenn.) 26 (relies on Walton v. Walton, 7 Johns. Ch. 268, not now law in New York).

[238] In re Tillman's Estate (Cal.) 31 Pac. 563; Bruck v. Tucker, 32 Cal. 426;

executors. The ownership of the things devised may, after its probate, be fought out between the devisees, on the one hand, and either the grantee or the heir, on the other.

As a mortgage is not within the old rule, neither is a deed securing a number of creditors, for this is, in legal effect, no more than a mortgage; and if the debts are discharged, leaving a part of the mortgaged land unsold, the devisee takes it, or, when the whole land is unsold when the testator dies, the devisee takes the equity of redemption.[239]

The deed which is to revoke a devise must be lawful and valid. If it be obtained by the grantee's fraud, or was executed by the testator while of unsound mind, such deed can no more work a revocation than a second will made under undue influence, or in a fit of insanity, and it ought not to help the heir any more than the grantee.[240]

Among the statutes providing that a conveyance or contract shall only affect the previous devise of the same land as far as it lessens the testator's power over it, those of New York, California, the Dakotas, Montana, Utah (which are couched in the same language), Ohio, and Kansas make the exception, "unless it is so expressed in the conveyance." They thus enable the testator to revoke a devise

Morey v. Sohie, 63 N. H. 507 (a conveyance not attested by three witnesses cannot be a revocation in New Hampshire); Young v. Crowder, 2 Sneed, 156 (though a transfer of everything); Hoitt v. Hoitt, 63 N. H. 475 (though concurring with other changes); Taylor v. Kelly, 31 Ala. 59. Contra, the case of a mutual will by husband and wife held revoked by divorce and voluntary division of property, Lansing v. Haynes, 95 Mich. 16, 54 N. W. 699.

239 McTaggart v. Thompson, 14 Pa. St. 149; or a deed of trust for several creditors, Jones v. Hartley, 2 Whart. 103.

240 Graham v. Burch, 47 Minn. 171, 49 N. W. 697, in accord with Hawes v. Wyatt, 3 Brown, Ch. 156 ("whoever orders it to be delivered up declares it to be no deed"); and while contrary to 2 Greenl. Ev. § 687, based on Simpson v. Walker, 5 Sim. 1, is supported by Smithwick v. Jordan, 15 Mass. 113. In this, as well as in the Minnesota case, the deed had been set aside before it was opposed to the probate. The position of Chancellor Kent (4 Comm. 528), that contracts to convey and inoperative conveyances will amount to a revocation, if there be evidence of an intention to convey, was laid down before the statute of 1 Vict. and statutes of like import were enacted, which confine conveyances to their direct effect upon the thing conveyed. And see Bennett v. Gaddis, 79 Ind. 347.

without parting with his estate, and without the solemnities of a will.[241] Nor are acknowledgment and recording material, for the conveyance need only be good between the parties.[242]

Under the modern statutes, though, upon an actual sale of land on installments, the notes secured by mortgage or lien are not substituted for the devised land,[243] except in Indiana and in Alabama, where such a conversion is held to be directed by the statute,[244] yet land purchased out of a bequeathed trust fund has been held to represent it.[245] In Kentucky the law seeks to protect particularly a coheir to whom a devise is made, and who is not to suffer by the change in form of the thing allotted to him, upon the ground that the testator chose a specific devise only as a mode of conveniently dividing his estate among his children or other heirs, and did not, by a sale of any one lot, intend to change the proportion. But the intention to adeem the devise may, under the statute, be shown by evidence in or out of the conveyance.[246] A general devise, not of a specified tract, but of "my lands," or "my real estate," is defeated when the testator sells or otherwise parts with all of his lands, but revives whenever he acquires other lands, whether or not they can be traced to the proceeds of those sold.[247]

The courts have been slow in applying the doctrine of satisfaction to specific devises of land. A father, having devised two tracts to

241 New York, Rev. St. pt. 2, c. 6, tit. 1, § 47; California, Civ. Code, § 1304; Ohio, § 5956, etc.

242 Collup v. Smith, 89 Va. 258, 15 S. E. 584.

243 Walton v. Walton, 7 Johns. Ch. 258, quoting Knollys v. Alcock, 5 Ves. 654, and going back to Cotter v. Layer, 2 P. Wms. 623.

244 Alabama, Code, § 1958, construed to apply to proceeds of an out and out sale. Powell v. Powell, 30 Ala. 697; Welsh v. Pounders, 36 Ala. 668; Indiana, Rev. St. 2563.

245 Clements v. Horn, 44 N. J. Eq. 595, 18 Atl. 71; and see McNaughton v. McNaughton, 31 N. Y. 201. If the testator reacquires lands conveyed away, they pass under the devise. Brown v. Brown, 16 Barb. 569. An exchange revokes, and there is no substitution. Gilbert v. Gilbert, 9 Barb. 532.

246 Kentucky, Gen. St. c. 50, art. 3, § 1 (St. 1894, § 2068). Those claiming against the will have the burden of proof. Hocker v. Gentry, 3 Metc. (Ky.) 473; Wickliffe v. Preston, 4 Metc. (Ky.) 180.

247 McNaughton v. McNaughton, 34 N. Y. 201; and see Langdon v. Astor's Ex'rs, 16 N. Y. 39 (case of bequest of securities, but where the whole doctrine is discussed).

two children, afterwards conveys to one by deed of gift. He may share in so much of the devise as remains to the testator at his death.[248] But a mere gift of money, though made and accepted in lieu of all prospects from the father's estate, has, in New York, been deemed ineffective to satisfy a devise of land, though it might have discharged a legacy.[249] In several states the statute has stepped in, under the head of "Advancements"; that is, where the devisee is a child or grandchild, a substantial gift, made by the devisor, with a view of setting him up or advancing him in the world,—such a gift as would have to be brought into hotchpot in case of descent upon several heirs,—will also be considered an advancement, as against the devise, wiping it out, if equal, or lessening it pro tanto, if less.[250]

§ 87. Effect of Probate.

In almost every state the first probate of a will is ordered by a court of lower rank than that which decides questions of property between man and man. In some the will is provisionally admitted to record by the clerk of a court, or by an officer like the "register" in New Jersey, who is more clerk or master than judge. But in all states an appeal is allowed, in some form or other, to either contestant or propounder, and the ultimate decision will be rendered by the highest court of errors and appeals, known as the supreme court or by some other name (in New Jersey by the chancellor, presiding in the prerogative court). Hence, the reason which justified the common-law courts in England in ignoring the probate or rejection of a will whenever it came to a contest over land does not exist in this country; and, as we have stated in a former section, generally speaking, the probate or rejection of the will by the court in which, under the law of the state, it is to be propounded is conclusive until set aside upon appeal, or in the course of a suit to vacate, which, under the statute of some of the states, and under some circumstances, takes the place of an appeal.

[248] Swails v. Swails, 98 Ind. 511; Brush v. Brush, 11 Ohio, 287. See, also, King v. Sheffey, 8 Leigh, 614.

[249] Burnham v. Comfort, 108 N. Y. 535, 15 N. E. 710, refers to Story, Eq. Jur. § 1111; Davys v. Boucher, 3 Younge & C. 397; Stubbs v. Houston, 33 Ala. 555. And see McTaggart v. Thompson, 14 Pa. St. 149.

[250] Kentucky, Gen. St. c. 113, § 17 (St. 1894, § 4840); Virginia, Code, § 2522;

The English rule, before the statute of 1 Vict. as to personal property, was that the common-law courts could not in any case go behind the sentence of the spiritual court, except that, if the pretended last will of a person still alive should be admitted, the sentence was void for want of jurisdiction.[251] If, in this country, the effect of the probate was only confined to the personalty, this rule would most probably have been followed without objection. Not only in those states in which the real and personal estates were thrown together in case of intestacy, as in New Hampshire and Georgia, but in other states in which the "descent cast" on the heir was fully recognized, the English limit upon the power of the probate judge was dropped in very early times, and both lands and goods were claimed through the probated will alone.[252] Gradually all the states, by statute, fell into line. Only in New York and New Jersey the original will may still be proved or disproved in an action over devised lands, when the parties to the suit have not been parties to

West Virginia, c. 77, § 11. In these three states, the benefit of the statute extends to strangers as well as to children. See, respectively, the sections cited.

[251] "What is the effect of a probate? It has been contended by the counsel—First, that it is not a judicial act; secondly, that it is not conclusive. But I am most clearly of opinion that it is a judicial act; for the ecclesiastical court may hear and examine the witnesses on the different sides, whether a will be or be not properly made. That is the only court which can pronounce whether or not the will is good, and the courts of common law have no jurisdiction over the subject. Secondly, the probate is conclusive till repealed, and no court of common law can admit evidence to impeach it. Then this case was compared to a probate of a supposed will of a living person, but in such a case the ecclesiastical courts have no jurisdiction and their probate can have no effect. Their jurisdiction is only to grant probate of the wills of dead persons." Mr. Justice Buller in Allen v. Dundas, 3 Term R. 125, the case of a debt being paid to the executor qualified under a forged will. Same principle as to a will of personalty obtained by fraud, Allen v. McPherson, 5 Beav. 469, 1 Phil. Ch. 133, and 1 H. L. Cas. 191.

[252] "The probate of a will I conceive to be a familiar instance of a proceeding in rem in this state. The proceeding is, in form and substance, upon the will itself. No process issues against any one, etc., and the judgment is not that this or that person shall pay a sum of money or do any particular act, but that the instrument is or is not the will of the testator. The judgment is conclusive, and makes the instrument as to all the world, at least so far as the property of the testator within this state is concerned, just what the judgment declares it ought to be." Woodruff v. Taylor, 20 Vt. 65.

a contest over the will; and even in these states the right is but seldom exercised in recent times.[253]

The order of probate cannot be set aside by bill in equity on the ground of fraud or forgery, or on any other ground; that is, not under the old equity jurisdiction.[254] In some states those interested for or against a will might formerly bring a suit in equity to set aside the order of the probate court; but this was simply a statutory mode of appeal from the probate judge to the chancellor, and not at war with the finality of the sentence.[255]

253 In New York, an act of 1853, re-enacted in section 1537 of the Code of Civil Procedure of 1881, allows the heir to assail a pretended devise in an action for partition; and this was done in Hewlett v. Wood, 55 N. Y. 634, and lately in Vogel v. Lehritter, 64 Hun, 308, 18 N. Y. Supp. 923. But see Wetmore v. Parker, 52 N. Y. 450, Caulfield v. Sullivan, 85 N. Y. 153, and section 2627 of the Code of Civil Procedure (by which the probate becomes final after 20 years' possession under it). On the other hand, Massachusetts, Pub. St. c. 127, § 7 (no will valid unless proved); Kentucky, Gen. St. c. 113, § 28 (not admitted in evidence unless, etc., and the sentence of probate incontrovertible, except as to jurisdiction). In New Jersey, until 1873, it was quite common to try a will upon an ejectment (see Allaire v. Allaire, 37 N. J. Law, 312; Otterson v. Hofford, 36 N. J. Law, 129); the effect of the probate being only to make the recorded copy as good as the original. An act of 1873 makes the probate conclusive against adults after 7 years. It has, however, since become customary to fight out all will contests in the prerogative court, the highest and appellate court in matters of probate, held by the chancellor. In Pennsylvania an act of April 22, 1856, § 7, made the probate conclusive as to land. See Warfield v. Fox, 53 Pa. St. 382; Wilson v. Gaston, 92 Pa. St. 207. In North Carolina the Digest (Battle) of 1873, c. 119, § 15, declares the same principle, doing away with the views laid down in Redmond v. Collins, 4 Dev. (N. C.) 430. In Virginia the probate is binding on lands (Norvell v. Lessueur, 33 Grat., Va., 222), though an exception was made in that case on account of the great length of time during which the will had been understood as of personalty only.

254 Wetmore v. Parker, 52 N. Y. 450; Caulfield v. Sullivan, 85 N. Y. 153. Wolcott v. Wolcott, 140 Mass. 194, 3 N. E. 214; Broderick's Will, 21 Wall. 503 (where the English cases are reviewed); Kerrich v. Bransby, 7 Brown, Parl. Cas. 438; Barnesley v. Powel, 1 Ves. Sr. 284 (contra, Marriot v. Marriot, 1 Strange, 666); Allen v. McPherson, 1 H. L. Cas. 191.

255 It was so in Virginia (see Schultz v. Schultz, 10 Grat. 358) and Kentucky, but not now (Thompson v. Beadles, 14 Bush, 47), in favor of persons under disability, who could not appeal in the regular way within the short time prescribed; but is done away with under the present revisions. There is still a similar proceeding in Missouri. See the remark about these quasi

The probate court, it has been said, has general cognizance in all matters of wills and of administrators, and the same presumption that everything was done rightly and within the jurisdiction should be indulged in its favor, as it would in favor of a court that has general cognizance of demands for money or land.[256] Yet the courts of common law have not been uniformly willing to carry out the rule in all cases. In Massachusetts, however, it was asserted at an early day (and lately in Kentucky) that the common-law court can in no case try the execution of a will; not even of a foreign will, which a probate court in Massachusetts had ordered to be recorded in its office. If there was a question as to the proper subscription and attestation, it must have been decided by the probate court; hence the order is as conclusive on this question as on any other.[257] In the same state the probate of a married woman's will, made at a time when coverture took away the testamentary capacity, was nevertheless deemed conclusive as to her lands; for she might have acted under a power, or upon separate estate, or the probate judge might have thought so.[258] And, in Kentucky, a will which showed upon its face that it had been subscribed by only one attesting witness was deemed conclusively established by the probate when it came into issue in an action of ejectment.[259] There are, on the other hand, a few very recent cases in which the narrower ground was taken that, where the will shows defects on its face, the probate court has no jurisdiction, which would in effect come to this, that the probate judge can finally decide only questions of fact, but not questions of law. Thus, it was held, in Georgia, that a will subscribed by only two witnesses (the statute demanding three) remains invalid, though ad-

proceedings in chancery in Broderick's Will, supra. The proceeding in New York under an act of 1853 (chapter 238) was similar.

256 Jacobs' Adm'r v. Louisville & N. R. Co., 10 Bush, 263, where an order of administration did not state that the intestate was "of Hardin county." Same principle held in Ryno v. Ryno's Adm'r, 27 N. J. Eq. 522.

257 Dublin v. Chadbourn, 16 Mass. 433 (writ of entry for land; the will was originally proved in New Hampshire); Whalen v. Nisbet, 95 Ky. 464, 26 S. W. 188.

258 Parker v. Parker, 11 Cush. 519 (though the coverture was recited in the order).

259 Stevenson v. Huddleson, 13 B. Mon. 299. One reason assigned was that possibly the probate judge might have thought that the will was all in the testator's handwriting, and thus needed no witness.

mitted to probate; in Kentucky, that the probated will of a married woman did not carry her estate.[260]

The rejection of a will is just as binding as its admission,[261] and where the executor has propounded it and failed, neither a legatee nor a devisee can offer it thereafter, unless he is by the statute allowed to reopen the sentence of rejection by some proceeding in review or appeal.[262]

In every state the jurisdiction to hear the proof and to admit or reject a will is given to the county court, or orphans' court, or probate court, or surrogate, register, or ordinary of some particular county or district,—that of the testator's last residence, when the testator has a residence in the state;[263] while in the case of non-residents greater latitude is given. In fact, however, as every man must have a domicile or residence in some state or sovereignty, his will ought to be proved there, and the probate certified from it to any other state in which he has left property.

When and where an admission or rejection by the probate court of the wrong county would be void will be discussed in the chapter on Valid and Void Judgments.[264] And should it turn out that the testator was still alive at the time when his supposed will was acted upon by the ordinary or surrogate, such action is void, as of necessity, though the fact of death is one on which the probate judge must, in the nature of things, pass; for the living owner of the prop-

[260] Cureton v. Taylor, 89 Ga. 490, 15 S. E. 643; Gregory v. Oates, 92 Ky. 532, 18 S. W. 231 (this may be justified on the ground that the county court, in admitting the married woman's will, only decided she had some separate estate).

[261] O'Dell v. Rogers, 44 Wis. 136, 173; and see next case.

[262] Redmond v. Collins, ubi supra. Thornton v. Baker, 15 R. I. 553, 10 Atl. 617. Here the propounder, having been repelled in the probate court for one county, tried her luck in another, claiming that the rejection in the first was invalid for want of jurisdiction, it not being the testator's domicil; but she was held to be estopped. But see the practice in Ohio, as explained in Feuchter v. Keyl, 48 Ohio St. 357, 27 N. E. 860, where the devisees were allowed to repropound a will which had been rejected on motion of the heirs, the executor refusing to defend it.

[263] E. g. Kentucky, Gen. St. c. 113, § 26; St. 1894, § 4849; Vermont, § 2019; New York, Code Civ. Proc. § 2476.

[264] The modern view that the probate court is a superior court has a strong bearing towards the validity of their action.

erty was not a party to the proceeding in which his estate is disposed of.[265]

Where a will is wholly revoked by marriage or birth of child, though the fact should have arrested its admission to probate, yet the order admitting it will not bar the wife or child of their rights, but will be considered as merely establishing the execution of the instrument.[266]

A foreign will, certified from the state of the last residence to that of the situs of devised lands, is (with the exception of a few states which have been named in section 76) not operative as to these lands, unless it conforms to the law of the situs. The will and order of probate show and recite the manner of execution. If this does not conform to the requirements of these latter laws, the lands are not affected. The statutes for recording foreign wills generally direct the probate court in the state of the situs to decide whether "such copy may be admitted to probate as a will of real estate";[267] and it seems that its decision on this matter, when it is authorized to render it, should be as binding as on any other.[268]

In like manner, where the local law allows a married woman or an infant to dispose by will of one class of property, but not of another (say of land but not of goods, or vice versa), the probate of a will showing the disability of the testator or testatrix will be construed as establishing the instrument only as to the property to which the testamentary power of the maker extends.[269] And though, generally speaking, the sentence of probate is a judgment in rem, and ought to be good against all the world, yet cases have arisen in which those who were cited or took part in the contest were held estopped,

[265] Many cases state the point as a matter of course, yet it is hardly anywhere decided directly, but in Joehumsen v. Suffolk Sav. Bank, 3 Allen, 87; contra, Roderigas v. East River Savings Inst., 63 N. Y. 460. Neither of them, however, on the probate of a will, but on the appointment of an administrator of a living man.

[266] Belton v. Summer, 31 Fla. 139, 12 South. 371 (see section on pretermitted children); and Bresee v. Stiles, 22 Wis. 120 (on unborn posthumous child); and Newman v. Waterman (on pretermitted child in notes to same).

[267] E. g. Kentucky, Gen. St. c. 113, § 30.

[268] Dublin v. Chadburn, 16 Mass. 433.

[269] In re Cary's Estate, 49 Vt. 236.

while those who neither were cited nor appeared were allowed to disregard it.[270]

After a will has been admitted to probate, and while no appeal is pending from the sentence of the court, nor any proceeding in the nature of such appeal, it seems that a power of sale given to the executor or devisee may be executed, and the purchaser under such power or a purchaser from a devisee takes a good title, irrespective of a subsequent reversal of the sentence of probate, resulting in the rejection of the will.[271]

§ 88. Lapse and Failure of Devises.

Though by the older law a will operated only on the lands owned at the date of its execution, it took effect at the testator's death like a conveyance, and like it could vest the estate devised only in persons capable of taking at that time, and not in some one then dead. Hence, if the devisee in fee or in tail died before the testator, the estate of inheritance bestowed on him would "lapse," and go by intestacy to the heir at law, just as much as if the devise had not been written. In like manner, where a devise was made to one incapable of taking,—e. g. in England, after the enactment of the mortmain act, a devise of land to a charitable corporation; or, in the slave states, to a slave; or to one of the necessary witnesses attesting the will,—the thing devised was considered as not devised at all, and went to the heir, not to the residuary devisee.[272]

[270] O'Dell v. Rogers, 44 Wis. 136, 173.

[271] Reed v. Reed, 91 Ky. 267, 15 S. W. 525. It is to be regretted that so important a question should have been decided in a friendly suit on the issue whether the trustee under the will could give to a purchaser an indefeasible title. But Steele v. Renn, 50 Tex. 467, was a hotly-contested case between the heir and a bona fide purchaser from the devisee in a forged will. No other cases can be found on a point which it seems ought to have often arisen.

[272] 1 Jarm. Wills, 293: "The doctrine [of lapse] applies indiscriminately to gifts with and gifts without words of limitation. Thus, if a devise be made to A. and his heirs, or to A. and the heirs of his body, and A. die in the lifetime of the testator, the devise absolutely lapses, and the heir of A. takes no interest, he being included merely in the words of limitation." Section 32 of the will act of 1 Vict. exempts devises in tail in all cases from lapse by the

Of course, the testator might in his will direct, by a devise over, what shall be done with any parcel or interest, if through death or for any other reason the first devise could not take effect; or a residuary devise might be so written as to comprise everything which might lapse from any cause.[273] And modern statutes have stepped in to supply such further directions, which it is supposed the testator would have added if he had thought of the chance that his primary object might fail. These statutes, in the first place, prevent the lapse of a devise by death by directing that it shall go to the issue of the named devisee in the event of his dying before the testator; and some of them, also, divert the lapsed devise into the residuary gift, when there is such in the will, instead of allowing it to go to the heirs as wholly undisposed of.

The English statute relieves against lapse when the devisee is a child or descendant of the testator. In most American states the words are, "child or grandchild." In some the same favor is extended when the devisee is a relative. Again, in some states the relief is given without regard to the ties of kindred between testator and devisee. But in all cases the predeceased devisee must have issue. The devise cannot be transferred to collateral heirs, or to a surviving husband or wife. And in all cases the statute aids the children or descendants of the dead devisee only, when the will does not show an intent to the contrary. The states are grouped in the note, in which reference is made to their statutes.[274]

death of the devisee on the ground that the issue in tail is always in the donor's mind. The best-known authority for the position that lapsed devises go, under the old law, by intestacy to the heir, and do not fall into the residuary, is Ackroyd v. Smithson, 1 Brown, Ch. 503. 1 White & T. Lead. Cas. Eq. 890. There was at common law this broad distinction, that a lapsed legacy fell into the residuary, but land embraced in a lapsed devise went to the heir. Kent, in his Commentaries (volume 4, p. 541, etc.), gives the reasons why devises of land could not lapse into the residuary.

[273] But a declaration that a devise shall not lapse is at common law not enough to save it. The will must say to whom it shall go in case of the devisee's death (1 Jarm. Wills, 294), as the heir can be disinherited only by a valid affirmative disposal. The addition "habendum to her and her heirs," though words of inheritance are dispensed with by statute, is not a provision against lapse. In re Wells, 113 N. Y. 396, 21 N. E. 137.

[274] The American statutes relieving against lapse are generally older than the English statute of 1 Vict. That of South Carolina dates back to 1789,

The reason for confining the relief to devises made to children or near kindred is obvious. The will may have been drawn only as a convenient method of dividing the estate, without any intent to do violence to the order of descent prescribed by law, which would generally put the child in the place of its predeceased parent. Hence, the words of the statute, where it is thus narrowed, will not be enlarged by construction. A wife or those connected by affinity are not relatives for this purpose. A devise made to the wife will not go to her children (who are not the testator's), nor to her brothers.[275] Attempts have been made to extend the statutes, so as to allow a devise to pass to other than lineal heirs of the devisee, but these attempts have in all cases been repelled by the courts.[276]

that of Pennsylvania to 1810, New York to the Revisions taking effect in 1830. Those at present in force may be grouped, according to the relation of devisor to testator, as follows: (1) Child or grandchild (or descendant), New York, Rev. St. pt. 2 c. 6, tit. 1, § 52; New Jersey, "Wills," § 20; North Carolina, § 2144; Indiana, § 2571; Illinois, c. 39, § 11; Alabama, § 1961; Arkansas, § 6502; Texas, art. 4871; South Carolina (child only), § 1865; Arizona, § 3246. (2) Child or grandchild or relative. Pennsylvania, "Wills," 14, 15 (child or grandchild; but brothers, sisters, and children of deceased brothers and sisters, when there is no issue); Connecticut, § 541 (child, grandchild, brother, or sister); Massachusetts, c. 127, § 23; Maine, c. 74, § 10; Vermont, § 2241; Ohio, § 5971; Michigan, § 5812; Wisconsin, § 2289; Minnesota, c. 47, § 25; Kansas, c. 117, § 55; Nebraska, § 1210; Dakota Territory, Civ. Code, § 716; Montana, Prob. Code, § 470; Idaho, § 5747; California, Civ. Code, § 1310; Missouri, § 8879; Nevada, § 3017; Oregon, § 3077; Washington, § 1467. (3) Any devisee, New Hampshire (heirs in the descending line of devisee) c. 193, § 12; Rhode Island, c. 182, § 14; Iowa, § 2337; Maryland, art. 93, § 313 (broader than any other; every devise to take effect as if devisee survived testator); Virginia, § 2523; West Virginia, c. 77, § 12; Kentucky, Gen. St. c. 113, § 18; Tennessee, §§ 3036, 3276; Georgia, § 2462. There is no statute relieving against lapse in Delaware, Florida, Mississippi, and Wyoming. In Iowa the devise goes, under the words of the statute, to the heirs of the devisee, but, by decision of the supreme court, only to lineal heirs. In re Overdieck's Will, 50 Iowa, 244. See North Carolina statute enforced in Cox v. Ward, 107 N. C. 507, 12 S. E. 379. Where a bastard takes by descent from his mother, he will take, as issue, her lapsed devise. Goodwin v. Colby, 64 N. H. 401, 13 Atl. 866. Issue take in same proportions as in case of descent. Schieffelin v. Kessler, 5 Rawle, 118.

[275] Esty v. Clark, 101 Mass. 36; Pittman v. Burr, 79 Mich. 539, 44 N. W. 951; In re Pfuelb's Estate, 48 Cal. 643; Mann v. Hyde, 71 Mich. 278, 39 N. W. 78; Keniston v. Adams, 80 Me. 290, 14 Atl. 203.

[276] Not in favor of devisee, Dixon v. Cooper, 88 Tenn. 147, 12 S. W. 445;

It seems that while a substitution of the children for the parent, if made by the testator in his will, though by words of implication only, gives to such children an independent devise free from all equities between the testator and the first-named devisee, it is otherwise with the substitution worked by the statute. The issue takes cum onere,—that is, subject to any debt which the original devisee may have owed to the testator.[277]

The statutes against the lapsing of legacies and devises indicate a policy, which the courts try to follow in the construction of wills; that is, they will take hold of any word which will enable them to leave the devised lands among the children or descendants of the first-named taker.[278] But, as the policy of saving devises from lapse is subordinated to the intention, the court may allow a devise to lapse, though the devisee was a relative and left children, whenever the will clearly indicates that testator had only the individual devisees in his mind as the objects of his bounty; and a partial intestacy will arise.[279]

Should the devisee, against the lapse of whose devise the law provides, be actually dead at the time when the will is made, which may often happen without the testator's knowledge, his issue will take, just as if he had died afterwards.[280] Though by the ordinary rule, the law of the time of execution governs the construction of a will, a statute to relieve against lapse, enacted at any time before

nor of mother, Morse v. Hayden, 82 Me. 227, 19 Atl. 443; Ballard v. Ballard, 18 Pick. 41; Hooper v. Hooper, 9 Cush. 122; Fisher v. Hill, 7 Mass. 86; Van Gieson v. Howard, 7 N. J. Eq. 462 (nephews and nieces, not descendants). Not to husband or wife of predeceased child. Prather v. Prather, 58 Ind. 141. Where the issue of the devisee also dies before the testator, a lapse takes place. McGreevy v. McGrath, 152 Mass. 24, 25 N. E. 29; Van Beuren v. Dash, 30 N. Y. 393.

277 Denise v. Denise, 37 N. J. Eq. 163. But the issue (and, in Maryland, the heir) of the predeceased devisee takes in his own right, and free from the latter's debts to strangers. Wallace v. Du Bois, 65 Md. 153, 4 Atl. 402.

278 Rood v. Hovey, 50 Mich. 395, 15 N. W. 525. Life estate to widow, remainder to children "now living, or who may be living at the time of her death," extended so as to go to the children as a vested remainder, and to give shares to the issue of children dying before the widow; somewhat questionable.

279 Daboll v. Field, 9 R. I. 266.

280 Minter's Appeal, 40 Pa. St. 111.

the testator's death, will have that effect.[281] The old rule was that where a devise or legacy is given jointly to those of a class,—for instance, to the children of a named person, or "to all my first cousins,"—those who happen to be alive when the devise takes effect alone share in it, to the exclusion of the issue of those members of the class who have died before.[282] But where the fraction going to each member of the class is named, or each is to take an equal share, each has a separate devise, which lapses when the statute does not extend relief to the devisee's issue, or goes to such issue when it does; and in this way the old distinction between joint tenancy and tenancy in common has been kept up as to getting an estate, although after it had once vested there would be no distinction.[283] The modern drift of the law is always against survivorship; and statutes have been passed to keep it from arising through death of devisees before the testator, not only in favor of the devisee's issue, but even of testator's heirs; the statute creating a lapse where it would not have been adjudged otherwise.[284]

It seems to be settled, and has been so decided in at least two states, that whenever devisees are actually named, though they be

281 Hamilton v. Flinn, 21 Tex. 713.

282 Howland v. Slade, 155 Mass. 415, 29 N. E. 631; Worcester v. Worcester, 101 Mass. 128; Merriam v. Simonds, 121 Mass. 198; Baldwin v. Rogers, 3 De Gex, M. & G. 649; Campbell v. Rawdon, 18 N. Y. 412; Campbell v. Clark, 64 N. H. 328, 10 Atl. 702 (nephews and nieces); Hall v. Smith, 61 N. H. 144; Barber v. Barber, 3 Mylne & C. 697.

283 Anderson v. Parsons, 4 Me. 486, when the fractions for each child or set of two grandchildren were set out, the two latter were joint tenants at common law, and the survivor took the share of the set. Morse v. Hayden, 82 Me. 227, 19 Atl. 443, all was to be "equally divided"; share of one who died lapsed. The older English cases (Bagwell v. Dry, 1 P. Wms. 700; Page v. Page, 2 P. Wms. 489; Man v. Man, 2 Strange, 905) proceed on the distinction between joint tenancy and tenancy in common. See, also, Shaw v. Hearsey, 5 Mass. 521; Fox v. Fletcher, 8 Mass. 274. As to the effect of the words "to be equally divided," see Knight v. Gould, 2 Mylne & K. 298; Frewen v. Relfe, 2 Brown, Ch. 224. It is not conclusive against survivorship in the class.

284 Howland v. Slade, 155 Mass. 415, 29 N. E. 631; Moore v. Weaver, 16 Gray, 305 (same will in Moore v. Dimond, 5 R. I. 121); In re Stockbridge, 145 Mass. 517, 14 N. E. 928, where a remainder to children of first taker was held to be vested, hence, on death of one among them, its share went to issue under the statute. In West Virginia (chapter 77, § 12), the survivors of a class do not take in any case, unless the will says so in terms.

also referred to by common kinship (as my nephews and nieces, or the children of I. S.), they are no longer to be deemed as "a class"; but the devise to any of them will separately lapse and, if protected by the statute, pass over to their children, but not to their fellow devisees.[285]

In Virginia, West Virginia, and North Carolina, by statute, all property of which the devise lapses by death or fails for any cause goes into the residuary devise if there is one, and only in default thereof to the heir; while in Kentucky the contrary rule is laid down, all failing devises going as in case of intestacy, unless the intent of including them in the residuary is clearly shown.[286] In Pennsylvania, though the statute seems to favor the residuary devise, the latest decision upholds the common-law rule, and turns over all the lapsed devises of land to the heir, as in case of intestacy.[287] In Illinois the lapsed devises fall into the residue.[288]

Where the testator disinherits a part of his heirs, saying they shall have no share in his estate, without giving what would have been their share to any one else, he is intestate as to this part of his estate, though his intention most probably was to devise their shares to the other coheirs; and we have here a devise failing for want of the proper form of words.[289]

Where a devise for life lapses by the devisee's death, there is no difficulty, for he in remainder will take at once; but it may fail from other causes,—e. g. when made in favor of an attesting witness, or by a condition subsequent in the will, such as the widow entering another marriage,—there being no direction in the will as to the

285 Workman v. Workman, 2 Allen, 473; Jackson v. Robert, 14 Gray, 546, approved in Claflin v. Tilton, 141 Mass. 343, 5 N. E. 649; Mebane v. Womack, 2 Jones Eq. (N. C.) 293,—all following Barber v. Barber, 3 Mylne & C. 697.

286 Virginia, § 2524; West Virginia, c. 77, § 13; North Carolina, § 2142; to the contrary, Kentucky, Gen. St. c. 113, § 20.

287 Pennsylvania, "Wills," pl. 24; Massey's Appeal, 88 Pa. St. 470. An act of 1855 declaring certain devises void does not change the rule. In re Gray's Estate (Appeal of Park) 147 Pa. St. 67, 23 Atl. 205. In Patterson v. Swallow, 44 Pa. St. 490, the devise that fell into the residue was void (being in blank); it did not lapse.

288 Crerar v. Williams, 145 Ill. 625, 34 N. E. 467, affirming 44 Ill. App. 497.

289 Schauber v. Jackson, 2 Wend. 13. "Conjecture nor uncertainty shall never disinherit him [the heir]"; quoting Denn v. Gaskin, Cowp. 657. Contra, Clarkson v. Clarkson, 8 Bush, 655.

unexpired part of the life estate. Shall the remainder be hastened by the failure of the particular estate? The better opinion seems to be that there is a partial intestacy, though there is some authority in favor of hastening the remainder.[290] Where all the members of a class are enumerated,—e. g. "I give to my brothers John, William, and James,"—the right of the individual prevails over that of the class; and if any one should die before the testator his share must lapse, unless it be saved by the statute to his issue.[291] No room is left for construction where a devise is given to the survivors of a class. The share of one who dies before the testator can neither lapse nor go to his issue.[292]

When there must be a survivorship among a class, that class will, if possible, be restricted. Thus, if the estate be divided into so many shares, and one of these shares again is to be divided among those of a named family, the lapse among these latter will inure only to the others of that family, the takers of that share.[293]

At common law, while a lapsed legacy went into the residuary, a lapsed devise went to the heir, unless the contrary was expressly directed; and such, as to devises of land, is still the law in Maryland. But in many states, though the statute is silent, yet the law

290 Augustus v. Seabolt, 3 Metc. (Ky.) 161. Contra, Jull v. Jacobs, 3 Ch. Div. 703.

291 Dildine v. Dildine, 32 N. J. Eq. 78. A case to the contrary in Georgia is Springer v. Congleton (1860) 30 Ga. 976, in which six members of a class were named separately, and one being dead, without the testator's knowledge, leaving issue, her part was given to the other five. This case was approved lately in Dane v. Wynn (Ga.) 6 S. E. 183, where, however, the members of the class were not named. To the writer, this practice of passing by the issue, and giving the dead person's share to the others of the class, in a state which gives lapsed devises to the devisees' issues, seems inconvenient, for what is to be done when they are all dead? Shall the thing devised go to the issue of the last survivor, excluding the issue of those dying sooner? This would certainly run counter to the testator's intent or expectation. The Kentucky statute, supra, prevents this; and so, in Ohio, the lapsed devise goes to the issue, though the devisee is one of a class. Woolley v. Paxson, 46 Ohio St. 307, 24 N. E. 599.

292 Roundtree v. Roundtree, 26 S. C. 449, 2 S. E. 474. The case discusses the meaning of "surviving children."

293 Mann v. Hyde, 71 Mich. 278, 39 N. W. 78. Well discussed in Re Batchelder, 147 Mass. 465, 18 N. E. 225, where the bequest in dispute was, however, of personalty.

has gradually been changed, and a plainly drawn residuary devise of land takes in whatever is lapsed.[294]

§ 89. Construction of Wills.

In the chapter on the several estates in land we have treated of the sets of words fitted to create the various estates or interests in land, and pointed out how certain forms of expression would suffice in some states, or at some periods, to carry out the supposed intention of the writer, in a will, which would then or there not have such effect in a deed, the form of the latter being bound down by more technical rules.[295] The distinction arose because a will is often drawn by the testator himself or by some lay friend, or at least without full time for deliberation; hence some phrases which, to the popular mind, carry a meaning other than their legal import, must be taken in such other or popular sense, which is most likely in accord with the testator's intent. The cases already stated (dispensing with words of inheritance, and not applying the rule in Shelley's Case) are not the only ones, but it is stated, broadly, "that the intent of the testator is the pole star in the interpretation of wills." [296]

[294] Tongue v. Nutwell, 13 Md. 427; Stonebraker's Will (Orrick v. Boehm) 49 Md. 72, 104; Rizer v. Perry, 58 Md. 112.

[295] Chapter 3, § 15, notes 5, 6; Id., § 21, note 115.

[296] 4 Kent, Comm. 534: "The intention of the testator is the first and great object of inquiry; and to this object technical rules are, to a certain extent, made subservient." Finlay v. King, 3 Pet. 346. Kent, on page 539, laments the tendency of American courts to cut loose from all English adjudications on wills, and to hold the intention of the testator paramount to technical rules. In his time this tendency would oftenest lead the court to give the first taker of a devise a fee, rather than a life estate. Now, unfortunately, when technical rules no longer stand in the way of a fee, the pole-star doctrine leads to the opposite result. The testator is assumed, perhaps correctly, to have meant tying up his lands in successive life estates, and to postpone the free disposition as long as possible; and he is indulged in thus vexing his children and annoying his neighbors, although he and his advisers lacked the needful knowledge to do so in legal phrase. An extreme example may be found in Righter v. Forrester, 1 Bush, 278 (already quoted in section on "Estates Tail"), somewhat mitigated in Wedekind v. Hallenberg, 88 Ky. 114, 10 S. W. 368. The leading American "pole-star" case is Smith v. Bell, 6 Pet. 75, 84, where, however, no violence was done to any technical rule. It is quoted in Homer v. Shelton, 2 Metc. (Mass.) 194, as deciding that technical language

I. In searching for the intent of the testator, the court takes hold of every part of the will; e. g. any difference in the language by which two tracts are devised to the same devisee, from which it may be inferred that a greater or a less hampered estate is intended to be given in the one than in the other,[297] or a like difference in the words of gift to two objects of the testator's bounty,[298] or words, either in the introduction or elsewhere in the will, showing a clear intention of disposing of all of the testator's property.[299] When the will shows upon its face that it is written by a lawyer, and is couched in legal phrase, it may be construed differently[300] from an ungrammatical or informal instrument, which shows upon its face the writer's ignorance of legal terms and conceptions; [301] and

cannot prevail against the manifest intent. Worman v. Teagarden, 2 Ohio St. 380 (grammatical rules may be disregarded). Johnson v. Mayne, 4 Iowa, 180, states the principle, and applies it to the trusteeship of a charity. Stokes v. Tilly, 9 N. J. Eq. 130, by applying the intent, turns "children" into a word of limitation. Malcolm v. Malcolm, 3 Cush. 472, where, on this ground, successive remainders to a male heir were construed into an estate tail. More recent cases are Baker v. Riley, 16 Ind. 479 (construction does not depend on rigid principles, etc.); Pugh v. Pugh, 105 Ind. 552, 5 N. E. 673 (rather negative); Wager v. Wager, 96 N. Y. 164 (in case of conflict, descriptive portions of will must give way to disposing portions); Roe v. Vingut, 117 N. Y. 204, 22 N. E. 933.

297 Kelly v. Stinson, 8 Blackf. 387, where the ordinary construction of a devise is set aside to give effect to other parts of the will; Land v. Otley, 4 Rand. (Va.) 213 (gather the intent from the whole will); Osborn v. Jefferson Nat. Bank, 116 Ill. 133, 4 N. E. 791; Taubenhan v. Dunz, 125 Ill. 529, 17 N. E. 456; Roe v. Vingut, 117 N. Y. 204, 22 N. E. 933, where the "scheme" of the testator was gathered from the whole will, and carried out.

298 Righter v. Forrester, supra, is an instance where words clearly denoting an estate tail were turned into strict settlement because another tract was given to the same devisee with full power of disposition. Mutter's Estate, 38 Pa. St. 314 (every clause of the will, if possible, must have its effect); Finney's Appeal, 113 Pa. St. 11, 4 Atl. 60.

299 As to the force of introductory words, see chapter 3, § 15, note 6; the English authorities giving little weight to it, but the main effect claimed for them, in turning an apparent devise for life into a fee, is now obsolete. Yet it is appealed to in a late case (Canedy v. Jones, 19 S. C. 297, 300) to repel the implication of a life estate from the words, "to dispose of during her natural life."

300 In re Whitcomb's Estate, 86 Cal. 265, 24 Pac. 1028.

301 Canedy v. Jones, supra, note 299, where the will was without punctua-

great freedom of construction is applied in the latter case, or whenever it appears that the main purpose of a testator has been endangered by an unskillful handling of the details, though the will may be drawn by counsel, and, to all appearances, highly elaborate.[302]

II. Though the chief end of a will is to divert from the testator's heirs some part or the whole of the estate which would otherwise descend to them, or to divide it among them in other proportions than those prescribed in the law, yet where the meaning of a devise is in doubt a court cannot construe it aginst them simply to give greater effect to the instrument. On the contrary, the heirs can be disinherited only by clear words.[303] The presumption is thus: That the testator intended to depart as little as possible from the law of descent; that he desires to treat his children equally, unless the contrary intent is shown; indeed, that all devisees put in a class shall share equally, unless the contrary intent is made to appear.[304]

tion; Brimmer v. Sohier, 1 Cush. 118, 129 (will drawn by testator; "survivors" used in the popular sense,—"now living"); Lytle v. Beverlidge, 58 N. Y. 592.

302 East v. Cook, 2 Ves. Sr. 30 (Lord Hardwicke). The exact order of words need not be regarded. "Where the purpose of the testator is endangered by inapt or inaccurate modes of expression, and we are sure that we know what the testator meant, we have the right, and it is our duty, to subordinate the language to the intention. In such cases the court will reject words and limitations, supply them, or transpose them, to get at the correct meaning." Phillips v. Davies, 92 N. Y. 199, quoting Pond v. Bergh, 10 Paige, 140; Drake v. Pell, 3 Edw. Ch. 251 et seq., and sustaining a trust power to sell real estate as arising by implication. Followed in Re Miner's Will, 72 Hun, 568, 25 N. Y. Supp. 537. See, also, Kalbfleisch v. Kalbfleisch, 67 N. Y. 354; Taylor v. Watson, 35 Md. 519 (particular intent abandoned, to save general intent); Sullivan v. Straus, 161 Pa. St. 145, 28 Atl. 1020 (will disinherits John, then gives estate to "all my children," means all children other than John). A will may, however, be so vague in most of its clauses that they cannot be understood and enforced; and it might then be improper to enforce the only intelligible clause, which was not intended to stand by itself. Cope v. Cope, 45 Ohio St. 464, 15 N. E. 206.

303 Barlow v. Barnard, 51 N. J. Eq. 620, 28 Atl. 597 (life estate given to four daughters; sons cut off with one dollar each, and told to earn their own fortunes; yet the remainders after the life estates are undisposed of); Fahrney v. Holsinger, 65 Pa. St. 388 (indication towards equality carried out, though with some difficulty).

304 Thus a devise "to my and my husband's nephews and nieces" goes per

III. When all attempts to reconcile contradictory devises in a will turn out to be fruitless, but only then, the last clause is made to prevail over the preceding ones, but never so as to defeat the ill-expressed but apparent intent of the testator.[305]

IV. In one line a technical rule seems to have prevailed over intentions very clearly expressed. Where the will gives a fee, either by words of inheritance or perpetuity, or by conferring general powers of disposition, by either deed or will, to the first-named devisee, subsequent devises of the same property have been held "repugnant," and therefore void. We may here distinguish two classes of cases. In one of these the executory devise is of what "remains undisposed of" at the death of the first taker, sometimes spoken of as the "surplus" or the "remnant," or by similar terms, which would in themselves indicate a power of disposition. In such cases the courts of New York, Vermont, Massachusetts, and Iowa (disregarding a contrary decision of the supreme court of the United States) have rejected the devise over. Those of Iowa have even declared pecuniary legacies given after a sweeping devise in fee as repugnant.[306] But

capita, and one who is a niece of both gets only one share. Campbell v. Clark, 64 N. H. 328, 10 Atl. 702 (devise "to my heirs and my wife's heirs," all take per capita, though there are 10 of the former, 11 of the latter); Bisson v. West Shore R. Co., 143 N. Y. 125, 38 N. E. 104.

[305] Hendershot v. Shields, 42 N. J. Eq. 317, 3 Atl. 355; Newbold v. Boone, 52 Pa. St. 167 (two clauses on same subjects, last prevails). The rule runs back to Co. Litt. 112, and Plow. 541. It is applied mainly when the first clause is general, the latter special, Amlot v. Davies, 4 Mees. & W. 599; or the fee to the first-named devisee is cut down to a life estate by that to the second, Sherratt v. Bentley, 2 Mylne & K. 149; a result rather opposed to Lord Stirling's Will Cases, cited in next note. Contra, Rogers v. Rogers, 49 N. J. Eq. 98, 23 Atl. 125 (not absolutely necessary in this case); Jones v. Strong, 142 Pa. St. 496, 21 Atl. 981 (first clause not to be lightly sacrificed); Jenks v. Jackson, 127 Ill. 341, 20 N. E. 65 (paramount rule being to give effect to all clauses, last not to revoke, unless, etc.).

[306] Bills v. Bills, 80 Iowa, 269, 45 N. W. 748; In re Burbank's Will, 69 Iowa, 378, 28 N. W. 648; Foster v. Smith, 156 Mass. 379, 31 N. E. 291. These cases are based on the New York cases growing out of Lord Stirling's will (Jackson v. Delancy, 13 Johns. 538, before the court of errors; Id. 11 Johns. 367), where the testator devised his lands to his widow in fee, with full power of disposition, and gave his daughter an estate in fee in what should remain at the widow's death undisposed of. It was held the devise over was bad, and the daughter took nothing. To same effect is Stowell v. Hastings, 59 Vt. 494,

the supreme court of Maine has gone still further (claiming support from some cases in Massachusetts), and maintains that a devise in simple words, under the statute, without mention of heirs or the addition "forever," gives a fee, which cannot be cut down to a life estate by an attempted gift of a remainder over, though such remainder be understood of the whole estate, and not merely of the part left undisposed of.[307]

V. Certain rules of construction are peculiar to devises because the need for them arises almost or quite exclusively under wills, and seldom or never under deeds. The policy of the law is to let the fee vest at the earliest possible time. Thus, where an estate is to be divided at some time in the future among a class which is still indefinite, but the shares after the division are to be vested in the takers, the delay of the executors or trustees under the will to make the actual division cannot delay the estates from vesting, but each devisee is entitled to his undivided share as soon as the time for the division has arrived.[308] Where the condition, "in case of his death," or "if he should die," with a devise over, is attached to a gift of either lands or personalty, it cannot be meant literally, for death is certain. It must therefore mean, "if he should die before it is ex-

8 Atl. 738 (widow takes fee, remainder over void for repugnancy). The widow is not to be made a trustee for remainder-man. Westcott v. Cady, 5 Johns. Ch. 349; Moore v. Sanders, 15 S. C. 440; Gifford v. Choate, 100 Mass. 346; Campbell v. Beaumont, 91 N. Y. 464. Here "precatory words" (see below) in favor of the son, as to the estate "or such portion as may remain thereof," after a fee, were held void. In both these cases the authority of Smith v. Bell, 6 Pet. 68, was doubted, the case having been decided without hearing counsel on both sides. Redman v. Barger, 118 Mo. 568, 24 S. W. 177, is rather opposed to this line of authorities.

307 Ramsdell v. Ramsdell, 21 Me. 288 (really does no more than sustain the implied power of sale of the first taker); Jones v. Bacon, 68 Me. 34; Stuart v. Walker, 72 Me. 145; Mitchell v. Morse, 77 Me. 425, 1 Atl. 141 (where the word "remainder" is used, and seems to be understood by the court in its technical sense of an estate following a particular estate in time). Gifford v. Choate, supra, note 306, is quoted in support of the doctrine. It seems opposed by Ayer v. Ayer, 128 Mass. 575, which is the stronger, being a case of personalty only, which would more likely be decided for the first taker.

308 Manice v. Manice, 43 N. Y. 303. In this case all contingencies depending on "the division" were meant to depend on the time of the widow's death, when the estate was to be divided. Any other construction would have defeated the devise under the New York law of perpetuities.

pected," or "if he should die so soon as to defeat the scheme of the will"; and, according to the context, this will be referred to a death preceding that of the testator, or, if the gift is to take effect at a future day, or after some future event, to a death before such day or event.[309] Upon the same principle that a devise should vest at the earliest possible time, wherever an estate is given to those of a class (e. g. children or grandchildren), or their survivors, the gift goes, unless the contrary appears, to those living at the time of the testator's death, though the estate is to come into possession of the class, or its survivors, at a subsequent date, such as the death of a life tenant. At any rate, the word "survivors" will not be construed as raising cross remainders among those of the class.[310] But when

[309] Clason v. Clason, 18 Wend. 369; Goodwin v. McDonald, 153 Mass. 481, 27 N. E. 5; Marsh v. Hoyt, 161 Mass. 459, 37 N. E. 454; Wootten v. Shelton, 2 Murph. (N. C.) 188. Hilliard v. Kearney, Busb. Eq. (N. C.) 221, states the position on the authority of Smith's notes to Fearne's "View of Executory Interests," who wants not only conditions merely destructive, which defeat an estate and return it to the heir, but also such as are both destructive and creative,—that is, conditional limitations,—to be thus construed, so that the estate might become indefeasible at the earliest moment. In Hughes v. Hughes, 12 B. Mon. 115, devise to three grandchildren on their coming of age or marriage, and "in case of death" to survivors, means, "in case of death before full age or marriage." Note the interpolation of the words "without issue," after "if he should die," in Abbott v. Middleton, 21 Beav. 143.

[310] Nearly all the older English and most of the American cases turn on bequests of personalty; and, considering the disinclination of the courts for limitations over in chattels and effects, this is natural. The earliest case is Lord Bindon v. Earl of Suffolk, 1 P. Wms. 96, before Lord Cowper,—bequest of £20,000 to five grandchildren, to be equally divided, and "if any of them died" his share to go to the survivor or survivors. Held, to mean, "dying before the testator." Though the case was for some reason reversed in the house of lords, it seems to have been ever since followed,—e. g. in Lord Douglas v. Chalmer, 2 Ves. Jr. 501. In a note to the American edition Mr. Sumner quotes a number of American cases, all of them of bequests. He suggests that "in case of her death," the words used in the last-named case, may even indicate a belief of the testator that the legatee is possibly dead, even at the time of writing the will. Mr. Jarman devotes chapter 49 of his work on Wills to this subject. Coleman-Bush Inv. Co. v. Figg, 95 Ky. 403, 25 S. W. 888 (survivorship applied to the smallest number, so as to be determined the soonest); Harris v. Berry, 7 Bush, 113 ("survivors" is a flexible word). See, somewhat opposed to it, Best v. Conn, 10 Bush, 36.—"In case of the death of my sons or either of them," raising a survivorship, means "before testator."

the condition, "if he should die without issue," with a devise over, is annexed to a gift in remainder, or to a gift which is to take effect at a future day, there is no intrinsic necessity for interpolating words hastening such death to any earlier period. In those states where, under the common-law rule, this condition raises an estate tail, which is either turned by the statute into a fee simple, or differs from it but slightly in effect, it is of little import to what point of time the death without issue is referred; but in those states (and they are greatly in the majority) in which these words create a defeasible fee, and thus hamper the power of free sale, the distinction is important. The authorities on this as well as on the preceding point turn oftener on legacies than on devises of land. With regard to the latter, it can hardly be said that a devise to A. for life, remainder to B., and, should he die without issue, to C., does always, by its own force, mean that B., on surviving A., shall have an indefeasible estate, but the court will take hold of any other words in the will to work out such a result.[311]

Stokes v. Weston, 142 N. Y. 433, 37 N. E. 515, reversing same case, 69 Hun, 608, 24 N. Y. Supp. 26, and distinguishing Mead v. Maben, 131 N. Y. 255, 30 N. E. 98.

[311] There is a long line of English decisions,—among them one of Lord Mansfield, in Rose v. Hill, 3 Burrows, 1882,—only broken by Cripps v. Wolcott, 4 Madd. 11, where Sir J. Leach refers the surviving to the death of the life tenant. The text is also supported by the American decisions. Drayton v. Drayton, 1 Desaus. Eq. 328; Moore v. Lyons, 25 Wend. 119, 139; Lawrence v. McArter, 10 Ohio, 37 (under a devise "to my sons, or the survivors of them, when the youngest attains the age of twenty-one"); Johnson v. Morton, 10 Pa. St. 245, 250; Ross v. Drake, 37 Pa. St. 373 ("to A. for life, remainder to A.'s surviving children," is made to mean those living at the testator's death). The court here relies on 2 Jarm. Wills, 634, and cases there quoted; Whitney v. Whitney, 45 N. H. 311; Hempstead v. Reed, 6 Conn. 480; Brimmer v. Sohier, 1 Cush. 118. A stronger case than all the rest, decided pretty much in the teeth of the plain meaning of the words, is Bolton v. Ohio Nat. Bank, 50 Ohio St. 290, 33 N. E. 1115; Coles v. Ayres, 156 Pa. St. 197, 27 Atl. 375 ("die without issue" means during life of life tenant). See, also, chapter 3, § 26, near end, as to meaning of "survivors." Stokes v. Weston, 142 N. Y. 433, 37 N. E. 515 ("if either should die without issue," added to a devise to two children after the death of the widow). Thackston v. Watson, 84 Ky. 206, 1 S. W. 398 (one of those cases in which the rights of unborn children are passed on in a suit to compel a buyer to accept a title), relying mainly on the elaborate opinion of Chief Justice Robertson in Birney v. Richardson, 5 Dana, 424 (a

VI. There is a presumption against partial intestacy, even when the will does not contain any clause showing the testator's intent to dispose of "all his worldly goods." Where the whole estate, or any parcel, is devised to the testator's heirs from and after the death of a person named (most frequently, where land is devised to the testator's children from and after the death of his widow), a life estate will be implied in favor of the person named,—for otherwise there would be a temporary intestacy, resulting in leaving the estate, during the named life, to vest in the heirs, and thus the direction that they shall take it only at the end of the life would be rendered nugatory; and, more generally speaking, a life estate will be implied in the cestui que vie at whose death the estate is given in fee to the heir.[312] And a remainder in fee, if it be undisposed of, may also be

devise of slaves, deemed chattels when the devise was made). And this, in turn, refers to King v. Taylor, 5 Ves. 806; Hallifax v. Wilson, 16 Ves. 168; and English cases referred to in note 310,—all of personalty. Another case (Wills v. Wills, 85 Ky. 486, 3 S. W. 900) soon followed in the same court. This was a real controversy, but had been preceded by a fictitious case arising upon a contract of sale. In both cases the will contained enough to render it probable that the testator really meant the devise to become indefeasible, if it ever took effect.

[312] Peckham v. Lego, 57 Conn. 553, 19 Atl. 392, relying on Minor v. Ferris, 22 Conn. 371; Holbrook v. Bentley, 32 Conn. 502; Edens v. Williams, 3 Murph. (N. C.) 27. In the case first named the court considered evidence that the first takers were particularly endeared to the testatrix. Many American authorities are averse to implied devises, as Dixon v. Ramage, 2 Watts & S. 142; Dudley v. Mallery, 4 Ga. 52 (expressly giving one estate excludes another); Ridgely v. Bond, 18 Md. 433. One implication may be rebutted by another. Rathbone v. Dyckman, 3 Paige, 9. Jarman quotes, for the implied devise, Ex parte Rogers, 2 Madd. 455; Hutton v. Simpson, 2 Vern. 723; Willis v. Lucas, 1 P. Wms. 472; Blackwell v. Bull, 1 Keen, 176 (in equity and at law); Doe v. Brazier, 5 Barn. & Ald. 64; Rex v. Inhabitants of Ringstead, 9 Barn. & C. 218 (one tract to widow during life or widowhood. After her death or remarriage, this and all other land over to ——, gives by implication an estate durante viduitate in the other land; and such is, in substance, the North Carolina case quoted above). Many old English cases on implied devises, and a free interpretation of wills generally, are gathered up in Richardson v. Noyes, 2 Mass. 56. Contra, Aspinall v. Petvin, 1 Sim. & S. 544, where the inconveniently outstanding life estate went into the residuary. Mr. Jarman thinks the rule does not apply to a will with a residuary clause. He puts, as the most frequent instance of the implied devise, the gift of an estate to the presumptive heir, to take effect at the death of a named person, amounting to a gift

implied from the words accompanying the grant of the life estate.[313]

VII. A devise needs no technical words. "I bequeath," applied to land, or "I devise," to chattels, is perfectly good. A life estate may be devised by loaning its subject. "I wish ——— to have," or "I will," and many like phrases, are used indiscriminately. Yet sometimes it will be found, by a little close attention, that one of those words which ordinarily would pass an estate in land is used in another sense: Thus, "I leave" may be meant to convey neither a fee, nor even a life estate, but simply a power of management.[314]

VIII. A devise need not be couched in such words as "I devise," "I give," "I will," "I leave," or "I bequeath," in which the testator seems knowingly to exercise his power over his own. The same effect is produced by words expressing a wish, a desire, a hope; and these words should have such effect when placed in a writing which shows on its face that it is intended only for a last will as the law will not suppose a man to put words without legal effect into such an instrument.[315] We find also, quite frequently, that an estate is given to one, apparently for his own benefit, while a clause follows wherein the testator expresses his hope that the devisee will put such estate, or some part thereof, to a certain use, or wherein he recommends such a course to the devisee, perhaps with the assurance that the person first named is to be under no compulsion, but

for life to that person, though if the gift, at such person's death, was to a stranger, the heir would take the life estate, by way of intestacy; quoting Cook v. Gerrard, 1 Saund. 183. See the like principle in White v. Green, 1 Ired. Eq. 50.

313 Mr. Jarman quotes for the implied devise in remainder: Armstrong v. Eldridge, 3 Brown, Ch. 215; Pearce v. Edmeades, 3 Younge & C. 246. The court must take care not to violate the maxim, "Voluit sed non dixit."

314 Allen v. McFarland, 150 Ill. 455, 37 N. E. 1006 ("leave to manage," etc., no estate).

315 Wood v. Camden Safe-Deposit & Trust Co., 44 N. J. Eq. 460, 14 Atl. 885. The authorities are to be found in Perry, Trusts, § 112, notes; Pom. Eq. Jur. §§ 1014, 1015, notes; and 1 Lewin, Trusts (Am. Law Series) pp. 130, 131. The leading cases are Harding v. Glyn, 1 Atk. 469 (wish, desire, recommendation); Malim v. Keighley, 2 Ves. Jr. 529; Paul v. Compton, 8 Ves. 380 (hope). The doctrine seems derived from the Roman law, where, in early times, the haeres factus, or general devisee, could not be compelled to pay legacies, and words of request, once used as request merely, became afterwards effectual. See Pennock's Appeal, 20 Pa. St. 268.

is to use his own discretion alone in the matter, the testator having "the fullest confidence" that the devisee will do what is right and proper, etc. Now, such clauses are known as "precatory trusts," and courts of equity have gone very far in enforcing them. Indeed, they have treated the wish, hope, recommendation, etc., as nothing more or less than a polite command.[316] There are, however, many cases in which the courts have refused to enforce precatory words, some times because the thing desired was too vague to enable a court to

[316] The extreme case is that of Bohon v. Barrett, 79 Ky. 378. The devise here was of all the devisor's estate to his brother, with a request, "but not as a condition," etc., "that he take charge and educate L. B.; and if she is obedient to him," etc., "and is governed by their advice, and conducts herself," etc., "and does not marry without their consent and contrary to their advice," etc., "and does not abandon their home, then I request him to expend for her benefit, in such manner," etc., "as he," etc., "may think," etc., "the sum of $10,000; but these requests are not to be legally binding on him, but I leave them entirely to his discretion." L. B. married without objection from the devisee, and her suit for the $10,000 was sustained. Burt v. Herron, 66 Pa. St. 402 (his wishes and desires constitute his will); Cary v. Cary, 2 Schoales & L. 173, 189 (desire need not be couched in mandatory language); Erickson v. Willard, 1 N. H. 217, 228; Noe v. Kern, 93 Mo. 367, 6 S. W. 239 (where the trust was enforced against the property on a devise made "in the full faith that W. F. will properly provide for," etc.); Colton v. Colton, 127 U. S. 300, 8 Sup. Ct. 1164 (where, after devising his all to his wife, testator said, "I recommend to her the care and protection of my mother and sister, and request her to make such provision for them as, in her judgment, will be best," and the trust was enforced). On the other hand, in New York, precatory trusts, like others, cannot be enforced when uncertain; hence, in Lawrence v. Cooke, 104 N. Y. 632, 11 N. E. 144, the words added to a devise, "I enjoin upon her," etc., "as she may deem expedient, and her sense of duty dictates," etc., are of no force, but to give them force would, under the New York law, as it then stood, render the devise void. See, however, the act of 1893, quoted at end of section 75. The arguments of counsel in this case contain a pretty full list of the English and American authorities down to 1887. An absolute devise to the widow is often explained by the hope or confidence that she would do right by the children, or would do by them as the testator himself would. Such words impose no trust. Durant v. Smith, 159 Mass. 229, 34 N. E. 190; Sturgis v. Paine, 146 Mass. 354, 16 N. E. 21; Taylor v. Martin (Pa. Sup.) 8 Atl. 920, where a devise in fee to A. was cut down to a life estate by a "desire," expressed later on, that the tract should, on A.'s death, go to B., is hardly a case of precatory trust. See, also, Van Duyne v. Van Duyne, 15 N. J. Eq. 503, reversing same case 4 N. J. Eq. 397.

act,[317] sometimes because there were words in the will which indicated that the testator, from his own standpoint, wished to have the devisee exert his judgment, but mainly in those cases where the request touched only such property as the devisee in fee (or a devisee whose estate becomes a fee by a general power of disposition) should leave, at his death, undisposed of. The words used are sometimes "the surplus," sometimes, "what remains unsold, or undisposed of by will," or "what is left in possession,"—all words which indicate that the first taker has an unlimited power of disposition.[318] The requests, expressions of hope, etc., in nearly all the cases, are almost always for the payment of money only; but, when addressed to a devisee of land, they affect a land title, as legacies to be paid by a devisee are in most cases a lien on the thing devised.

§ 90. When the Will Speaks—The Residuary.

The statute of wills, enacted in the reign of Henry VIII., and its early American re-enactments, treated the devise of lands as a species of conveyance, which could take effect only on such interests, present or future, as the devisor owned at the time when he made the will. A deed might, through its warranty, carry after-acquired interests, but a will could not, in its nature, contain a warranty, and was thus confined to the present state of ownership. The statute of frauds regulated the formal requisites for publishing a will, but did not affect its substance. But at present the law, both of England and America, is such that the testator may, as to his real estate, do what he could always do as to his personalty,—name the persons who at his death shall step into his shoes, those who shall take the place of his heirs, as he formerly could name those

317 Sale v. Thornberry, 86 Ky. 266, 5 S. W. 468 ("she will see to it that the interest of the children is protected").

318 Otway v. Otway (1773), noted in 2 Ves. Jr. 530, where the devisee was to give a legacy to daughters, if they, in his opinion, behaved dutifully. As a justification for not going into more detail as to the construction of this or that devise, we quote from Chitty's Chancery Digest (Ed. 1889) "Wills," pt. 6, p. 1627, though the name of the court or judge is not given: "The court deprecates the citation of authorities in cases of wills, except to lay down some general principle, or to explain some technical expression." Waring v. Currey, 22 Wkly. R. 150.

who should become his distributees. He can let his will speak as of the time of his death. But the statutes which have introduced the new rule differ in this: that some make the inclusion of after-acquired lands the rule, while others make it rather the exception.

The clause of the English will act of 1837, as reproduced in Kentucky, reads thus: "A will shall be construed, with reference to the real and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention appears by the will." This clause was enacted in North Carolina in 1844, in Kentucky in 1852, in Tennessee in 1842, in Maryland in 1849; and similar laws followed, upon the English pattern, in New Jersey, and Virginia, then including West Virginia. But Virginia and Kentucky had long preceded England, in conferring upon the testator the power to devise his after-acquired lands.[319] These, and all acts conferring such power in any form, have been construed not to apply to wills written and published before the enactment, though the testator died thereafter.[320] In North Carolina the law has been carried out most literally; a devise of "lands which I own now" being construed to include that which he bought thereafter, as the will speaks as of a time when the testator could say "I own it," but such has not been the understanding elsewhere.[321] In the states of Connecticut, Penn-

[319] Virginia, by an act of 1785, directed that any person sui juris should have the power by last will to devise all the estate which he hath, or at the time of his death shall have, in lands, etc. This act, it was held in Smith v. Edrington, 8 Cranch, 66, changed nothing in the construction of wills; and, unless it indicated an intent to charge or devise after-acquired lands, it would not have that effect. It was adopted in Kentucky in 1797, and the same view as to its effect was taken in Walton's Heirs v. Walton's Ex'x, 7 J. J. Marsh. 58: "If, from the will itself, it shall appear more reasonable to infer an intention that after-acquired land should pass by it, than that it should remain undevised, then it would pass by the will; otherwise, if" etc., "the land will descend." The phrase "which he hath, or at the time of his death shall have," has been transferred to the statutes of other states, where it is still in force, and should bear this interpretation. The will act (1 Vict. c. 26) has been often referred to. In New York the change was made by the Revised Statutes; in Pennsylvania by the will act of 1833. Florida came into line only in her Revision of 1892. Congress has never taken the trouble to change the old law in the District of Columbia.

[320] Parker v. Bogardus, 5 N. Y. 309; Williams v. Davis, 12 Ired. (N. C.) 21.

[321] In re Champion, Busb. Eq. (N. C.) 246. Contra (one judge dissenting),

sylvania, Georgia, Montana, California, the Dakotas, and Florida, though this very far-reaching language is not used, yet the law says that the will carries all the real estate owned at the time of death, unless the contrary appears,—or, what is about the same, "clearly appears."[322] In Maryland, Illinois, South Carolina, and Mississippi, the statute simply gives to any qualified person the power to "devise all real estate he then hath, or which he shall have at the time of his death," without raising any presumptions for or against the exercise of the new power. It would seem that under statutes of this kind a devise in the form of "all my land," or "all my other land," would embrace later acquisitions, but one devising "the lands which I now own" would not.[323] The New York statute—older, and not as radical as the English—reads thus: "Every will that shall be made by a testator of all his real estate, or in any other terms denoting his intent of devising all his real property, shall be construed to pass all his real estate" which he might devise at his death.[324] On the other hand, under the laws of Maine, New Hamp-

Sharpe v. Allen, 5 Lea (Tenn.) 81. In Smith v. Puryear, 3 Heisk. (Tenn.) 708, the testator, having devised to his wife his "home place," afterwards bought an additional strip to it. It was held to be included, but mainly by reason of a republication by codicil. In New Jersey the same construction prevails as in North Carolina. Garrison v. Garrison, 29 N. J. Law, 153 ("which I now own" is referred to the time of death). Of the English decisions, In re Midland Railway Co., 34 Beav. 525, turns, like one of the New Jersey cases, on a garden bought and included in a messuage "which I now own"; and it is held to pass without any republication. Contra, Hutchinson v. Barrow, 6 Hurl. & N. 583, and Cole v. Scott, 16 Sim. 259, where the context clearly shows a contrary intention.

[322] California, Civ. Code, § 1312. Dakota Civ. Code, § 719, adds that a will "devising or denoting the intent to devise all the real estate," etc., as in New York, infra. It was held in Pennsylvania, soon after the passage of the act, in Roney v. Stiltz, 5 Whart. 281, that a power to the executor to sell land includes that after acquired. The "speaking," as of one or the other time, may affect the person of the devisee, as well as the object devised. Gold v. Judson, 21 Conn. 616.

[323] Maryland, Pub. Gen. Laws, art. 93, § 321 (referred to as section 309 under the older Revision); Illinois, Rev. St. c. 148, § 1, etc. Where the residuary clause is evidently meant for personalty only, it will not embrace after-acquired land. Rea v. Twilley, 35 Md. 409. In Maryland, where lapses and invalid devises do not fall into the residuary otherwise, it is the same as to after-acquired lands. Rizer v. Perry, 58 Md. 112.

[324] Chapter of Revised Statutes on Wills, § 5. But "all my real estate in

shire, Vermont, Massachusetts, Rhode Island, Ohio, Indiana, Michigan, Wisconsin, Delaware, Alabama, Iowa, Minnesota, Nebraska, Kansas, Nevada, Washington, Wyoming, and Arizona, the will passes after-acquired lands only when the intent to do so appears in the will, or, as some of the statutes put it, when it "clearly and manifestly" appears, which is, however, pretty much the same thing, as a conclusion of law, in the eyes of the law, is always clear.[325] In Missouri the statute of wills empowers every person of full age to devise all his real estate; in Arkansas, to make a will of his real estate; and this, undoubtedly, is meant to cover all he may own at his death.[326]

Considering that a deed always speaks as of its date, while a will may, and in many states is presumed always to, speak as of a later and still uncertain date, we see that a general or residuary devise is subject to other rules of construction than a sweeping clause in a deed, such as those found in deeds of assignment for the benefit of creditors. When the intent can be said to appear, under one form of the statute, to exclude, or under the other, to include, later acquisitions, can be learned only by example, not by rule.[327]

—— county" would pass only what he owns in that county at the time. Pond v. Bergh, 10 Paige, 140. The effect of the statute is not near as sweeping as that of the English. The intent to give "all" must appear. Lynes v. Townsend, 33 N. Y. 558; McNaughton v. McNaughton, 34 N. Y. 201. For the sweeping effect which the statute gives to residuary clauses, see Byrnes v. Baer, 86 N. Y. 210, in which after-acquired lands passed under the item of "all the rest, residue, and remainder of my estate."

[325] Brimmer v. Schier, 1 Cush. 118 ("manifestly and clearly" no meaning). It seems to be the opinion in Minnesota that the will speaks, even as to realty, as of the day of death; but that the rule cannot be applied to such a wholly unexpected event as the law changing the meaning of the testator's words. In Re Swenson's Estate, 55 Minn. 300, 56 N. W. 1115, the testator had devised land to "my heirs," meaning his brothers and sisters. Before he died, the legislature made the wife his heir. Held, that the former took the devise.

[326] The Missouri decisions seem to put the affirmative on the devisee, as in Hale v. Audsley, 122 Mo. 316, 26 S. W. 963, and cases there quoted.

[327] The question runs sometimes into that of lapse. Thus, in Re Pearson's Estate, 99 Cal. 30, 33 Pac. 751, the testator had in one clause given a part of a large lot to A. & B., and then devised the lot, "except that devised to A. & B.," to C. A. and B. dying without issue before the testator, the question whether the whole lot should go to C. was treated as relating to the time of which the will speaks, and decided against him. In Hale v. Audsley, supra,

The general devise is most frequently joined with a general bequest of the personalty,—"all my estate, real, personal, or mixed," "all my worldly estate," or words of like effect. At other times, the personalty having been separately disposed of, there follows a general devise by itself, in such words as "all my lands," or "all my real estate." In like manner, a residuary devise may be coupled with a residuary bequest ("all the residue of my estate, real and personal"), or it may stand separately.[328]

It often happens that the testator gives either his lands generally, or the residue of his lands, in undivided shares, say one-third or one-fourth to each of his children, or he distributes it in duration, giving a life estate to one person, and successive remainders to others, or divides both by shares and by successive estates; and he may then conclude with another residuary clause, which will not only include such interests as have been omitted or overlooked in the first distribution of the lands generally, or of the residuary lands, but also any interests which may lapse, either by the illegality of the devise, or by the death of beneficiaries before that of the testator, or by death or failure of issue among the beneficiaries after the will takes effect, preventing the full operation of its provisions.[329]

The law dislikes and discourages partial intestacy. We have given an instance in the "life estate by implication." But the reasons for this dislike are strongest when there is a residuary clause by which a testator avows his unwillingness to die intestate as to any part of his disposable estate. The courts always lean towards giving such a clause a broader, rather than a narrower, construction.[330] It carries not only all those lands or hereditaments which are not

the testator having given his daughter his one-third interest in a named tract, it was held that his after-acquired interest in the tract did not inure to her.

[328] The distinction is important, as will be shown when we come to the incidence of debts and legacies.

[329] Allen v. White, 97 Mass. 504 (though the first clause said "real estate," the second, "all estate," takes in lapses). Riker v. Cornwell, 113 N. Y. 115, 20 N. E. 602 (takes in whatever may fall in by lapse, invalid disposition, or other accident).

[330] Lamb v. Lamb, 131 N. Y. 227, 30 N. E. 133; O'Toole v. Browne, 3 El & Bl. 572; Floyd v. Carow, 88 N. Y. 560 (the clause is not restrained, because the will does not show that some interest was within the testator's mind). And see, further, above in section on "Lapse."

separately devised before; but also such interests or estates in duration, which are not reached by special devises, in the way of remainders, possibilities of reverter, or intermediate interests, whether for life or for years, which in any way remain, after what has been "carved out." The phrase "all my other lands" is, perhaps, not so apt towards this end as "all the residue of my real estate"; but the word "lands" comprises all remainders and reversions, and will pass them in whatever way they arise.[331]

No technical words are necessary to constitute a residuary devise. Thus, to "give the surplus," though the word is more fitted to designate the mass of personalty after the payment of debts and charges, will pass the residuary lands.[332] When the residuary itself lapses, it must, of course, go to the heirs. It does not follow that a share of the residuary or mass should go thus in case of lapse, when the several takers are grouped without assigning to each his fraction. In fact, there is no reason why a devise of "my estate to John, James, and William" should be dealt with otherwise than a similar devise of a lot or farm, though there has been an attempt to distinguish between the two cases.[333]

There is a distinction between a specific and a general residuary. The former results, when the words of the will show a clear intent that all the previously named devises shall be taken out, so that the residuary shall be of a certain size, or quantity, which is before the testator's mind. The latter is the more usual residuary clause, often strengthened by the visible efforts of the testator to guard against intestacy,—e. g. when, having devised his estate to charities, he fears that the heirs or next of kin will try to break the devises for uncertainty, or under the mortmain acts, and he gives the fullest residuary devise to friends on whom he can fully rely.[334]

[331] Smith v. Smith, 141 N. Y. 29, 35 N. E. 1075; Pond v. Bergh, 10 Paige, 140 ("lands" embraces remainders, failing for want of persons to take them). Cruikshank v. Home for the Friendless, 113 N. Y. 337, 21 N. E. 64.

[332] Byrnes v. Baer, 86 N. Y. 210; Chandler's Appeal, 34 Wis. 505.

[333] Warner's Appeal, 39 Conn. 253; Talcott v. Talcott, Id. 186; Stedman v. Priest, 103 Mass. 293; Springer v. Congleton, 30 Ga. 976.

[334] "The rest of my estate not herein disposed of" was held a specific, not a general, residuary, in Greene v. Dennis, 6 Conn. 293 (quoted 4 Kent, Comm. 542), such as would not absorb land given by a void disposition. Kerr v. Dougherty, 79 N. Y. 327 (specific); Riker v. Cornwell, 113 N. Y. 115, 124, 20 N.

§ 91. Debts and Legacies.

The testator's personal property is the primary—that is, the first—fund out of which his debts must be paid; and this though the debts have been secured by mortgage or other lien in his lifetime.[335] Only where the testator has, by either purchase or descent, become the owner of incumbered land, without rendering himself personally bound for the sum secured, must the land bear its burden in the first instance.[336] What is said of debts may, in general, be also said of pecuniary legacies. But, in either case, the rule must yield when the testator by his will directs that either a debt or a legacy shall be paid out of the lands in general, or out of some particular tract, or by the person to whom such land is devised.[337] But it is sometimes not so easy to determine whether the will does or does not throw the burden of debts or of legacies on the lands or on any particular part thereof. The well-known rule on the order in which the deficit in an estate is to be met is this: First, personalty not bequeathed must be taken; next, personalty included in a general or residuary bequest; third, lands not devised; fourth, lands which are devised by way of residuary; fifth, specific legacies; last, lands specifically devised. A pecuniary legacy (unless it is made demonstrative, i. e. charged on a certain fund) can never come into conflict with either a specific bequest or specific devise;[338] but only descended land can

E. 602 (general). The differences are explained in Springett v. Jenings, 6 Ch. App. 333.

[335] Duke of Ancaster v. Mayer, 1 Brown, Ch. 454, 1 White & T. Lead. Cas. Eq. p. 505. The syllabus reads: "Personal estate, not specifically bequeathed, is primarily liable to the payment of debts of a testator, unless it be exempted by express words or necessary implication."

[336] A fortiori, judgments, though they are a lien on land, must be paid out of the personalty. Hoover v. Hoover, 5 Pa. St. 351; Mason's Appeal, 89 Pa. St. 402.

[337] Taylor v. Dodd, 58 N. Y. 335; Kelsey v. Western, 2 N. Y. 500. The charging of legacies on land is made a question of intent. Hogan v. Kavanaugh, 138 N. Y. 417, 34 N. E. 292. In Johnson v. Poulson, 32 N. J. Eq. 390, the intent was found not to charge the land.

[338] In re Bennett's Estate, 148 Pa. St. 139, 23 Atl. 1108 (lands devised specifically cannot be taken, though personalty deficient); In re Duvall's Estate, 146 Pa. St. 176, 23 Atl. 231 (by investing the personalty after will made, or spending it, the testator adeems the legacies).

be affected, or such land as is included in the residuary, and this only upon the ground that the very words which denote the gift of the land as residuary charge it with the legacy. The testator says: Whatever is left of my estate, real or personal, after debts and legacies are paid, I give to the residuary devisee.[339] The inference is much stronger when the lands not specifically devised and the personalty not specifically bequeathed are thrown together into one mass, as it then becomes clear that every part of that mass shall be liable to those charges to which any other part is subject.[340] Hence, a general devise of "all my lands" stands upon very different grounds. Such a devise is, for this purpose, specific. If I have three houses, Nos. 1, 2, and 3, a devise of "all my lands" is the same as a devise of the three houses by number, and would be defeated if one of the three houses had to be sold in order to raise the money with which to pay a pecuniary bequest.[341] In some cases, legacies have been thrown upon the residuary lands, not because the personalty was insufficient, but because its totality had been given in such precise words as to show that the payment of legacies or even of debts out of the same would be contrary to the testator's intention.[342]

Where the executor is given a power of sale over the lands, it is, unless a necessity for such a course otherwise appears on the face of the will, a strong indication that the land is at least a secondary, if not a primary, fund for the payment of legacies.[343] On the other hand, where land is ordered by the will to be sold, it does not thereby become the first fund to pay debts, or more liable for the satis-

[339] Reid v. Corrigan, 143 Ill. 402, 32 N. E. 387 (residue of real estate applied); Mirehouse v. Scaife, 2 Mylne & C. 695 (assets marshaled in favor of pecuniary legacy against residuary devise); Funk v. Eggleston, 92 Ill. 515 ("after payment of debts and legacies" is considered both charge and lien); American Cannel Coal Co. v. Clemens, 132 Ind. 163, 31 N. E. 786 (legacies given first, residue is what is left after paying them); In re Blake's Estate, 134 Pa. St. 240, 19 Atl. 850; same point, Lewis v. Darling, 16 How. 1.

[340] Corwine v. Corwine, 24 N. J. Eq. 579 (all in one mass, the general rule stated as above); Bench v. Biles, 4 Madd. 187; First Baptist Church v. Syms, 51 N. J. Eq. 363, 28 Atl. 461; Scott v. Stebbins, 91 N. Y. 608.

[341] In re Jamieson (R. I.) 28 Atl. 333.

[342] Reid v. Corrigan, 143 Ill. 402, 32 N. E. 387 ("all my personal property" was given to a legatee, clearly showing that it was to be undiminished). Compare In re Jamieson (R. I.) 28 Atl. 333.

[343] Hoyt v. Hoyt, 85 N. Y. 142; Le Fevre v. Toole, 84 N. Y. 95.

faction of legacies, unless an intent appears to convert it into personalty for all purposes, or for that purpose. When the testator directs his land (or some one tract) to be sold, and the proceeds to be paid over to one or more devisees, he does not thereby lower the privileged position of such land.[344] A provision that the lands in the residuary are to be divided after the death of the testator, or otherwise dealt with, does not exclude such legacies as would fall upon it otherwise, unless the language should clearly indicate that a division in kind alone was meant.[345]

The residuary, first of personalty, then of lands, is a primary fund for the payment of debts, even for those which are secured by mortgage upon other lands.[346] Upon the principle that the whole will must be construed together, a general or even a specific devise of land has sometimes been charged with a legacy, when the will upon its face absolutely exhausts the personal estate which the testator has or may have, and the bequest, unless it can be so charged, would be nugatory.[347]

When the residuary devise of land goes to several, including a legatee whose bequest is chargeable upon it, it is taken out first, so as to throw a proper share thereof on that part of the devise which goes to such legatee.[348]

Note on the Use of Extrinsic Evidence in the Interpretation of Wills.

A devisee takes his title under a written instrument, the purport of which cannot be changed by oral evidence, or, in fact, by any evidence, oral or written. There are, however, many cases in which such evidence must be admitted to show what the thing is which the testator meant to give, e. g. what the boundaries of a tract are which he denotes by general words, such as "my home place"; and who the person is whom he denotes otherwise than by a full name. And there are many cases of ambiguity which may be cleared up by

344 In re Pyott's Estate, 160 Pa. St. 441, 28 Atl. 921. And a direction to invest proceeds of lands protects it from legacies. Bevan v. Cooper, 72 N. Y. 317.

345 Lapham v. Clapp, 10 R. I. 543.

346 Gould v. Winthrop, 5 R. I. 319.

347 Goddard v. Pomeroy, 36 Barb. 546 (a case often afterwards doubted and distinguished); Kalbfleisch v. Kalbfleisch, 67 N. Y. 354 (context of whole will may show the precedence of legacies); Carper v. Crowl, 149 Ill. 465, 36 N. E. 1040.

348 Kinkele v. Wilson (Com. Pl.) 29 N. Y. Supp 27.

showing the circumstances which surrounded the testator when he made his will. Like doubts, requiring like outside proof, may arise in construing deeds, to which reference has been made in the chapter on "Boundary and Description," sections on Certainty and on Ambiguity, and in the chapter on "Title by Private Grant," section 56; but, for obvious reasons, the difficulty arises much oftener in the interpretation of wills than of deeds. Having transcribed in notes 89 and 90, chapter 2, § 7, the fifth and seventh of Vice Chancellor Wigram's propositions, we here subjoin the other five.

I. A testator is always presumed to use the words in which he expresses himself according to their strict and primary acceptation, unless from the context of the will it appears that he has used them in a different sense; in which case the sense in which he appears to have used them will be the sense in which they are to be construed.

II. Where there is nothing in the context of a will from which it is apparent that a testator has used the words in which he has expressed himself in any other than their strict and primary sense,* and where his words, so interpreted, are sensible with reference to extrinsic circumstances, it is an inflexible rule of construction that the words of the will shall be interpreted in their strict and primary sense, and in no other, although they may be capable of some other and secondary interpretation, and although the most conclusive evidence of intention to use them in such popular or secondary sense be tendered.

III. (like II. to *) but his words so interpreted are insensible with reference to extrinsic circumstances, a court of law may look into the extrinsic circumstances of the case, to see whether the meaning of the words be sensible in any popular or secondary sense, of which, with reference to these circumstances, they are capable.

IV. Where the characters in which a will is written are difficult to be deciphered, or the language of the will is not understood by the court, the evidence of persons skilled in deciphering writing, or who understand the language in which the will is written, is admissible to declare what the characters are, or to inform the court of the proper meaning of the words.

VI. Where the words of a will, aided by evidence of the material facts of the case, are insufficient to determine the testator's meaning, no evidence will be admissible to prove what the testator intended, and the will (except in certain special cases; see proposition VII.) will be void for uncertainty.

Mr. Wigram proceeds to illustrate his propositions. We shall give an abstract of the cases as far as they can bear on devises of real estate.

On the first proposition. First part, Hicks v. Sallitt, 3 De Gex, M. & G. 782; Grey v. Pearson, 6 H. L. Cas. 106. On the second part, Mostyn v. Mostyn, 5 H. L. Cas. 155; Doe v. Earles, 15 Mees. & W. 450. Meaning of "relations," Green v. Howard, 1 Brown, Ch. 31; "cousins," Stoddart v. Nelson, 6 De Gex, M. & G. 68; "family," In re Terry's Will, 19 Beav. 580; "and her family," as including husband, McLeroth v. Bacon, 5 Ves. 159; "representatives" to mean "descendants," Styth v. Monro, 6 Sim. 49; or "next of kin,"

Walter v. Makin, Id. 149; "all" to mean "any," Doe v. Gallini, 5 Barn. & Adol. 621; legacy and bequest extended to lands, Whicker v. Hume, 14 Beav. 518. In Dent v. Pepys, 6 Madd. 350, in obedience to context, one set of devises was substituted for another.

On the second proposition. Cartwright v. Vawdry, 5 Ves. 530, and many other cases down to Pratt v. Mathew, 22 Beav. 328, "child" means legitimate child, unless there is absolute necessity for including an illegitimate child; but it includes a child en ventre sa mere. Clarke v. Clarke, 2 H. Bl. 399; Royle v. Hamilton, 4 Ves. 437; Crook v. Whitley, 7 De Gex, M. & G. 490. The words "son," "child," "grandchild," to be taken literally, unless the will would thereby become insensible. Beaumont v. Fell, 2 P. Wms. 140, where Gertrude Yardley was given a legacy made to "Catherine Earnley," no person of the latter name being known. Contra, Delmare v. Robello, 1 Ves. Jr. 412, 3 Brown, Ch. 446 (where a bequest to the children of "my two sisters Reyne and Estrella" was not changed to Rebecca and Estrella, though Reyne had no children, being a nun, and Rebecca had); Hampshire v. Peirce, 2 Ves. Sr. 216 (legacy to four children of A., and a "further" legacy to the children of A.; evidence to restrict the latter to the four children by second husband disallowed); Strode v. Russel, 2 Vern. 621, 2 Atk. 374 (evidence not admitted that "my lands," etc., "out of settlement," were not meant to embrace a reversion of a settled estate); Doe v. Oxenden, 3 Taunt. 147 ("my estate of Ashton," evidence that testator had an estate, of which part only was at Ashton, which he called his "Ashton Estate," and of which he kept an account by that name, held insufficient to carry the part not at Ashton), affirmed in house of lords (4 Dow, 65), followed in an equally strong case (Stone v. Greening, 13 Sim. 390), where "my freehold messuage, farm, &c.," was held to exclude rigidly all parcels held on long terms intermixed with it. Contra, Anstee v. Nelms, 1 Hurl. & N. 225; Doe v. Westlake, 4 Barn. & Ald. 57, where, under a devise to "Matthew W., my brother, and to Simon W., my brother's son," evidence in favor of Simon, son of another brother, was rejected; Mounsey v. Blamire, 4 Russ. 384, stranger cannot claim a legacy "to my heir" by proving that the testatrix called him so. In Fraser v. Pigott, 1 Younge, 354, where bequests were made to "children of William and John," whether born in wedlock or not, and "a residue to their children equally," the illegitimate children of the son, who had also legitimate children, should take no part with the latter. Doe v. Bower, 3 Barn. & Adol. 453, devise of "messuages at, in, or near street called 'Sing Hill,' which I lately purchased from N.'s trustees,"—there being four houses on a closely-adjoining street, and two at a distance of 370 yards from Sing Hill, but bought from N.'s trustees,—the two were excluded. In Wilson v. Squire, 1 Younge & C. Ch. 654, bequests to an orphan society "in the City Road," in a name not borne by any, given to the society, among two claimants of different names, having its place of working in the City Road. In Richardson v. Watson, 4 Barn. & Adol. 799, evidence was rejected by which two closes or inclosures were to pass under the devise of a close. In Illingworth v. Cooke, 9 Hare, 37, a gift to "all my grandchildren, with the

exception of one," was sustained, though the one was not named. Attorney General v. Grote, 2 Russ. & M. 699, is quoted for its strong language on the proposition. The words of Vice Chancellor Knight Bruce in Bird v. Luckie, 8 Hare, 306, are also quoted for it: "No man is bound to make a will in such a manner as to deserve approbation from the prudent, the wise, or the good. A testator is permitted to be capricious, and to conceal the circumstances and the motives by which he has been actuated." Contra,—i. e. for allowing words to be deflected from their natural sense,—he quotes Druce v. Denison, 6 Ves. 385, approved in 2 Sugd. Powers, p. 349. The cases quoted as to the facts which will refer the words "in default of issue," or "in the event of dying without issue," to the first taker's death, beginning with Wellington v. Wellington, 4 Burrows, 2165 ("Item. In default of issue of my own body, I give," etc.; the will being that of an unmarried man),—are now in most of our states of little importance, as their laws, like the English will act of 1837, regularly give this meaning to these words.

On his third proposition, Mr. Wigram, after noting that the word "insensible," used by him, is a technical word, used in many of the reported cases, refers to Wilkinson v. Adam, 1 Ves. & B. 422 (which is rather the other way); Tytler v. Dalrymple, 2 Mer. 419; and other cases down to Pratt v. Mathew, 22 Beav. 328 ("child" was applied to illegitimate offspring, there being no other); Steede v. Berrier, 1 Freem. 292, 477 (where "son" had to mean a more distant descendant); Napier v. Napier, 1 Sim. 28 ("my estate," when there was only estate subject to the testator's power); Gill v. Shelley, 2 Russ. & M. 336 (the defendant was the wife of the poet Shelley), (where "the children of M. G." were made to include a child born before marriage, as M. G. was known to have only one child born in wedlock). The following American cases may be quoted under this head: Dannelli v. Dannelli's Adm'r, 4 Bush, 52 (under a devise to "my brother G.'s daughter," his only daughter will take, though her legitimacy is not established); Warner v. Miltenberger's Lessee, 21 Md. 269 (it appeared by facts outside that "lot" meant a large tract, not a town lot). A charitable corporation can take by a designation which identifies it, though not its corporate name, on proof that it alone answers the description. Cromie's Heirs v. Louisville Orphans' Home Soc., 3 Bush, 365; 1 Greenl. Ev. § 289; Minot v. Boston Asylum & Farm School, 7 Metc. (Mass.) 416; in fact, there is little, if any, dispute on this point.

On his fourth proposition, he quotes, as to "deciphering," Masters v. Masters, 1 P. Wms. 421; Norman v. Morrell, 4 Ves. 769; Goblet v. Beechey, 2 Russ. & M. 624 (which finally went against the extrinsic evidence). And in Remon v. Hayward, 2 Adol. & El. 666, note a, the court decided the correct reading, and refused to let it go to the jury. In Langston v. Langston, 2 Clark & F. 240, Lord Brougham, in the house of lords, said that he had looked at the rough draft of a will, to get at the sense of an obscure passage. He admitted that he had no right as a judge to do so; but he might from the engrossed and executed will infer what mistake had been made in copying. For the right to have foreign or technical words explained by experts, he

quotes Attorney General v. Cast-Plate Glass Co., 1 Anstr. 39; Goblet v. Beechey, supra; Richardson v. Watson, 4 Barn. & Adol. 787; and cases on royal charters, mining, and other business contracts. Doe v. Hiscocks, 5 Mees. & W. 363, allows proof that certain persons were called by the testator by nicknames. Kell v. Charmer, 23 Beav. 195, that he used a certain cipher for sums of money. In Goblet v. Beechey, which is reported in full in the appendix, the word or part of word "mod," with a dot or small mark behind it, in the will of a sculptor, was unintelligible; and, while the lower judge (Vice Chancellor Shadwell) gave weight to the testimony of experts as to a sculptor's tools and models, even he wholly rejected the testimony of an attesting witness who deposed that she read the will out to the testator, and, asking him for the meaning of "mod," was told he meant "models." To admit such testimony, said the vice chancellor, would be to repeal the statute of frauds.

Of the fifth proposition (which is involved in the second and third) he puts as example 1, where the person or thing intended is the point of contention, the court is simply to declare what person or thing is described in the will. It applies to all cases where the person or thing is correctly denoted, but evidence is needed to identify it. Example 2 is more difficult. The description in the will is incorrect; then "evidence that a subject having such marks upon it exists" is admitted, that the court may determine (which it cannot do without evidence) whether such subject, though incorrectly described, was intended. Thus, a nickname is a sufficient description of the legatee or devisee (Baylis v. Attorney General, 2 Atk. 239; Doe v. Earl of Jersey, 3 Barn. & C. 870); or a name gained by reputation (Queen's College v. Sutton, 12 Sim. 521); or a partially false description, as "my freehold houses," when he has only leasehold houses (Doe v. Lord Cranstoun, 7 Mees. & W. 1); but not where the devisee has knowingly assumed a false character (Kennell v. Abbott, 4 Ves. 802). Example 3. "A knowledge of the circumstances by which a testator was surrounded at the time of making his will, the situation in which he stood with respect to the objects to which his will refers, and, generally, a knowledge of the circumstances of the testator, his family and affairs, may be necessary for the same purpose." Thus, he says a testator having none but an illegitimate child must mean such when he says "my child"; being acquainted with only one of two persons of like name, must mean him in a devise by that name,—and quotes Doe v. Langton, 2 Barn. & Adol. 680, where the history of the family of a manor and of a new purchase of lands was admitted to show whether the latter were meant by the "lands, etc., thereunto belonging," an often unmeaning phrase. The court in such cases must place itself in the situation of the testator who made it. Example 4, not so clear as the preceding, is where the quantity of interest is in dispute. Lowe v. Lord Huntingtower, 4 Russ. 532 (opinion of king's bench judges on submission by chancellor), facts as to age, number of children, etc., were admitted to determine whether the testator meant to devise a fee simple. In Gall v. Esdaile, 8 Bing. 323, testator's having no lands beyond those specifically

devised was admitted for the same purpose. The proposition may be applied to all written instruments. Goodinge v. Goodinge, 1 Ves. Sr. 231; Jeacock v. Falkener, 1 Brown, Ch. 295; Mackell v. Winter, 3 Ves. 540; Blundell v. Gladstone, 11 Sim. 486; Lane v. Earl Stanhope, 6 Term R. 345; Doe v. Huthwaite, 3 Barn. & Ald. 632; Goodright v. Marquis of Downshire, 2 Bos. & P. 608; Wild's Case, 6 Coke, 16; Smith v. Doe, 2 Brod. & B. 553 (under a deed of settlement). In the will case of Doe v. Martin, 1 Nev. & M. 524, it is said: "Facts and circumstances relating to the subject of the devise are admissible; such as possession by the testator, the mode of acquiring, etc., and the state of the testator's property." Such evidence can never be received to alter or to control the sense. Guy v. Sharp, 1 Mylne & K. 602. Of the American cases for this proposition, the most interesting is perhaps that of Hinckley v. Thatcher, 139 Mass. 477, 1 N. E. 840, where the testator left the bulk of his estate in equal parts to the agents of home and foreign missions to aid in propagating the religion of Jesus Christ. There being many missionary bodies answering the description, the court heard proof as to the religious conduct (not as to the opinions) of the testator, and found him "confirmed" in the Episcopal Church, while usually attending the Congregational worship. (And see cases quoted on the admissibility of such proof from Massachusetts, Maine, New Hampshire, Vermont, and Connecticut.) Proof was also considered that he was only acquainted with the Congregational mission societies, and the residue was given to the A. B. C. F. M. and the Massachusetts Home Missionary Society. In Gilmer v. Stone, 120 U. S. 586, 7 Sup. Ct. 689, a devise of the estate, one-half to the home, one-half to the foreign missions, was given the societies for these purposes of the Presbyterian Church in the United States, to which church the testator belonged; the court quoting from Wigram that the reader of an instrument ought to have the same light as the writer had. In House of Mercy v. Institution of Mercy, 3 Bush, 365, the court also went into the testator's religious views and feelings. See, to the contrary, Shore v. Wilson (House of Lords) 9 Clark & F. 355, on a deed founding a charity. In Tilton v. American Bible Soc., 60 N. H. 377, a legacy to the "Bible Society" was given to the one to which contributions were taken up at the church to which the testator belonged. As to conditions and quantity of the estate being illustrated by outside facts,—the age of testator and devisee, etc.,—see Washbon v. Cope, 67 Hun, 272, 22 N. Y. Supp. 241. In Re Miner, 72 Hun, 568, 25 N. Y. Supp. 537, in order to construe a devise with such liberality as befits a devise to children, proof was admitted that the beneficiaries, though not of the testator's blood, had been raised by him as his children. In Sullivan v. Parker, 113 N. C. 301, 18 S. E. 347, extrinsic evidence was let in to show that the children spoken of by the will embraced illegitimates.

On his sixth proposition, Mr. Wigram quotes Lord Brougham's remarks in Doe v. Perratt (House of Lords) 6 Man. & G. 359, that a devise should not, without absolute necessity, be held void for uncertainty: "The books are full of cases where every shift, if I may so speak, has been resorted to, rather than hold the gift void for uncertainty." Lord Cowper in Strode v. Russel, 2 Vern.

620, on the supposed authority of Cheyney's Case, 5 Coke, 68, said that, where the words of the will stood in equilibrio, evidence should in all cases be read to explain them. To like effect, Hampshire v. Peirce, 2 Ves. Sr. 216; but this is disapproved by Lord Hardwicke in Ulrich v. Litchfield, 2 Atk. 374. If the testator's words, aided by the light of surrounding circumstances, do not express an intention ascribed to him, evidence to make out that intention is inadmissible to fill a blank. Castledon v. Turner, 3 Atk. 257; to insert a devise omitted by mistake, Lady Newburgh's Case, 5 Madd. 364; to prove what was intended by an unintelligible word, Goblet v. Beechey, supra; to prove a thing different from that named was intended, Selwood v. Mildmay, 3 Ves. 306; to change the person described, Delmare v. Rohello and Beaumont v. Fell, supra; to reconcile conflicting clauses, Ulrich v. Litchfield, 2 Atk. 374; to show to which of two antecedents a pronoun refers, Lord Walpole v, Earl of Cholmondeley, 7 Term R. 138; to explain or alter the estate, Cheyney's Case, supra; to construe the will from the instructions given, Bernasconi v. Atkinson, 10 Hare, 348; to show what is meant by "relations," Green v. Howard, 1 Brown, Ch. 31; to turn words of limitation into words of purchase, Brett v. Rigden, Plow. 340; and generally to prove intention, Doe v. Kett, 4 Term R. 601 (devisee dead); Kirk v. Eddowes, 3 Hare, 509. Where a will, after devising his estate in one way, disposed of it otherwise "if certain contingent property and effects in expectancy should fall in and become vested in my children," and there were no such contingent interests, the court in King v. Badeley, 3 Mylne & K. 417, would not admit evidence to show that the testator expected some incidents to happen which did happen. So, also, Preedy v. Holtom, 4 Adol. & El. 76. Mr. Wigram concludes that extrinsic evidence to prove intention cannot be admitted in the case supposed by Lord Cowper, and quotes Lords Alvanley and Eldon to the position that, to act upon extrinsic facts, their effect must be "irresistible to the judge's mind,"—"individual belief" must not govern, but "judicial persuasion."

The seventh proposition brings up the broad subject of latent and patent ambiguities. He quotes first a case of Reynolds v. Whelan, 16 Law J. Ch. 434, where a testator had in his employ on a farm two men of the name William Reynolds, and the question arose for which of two a legacy "to William Reynolds, another of my farming men," was intended. Declarations in favor of "Old Will," made to a witness, were admitted. In Selwood v. Mildmay, 3 Ves. 306, the testator having, in a will dated in 1796, left to his wife a sum in the 4 per cents., when he owned none,—having sold them out in 1792, and bought long annuities with the proceeds,—the mistake was corrected on the testimony of the draftsman that he had copied the bequest from an old will, and had not been informed by testator of the conversion. This decision is justly drawn in question by Vice Chancellor Wigram. In Doe v. Huthwaite, 3 Barn. & Ald. 632, land was devised in remainder to "S. H., second son of I. H., for life, with remainder to his sons and daughters in tail, and, in default, etc., to I. H., third son," etc. In fact, I. H. was the second son, S. H. the third son, of I. H., the elder. Neither claimant being rightly described, the jury

was allowed to hear evidence on the state of the family and other circumstances, and to decide thereon whether S. H. or the second son was meant to take first. In Cheyney's Case, 5 Coke, 68, the testator, having two sons, both baptized John, the elder having been long absent, and thought to be dead, devised his land generally to his son John. The younger was allowed to prove the father's intent by witnesses. No harm, it was said, can arise, as a purchaser should "inquire which John the testator intended." Followed by dictum in Counden v. Clerke, Hob. 32; and in Jones v. Newman, 1 Wm. Bl. 60, on a devise to John Cluer, there being two of that name, father and son, evidence was held admissible to show that the son was meant. In Thomas v. Thomas, 6 Term R. 671, a devise was made "to my granddaughter, M. T., at L., in M."; there was a granddaughter named E. E. at that place, and one M. T., a great granddaughter, lived elsewhere. Evidence on behalf of the former was admitted, with the approval of Lord Kenyon and Lawrence J. (as neither M. T. nor E. E. answered the description) that the will was read to the testator, and that he noticed the mistake, but thought the statement of the residence would set it right; but the jury, wiser than the judges, disbelieved the parol evidence. In Price v. Page, 4 Ves. 680, a legacy was given to —— Price, son of —— Price. The only claimant was allowed to prove, not only his relation to the testator, but also the remark of the latter that he would leave a legacy to this party. In Doe v. Westlake, supra, declarations of the testator as to which of two men of the same name was meant were ruled out only because the will itself seemed to identify one. In Still v. Hoste, 6 Madd. 192, the draftsman was allowed to testify that a bequest to "Sophia S., daughter of Peter S.," whose only two daughters were Selma and Mary, was intended for Selma. In Miller v. Travers, before the vice chancellor (1830), the devise was of all freehold estates, etc., in the county of Limerick and in the city of Limerick. The testator owned some real estate in the city, but none in the county of Limerick; but a good deal in the county of Clare. An issue was directed to try whether the latter was intended. Vice Chancellor Wigram remarks that the cases decided down to 1831, the date of his first edition (we have omitted some), which discuss direct proof of intention, are not easily reconciled; and he is right. He properly disapproves some of these decisions as upsetting the statute of frauds, which clearly means that the writing which it requires shall of itself express the intention of the testator (pl. 158), and he says (pl. 168) that in these decisions "a general principle has been sacrificed to meet the hardship of particular cases." Miller v. Travers was, however, reversed on appeal (8 Bing. 244) by a strong court (chancellor, chief justice of C. B., and chief baron). The opinion shows that only a latent ambiguity can be helped out, and that the words "in the county of Limerick" have nothing ambiguous in them. Even the extrinsic evidence that there was no property in that county produces no ambiguity. Most of the older cases are reviewed, including some not mentioned above. A blank for the devisee, according to one of Lord Bacon's rules, referred to in the next following case, makes a patent ambiguity, and cannot be "holpen out." It indicates that the

testator had not made up his mind when the will was written. In Doe v. Needs, 2 Mees. & W. 129, there was a devise to George Gord, son of George Gord; one to George Gord, son of John Gord; a third to George Gord, son of Gord. The court of exchequer held that the mention of the two Georges did not raise a patent ambiguity, and allowed the testator's declarations to be proved, that the third devise should go to George, son of George. The description fitted either of them equally. Doe v. Morgan, 1 Cromp. & M. 235, was said to be fully in point. Doe v. Hiscocks, 5 Mees. & W. 363, arose from a devise to "John H., eldest son of said John H.," where the eldest son's name was Simon, and John was a younger son, but eldest by a second wife. The judge at nisi prius having admitted evidence of the testator's instructions, the court of exchequer granted a new trial, holding that only the surrounding circumstances could be proved, and if these were insufficient to solve the doubts the heir at law must prevail, the devise being void for uncertainty. In Bennett v. Marshall, 2 Kay & J. 740, the devise was to "my second cousin, William Marshall." The testator had two first cousins once removed,—one, William Marshall, simpliciter; the other, William J. R. B. Marshall. The court (Vice Chancellor Wood), upon parol evidence of intention, decided for the latter. Mr. Wigram dislikes the decision. Bradshaw v. Bradshaw, 2 Younge & C. 72, is a very similar case.

Wigram's little book, from its first appearance in 1831, became a classic, and his own views are quoted as of the highest authority. On his last and most important proposition, long after his death, a case came before the house of lords (Charter v. Charter, L. R. 7 H. L. 364) where the testator had a son, William Forster Charter, always called William, who lived away from home, and a son named Charles, living in the family. A devise and the execution of the estate were given to Forster, and he was to pay a yearly sum to the widow "as long as he should live in the house." Evidence of intention was given in favor of the latter. Was it admissible? Unfortunately, on this question, the law lords present were divided, two against two; and the question in England is still open. Proof of the testator's expressions of intent has been more consistently ruled out in the United States; e. g. Wright v. Hicks, 12 Ga. 155, 15 Ga. 160; Magee v. McNiel, 90 Am. Dec. 354; Couch v. Eastham, 27 W. Va. 796. And the meaning of ambiguous words cannot be shown by the draftsman (McAllister v. Tate, 11 Rich. 509); nor by conversations of the testator (Jones v. McKee, 3 Pa. St. 496). It is hardly necessary to refer to cases like McCamphell v. McCamphell, 5 Litt. (Ky.) 92, or Stoner & Barr's Appeal, 2 Pa. St. 428, where the conversations offered in proof plainly contradicted the will. The American courts have also been slower, as between two objects defectively named in a devise, to hold that the description applies equally to both. House of Mercy v. Institution of Mercy, 3 Bush, 365. But where it did so apply, e. g. where a father in his will (Brownfield v. Brownfield, 12 Pa. St. 136) ran the share of one son "easterly to a post corner," and it appeared that there were two such corners, evidence of his affection towards the son was admitted with a view of running the line to the further

corner. In Hill v. Felton, 47 Ga. 455, the instructions to the scrivener were not admitted, upon the ground that the extrinsic circumstances shown had not raised a latent ambiguity. To like effect is Barnes v. Simms, 5 Ired. Eq. 392. That the testator did not own all of the ground covered by a lawful, though informal, description, as in Bradley v. Rees, 113 Ill. 327, is no ground for rejecting it, and introduces no ambiguity. In a very old American case (Shermer v. Shermer's Ex'rs, 1 Wash. Va. 266), declarations of the testator were admitted that he intended his wife's family to have half his estate, to make her nonexecution of a power of disposal given to her over such moiety inure to her heirs; but the case would hardly be followed now, as there was no ambiguity, either latent or patent.

In modern times the courts have admitted the evidence of outside facts to elucidate the testator's intent on one question more freely than on others, namely, whether money legacies are or are not to be paid out of devised land. These facts are the amount of realty and of personalty owned at the time when the will was published, and the conversion of land into personalty, or personalty into land, after publication, showing the state of the property at the testator's death. Perhaps the earliest of these cases is Canfield v. Bostwick, 21 Conn. 550. In Scott v. Stebbins, 91 N. Y. 608, the legacy being to a son, and a conversion made after the will into land rendering the personalty insufficient, an intent not to redeem the legacy was inferred; and it had to be charged on land, which, of course, could not have been specifically devised. The will being made on the day of testator's death, in McCorn v. McCorn, 100 N. Y. 511, 3 N. E. 480, the legacies to wife and son were charged on the land; there being no personalty. Secus, where personalty sufficient. Wiltsie v. Shaw, 100 N. Y. 191, 3 N. E. 331. The burden of proof in such cases is on the legatee. Brill v. Wright, 112 N. Y. 129, 19 N. E. 628. And in Briggs v. Carroll, 117 N. Y. 288, 22 N. E. 1054 (on grounds rather opposed to above cases), the legacies were not to be charged on the land unless the personalty was insufficient at the time of publication. Again, in Morris v. Sickly, 133 N. Y. 456, 31 N. E. 332, it was held that the legacies were not chargeable on land which the testatrix had bought after making her will. These legacies were not to her children. Such evidence was admitted at a somewhat earlier date in the New Jersey case of Leigh v. Savidge, 14 N. J. Eq. 124, and again in Johnson v. Poulson, 32 N. J. Eq. 390. We can find nothing common to these cases but the admission of the outside facts, while the inferences drawn seem to be the most contradictory.

CHAPTER VIII.

INCUMBRANCES.

NOTE. When incumbrances are created by deed, the principles, rules, and distinctions set forth in the chapter on "Title by Grant," as to the execution, form, and delivery of deeds, and the capacity of the grantor, apply in nearly all cases, as much as to deeds made in the way of sale and conveyance. Indeed, many of the illustrations given in that chapter were taken from mortgages.

§ 92. The Mortgage.

The ordinary way, both in England and America, in which land is pledged for the payment of a loan, or for the satisfaction of any other debt, is the mortgage; that is, the owner of land executes a deed of conveyance in the same form by which he would sell it, but he adds before the testimonium clause, what is known as the defeasance,—a clause in which the debt to be secured is recited, and a proviso is added that, if this debt is paid at maturity, "this deed is

to be void, otherwise it is to remain in full force." Taken literally, the land described in the mortgage would at once become the property of the mortgagee, who might take possession at once, and might also retain it forever if the debt should not be paid ad diem, and this without regard to the value and the comparative amount of the loan or debt.[1] The mortgage may be contained in two documents: an absolute deed, made by the mortgagor and delivered to the mortgagee; and a defeasance (which would have to recite the conveyance), signed and sealed by the mortgagee, and delivered to the grantor. Such an arrangement may lead to inconvenience, mistake, or fraud; but the effect, at law, is the same as if both parts were written in one deed.[2]

Before courts of equity interfered in the matter, the deed of mortgage was enforced according to its letter. But at an early day these courts introduced two measures of relief to the mortgagor: First,

[1] Why Englishmen should have adopted the clumsy contrivance of a deed with defeasance, instead of the hypotheca of the Roman laws, known both in France and in Scotland, by which, in form as well as in effect, the land is given as a security for the debt, seems to have two reasons: First, the prohibition of interest upon loans made the hope of forfeiture the main inducement to lenders; secondly, there was no machinery among the ancient writs, nor in the feudal conception of the time, for a judicial sale, which now seems the natural way to enforce a mortgage. When the extent of lands was given by act of parliament upon statute staple or statute merchant, landholders were enabled to borrow on the security of their lands without parting with the title and title deeds; and when these securities fell into disuse it was not uncommon to mortgage only a term of years created for that purpose, or to confess judgments as securities for loans, taking a stay of execution. An interesting history of the progress of the mortgage from the strictness of the common law to the "equitable view" prevalent in his time is given by Chancellor Kent in 4 Comm. p. 136 et seq. Many states have since his day, either by judge-made law or by statute, divested the mortgage of its old features altogether, and turned it into nothing but a lien to secure a debt.

[2] "If the defeasance be executed subsequently, it will relate back to the date of the principal deed." 4 Kent, Comm. 141. See hereafter as to the necessity, as against purchasers, of recording both. Between the parties, deed and defeasance make a mortgage, though the latter is not recorded. Moors v. Albro, 129 Mass. 9. By canceling an unrecorded defeasance the deed becomes absolute. Trull v. Skinner, 17 Pick. 213. Old defeasance given up, and new one given for new and larger debt, though, according to Kent's view, above, this would only enlarge the mortgage; yet held otherwise in Falis v. Conway Mut. Fire Ins. Co., 7 Allen, 46.

the mortgagee in possession was held to an account of the rents and profits, which he had to apply to the reduction of the debt; secondly, and what is most important, the mortgagor was allowed, though the day for payment had passed, to redeem his land on or before some day, to be set for that purpose by the chancellor. When such day was named, either at the instance of the mortgagee or of the mortgagor, and the debt was not then paid, the mortgage would thenceforward, by the decree of the chancellor, stand foreclosed; that is, the mortgagee would then, in equity as well as at law, become the owner of the mortgaged land.[3]

Some of the American colonies had, during the whole of their colonial life, no courts of equity. It was so in Pennsylvania, in Massachusetts, and in Rhode Island. They dealt with mortgages in a fashion of their own, but they followed the English court of chancery in the two great points: First, that a mortgagee in possession must account for profits; secondly, that the mortgagor cannot finally lose his lands without first having his "day in court." And any covenant or agreement by the mortgagor, waiving this right beforehand, is deemed in equity to be null and void.[4]

[3] The word "foreclosure" is in modern speech, even in statutes and opinions, often applied to decretal sales of mortgaged lands; but the true old meaning of the word is the loss by the mortgagor of the right of redemption, and the consequent completion of the mortgagee's title, without any sale. In the old chancery practice there was always, in the first instance, a decree nisi; that is, when the default in payment and the amount due had been ascertained, the court would state its findings in an interlocutory decree, and proceed "that unless the amount so found should be paid within" a named time, generally six months, the equity of redemption would be foreclosed. This time having expired, the court might, and often did, extend the time further; but, when no more indulgence could be given, a final decree would follow "that the equity of redemption be and it is forever barred and foreclosed." A decree of this sort is in our days, to distinguish it from a decretal sale, called a "strict foreclosure." It is pointed out by Kent (4 Comm. 186), quoting Perine v. Dunn, 4 Johns. Ch. 140, and English precedents, that the dismissal of a bill to redeem, for failure to pay the debt within the time limited by the nisi decree, is absolute, and works a foreclosure. See, on the old practice of foreclosure, 3 Daniel, Ch. Prac. (3d Am. Ed.) pp. 2222, 2224. It is regulated by statute in the New England states. As to accounting for rents, no matter how the possession is obtained, see Anderson v. Lauterman, 27 Ohio St. 104.

[4] Story, Eq. Jur. § 1019; 4 Kent, Comm. 159. In 2 White & T. Lead. Cas.

But these two great concessions, which equity both in England and America made to the mortgagor, left the mortgagee in all other respects the owner of the land. The former owner, while in possession, was looked upon in a court of law as a mere tenant at sufferance. The mortgagee might, at any moment before the debt fell due, or, as it was called in legal phrase, "before condition broken," turn him out of possession. He might treat any dealings with the land by the mortgagor, such as a lease given after delivery of the mortgage, as mere nullities, and eject his lessee as if he was a trespasser, without even a notice to quit.[5] Upon the death of the mort-

Eq. 1069, Howard v. Harris, from 1 Vern. 193, is given on this point. See English and American notes on this and two kindred cases. Also, Newcomb v. Bonham, Id. 7, 232 (Lord Nottingham, 1681), where redemption was allowed to the heir, though the mortgagor had covenanted that, if the lands were not redeemed in his lifetime, they should never be redeemed. Here occurs the phrase "once a mortgage, always a mortgage." Seton v. Slade, 7 Ves. 273 (no agreement of the parties can alter the right of redemption); s. p., Holridge v. Gillespie, 2 Johns. Ch. 30; Skinner v. Miller, 5 Litt. (Ky.) 84; Rogan v. Walker, 1 Wis. 527; Wilcox v. Morris, 1 Murph. (N. C.) 117. For the principle that the mortgagee in possession must account, see 4 Kent, Comm. 166; Story, Eq. Jur. § 1016a; and very old cases are quoted, such as Bonithon v. Hockmore, 1 Vern. 316; French v. Baron, 2 Atk. 120, etc. As the tendency has been all along in favor of the mortgagor, it is hardly worth while to pursue this line of cases into more modern times. The details of the account, the mortgagee's liability for waste or neglect, his right to commission or compensation, the credits, if any, which he may claim for improvements, etc., belong in a treatise on mortgages, but are foreign to a work confining itself to Land Titles. On the sacredness of the right to redeem, one case stands out in contradiction to all others. It is Conway v. Alexander, 7 Cranch, 218, where, in view of great delay and but little, if any, inadequacy of price, a deed directed a trustee, to whom it made title, to convey land at once to him who had advanced the price, if the grantor should not repay it by a given day; and the conveyance accordingly made by the trustee was sustained.

[5] Keech v. Hall, Doug. 21; Moss v. Gallimore, Id. 279,—both in 2 Smith, Lead. Cas. 1, 883. In the former, the lease being given by the mortgagor after the mortgage, the lessee was treated as a trespasser; in the latter case, the lease having been given before, the mortgagee, by the deed to him, became assignee of the reversion. It was an extreme consequence of the "old view" that, even as against third persons, the mortgagee was held to be the legal owner, so that in an ejectment a mortgage made by "the common source" might be shown as an outstanding title. Lawyers who have read Samuel Warren's great novel may recollect how at the ejectment trial the defendants produce a deed from the common ancestor, mortgaging the manor for a small

gagee his fee in the land descended to his heir at law, whom a court of equity would treat as a trustee for the executor or administrator, at least to the extent of the mortgage debt. The mortgage could only be transferred by a conveyance sufficient in law to pass the title to the land; but a court of equity would treat the mortgagee's estate as a mere incident to the debt, and compel the mortgagee or his heirs to convey the land so as to subserve the collection of the note or bond by whosoever had become its owner.[6]

The mortgagor's estate being, under the old view, a mere equity, as well before as after default, it was not subject to the widow's dower. A conveyance by the mortgagor, such as a second mortgage, was by some judges thought not to come within the registry laws; and, among other consequences, resulted that most unrighteous doctrine of "tacking." That is, if the legal title gained by the first mortgagee met in the same hand with a third incumbrance that had been taken originally without notice of the intervening or second incumbrance, the owner of the first and third could "tack" one to the other, and thus "squeeze out" the second. It seems that the third incumbrance had to be a mortgage, so as to constitute him who took it a "purchaser" in good faith; and he would buy up the first charge, to unite both in his hands, so as to have "both law and equity" for him. The second, or the first and the second, incumbrance might be a judgment. This whole doctrine was at an early day exploded in the United States as unjust, and as being moreover at war with the spirit of the registry laws.[7] There was also an

sum to Aaron Moses, which deed would have defeated the suit had it not been ruled out for an erasure. Such was still the law when Mr. Warren wrote. Another extreme result happened in the actual case of Williams v. Bosanquet, 1 Brod. & B. 238, where the mortgagee of a leasehold who had not taken possession, was held, as "assignee of the term," to be personally bound by the covenants of the lease.

[6] An example is furnished in the well-known case of Zouch v. Parsons, 3 Burrows, 1794, quoted in section on "Deeds by Infants," where a conveyance by the infant son of the mortgagee had to be obtained to perfect the title. But in equity the mortgage money was held to go to the executor as early as 28 Car. II. See Thornbrough v. Baker, 1 Ch. Cas. 283, 2 White & T. Lead. Cas. Eq. 1030.

[7] The leading case on tacking is Marsh v. Lee, 2 Vent. 337, best known through the Leading Cases in Equity. The American case putting an end to

English doctrine, derived from the Roman law of pledges, that the mortgagor, if in debt to the mortgagee otherwise than for the sum stated in the mortgage, cannot redeem without paying such other debt; nor can his heirs or his devisees, other than such as take the land under the will in trust for the payment of debts. This doctrine had some merit, while simple contract creditors had no means for reaching the lands of their deceased debtor, but is at present useless, and in America it is almost forgotten.[8]

We shall see hereafter how a mortgage can be made "continuing," so as to cover what are called "future advances." What debts a mortgage is meant to secure, where its language is not plain and unambiguous, is a question rather of the law of contracts than of land titles. The pledge of the land will be understood, just as a personal undertaking would be construed.[9]

Whether the mortgage be given to secure a past debt, a debt contracted at the time of its execution, or future advances and responsibilities, it remains in force till the indebtedness is actually paid off, notwithstanding a renewal, or merger in a higher security, as will be shown hereafter.[10] There may, however, be such a complete "novation" that the enforcement of the old lien would be un-

the doctrine is Grant v. United States Bank, 1 Caines, Cas. 112. See 4 Kent, Comm. 176–179.

[8] Kent, at 4 Comm. 175, quotes for this mode of tacking several English cases, coming down to 2 Ves. Jr. 376, but no American authorities. The American doctrine limits the mortgage narrowly to "what is written in the bond." In Williams v. Hill, 19 How. 246, it is held that a trustee in a "deed of trust" cannot set off his own debt, not secured by the deed, from the proceeds of sale.

[9] Thus, if the mortgage is given by a business man to a bank to secure his bills and notes, it will be construed like a personal guaranty for a merchant's bills and notes to a bank, so as not to include the debts of a firm of which he may become a partner. Bank of Buffalo v. Thompson, 121 N. Y. 280, 24 N. E. 473; Blood v. White, 100 Mass. 357 (mortgage to secure contract to give notes secures the payment of such notes). "Present indebtedness" is certain enough; it may be ascertained aliunde. Youngs v. Wilson, 27 N. Y. 351. But in Morris v. Murray, 82 Ky. 361, it is held that mortgage for a named sum, "less what the mortgagee owes to D.," is too uncertain to give a lien against subsequent mortgagees.

[10] See hereafter, under head of "Extinction." An agreed change in the terms of the note or bond carries a change in the defeasance. Union Cent. Life Ins. Co. v. Bonnell, 35 Ohio St. 365.

just to third parties; each case depending very much on its own circumstances.[11]

At common law a deed of release or other conveyance was resorted to, to reinvest the mortgagor with the title to his land; and in equity, either upon his own bill, or under the mortgagee's bill to foreclose, a reconveyance of this nature would be ordered. At the present day, in this country, payment of the debt after the day extinguishes all title, at law as well as in equity, which the mortgagee ever had in him;[12] and in order that the fact may be made known to the world the statutes of nearly all the states have contrived a short entry on the margin of the record, to which we will refer under the head of "Registry Laws."

Generally speaking, whatever is subject to absolute grant is also subject to being mortgaged.[13] And the description of land in a mortgage is construed as it would be in a deed, as to appurtenances, easements going with the land, accretions, and all other incidents.[14] Indeed, some interests, of which the policy of the law forbids a sale, may be thus conveyed as a security for debt, as land which has been pre-empted by a settler, and for which a patent has not been issued. When it is issued the mortgage will attach, in preference to later incumbrances.[15] And somewhat greater latitude has been given in

[11] See hereafter, under head of "Extinction."

[12] Bush v. Maklin, 87 Ky. 482, 9 S. W. 420. Yet the mortgagor is, under the general policy of the registry laws, entitled to have some record evidence of satisfaction.

[13] California Civ. Code, § 2926; Dakota Terr. Civ. Code, § 1731. So as to after-acquired title and the operation of the warranty and lands held adversely. California Civ. Code, § 2930; Dakota Terr. Civ. Code, § 1728. An option can be mortgaged (Bank of Louisville v. Baumeister, 87 Ky. 6, 7 S. W. 170); but not in Iowa (Conn v. Tonner, 86 Iowa, 577, 53 N. W. 320; compare Sweezy v. Jones, 65 Iowa, 273, 21 N. W. 603). A pre-emption under United States law may be mortgaged.

[14] Chandler v. Jamaica Pond Aqueduct Corp., 125 Mass. 544 (passway going with the land); Cruikshanks v. Wilmer, 93 Ky. 19, 18 S. W. 1018 (accretions).

[15] Stewart v. Powers, 98 Cal. 514, 33 Pac. 489, construing Rev. St. U. S. § 2262 (relying on Myers v. Croft, 13 Wall. 291); Kline v. Ragland, 47 Ark. 111, 14 S. W. 474; Gray v. Franks, 86 Mich. 382, 49 N. W. 130 (quitclaim deed, with something like a warranty in the habendum, inured to the mortgagee). A warranty or other covenants of title are nearly always put in a mortgage; and the words "mortgage and warrant" are in most of the statu-

allowing an after-acquired estate to inure to a mortgagee than to a purchaser; for, while one may be willing to pay his price for the chances of a good or bad title, a mortgage can have no purpose unless the title is good.[16]

What has been said as to parties in a common deed applies with equal force to a mortgage. We have seen how the states differ on the power of an agent intrusted with an otherwise executed deed to fill blanks before delivery. It is the same with mortgages. And where the grantee's name is left blank after delivery, or where a fictitious name is inserted for the grantee (in either case with the view of making the mortgage pass as a security to bearer), it is not a good mortgage; certainly, not at law.[17]

A deed may carry the legal title to a grantee, as a security for the payment of debts, but may not set a time when it is to become absolute by breach of condition, or when it will be defeated by compliance with the condition. It may thus be unfit for strict foreclosure, but it is, in effect, a mortgage as long as it shows that the payment of the debt is the main object; and, if so, such payment will work a redemption, while a court of equity will enforce such informal mortgage by its order of sale.[18] The assignment for the

tory forms. As a mortgage is given to guard against insolvency in the debtor, the pledge of the after-acquired estate is the only rational purpose of such covenants. See Edwards v. Davenport, 20 Fed. 756 (warranty by married woman unavailing when it does not bind her personally).

[16] The inclusion of land or fixtures not owned at all at the time of the mortgage, especially under the laws governing railroad mortgages, must be treated separately. The ordinary "after-acquired title," as treated in a former chapter, refers to land already claimed and possessed under a defective right.

[17] Chauncey v. Arnold, 24 N. Y. 330 (deed of land cannot be treated like bill of exchange).

[18] Catlett v. Starr, 70 Tex. 485, 7 S. W. 844; In re Helfenstein's Estate, 135 Pa. St. 193, 20 Atl. 151; Calder v. Ramsey, 66 Tex. 218, 18 S. W. 502. So, a mortgage in the common form, in which the day of payment set in the defeasance had passed before the date of the deed, was treated as a mortgage payable on demand. Hughes v. Edwards, 9 Wheat. 489. Anything a mortgage which leaves a right to redeem. Shillaber v. Robinson, 97 U. S. 68; Steel v. Steel, 4 Allen, 417 (words "then to be void" omitted). In Indiana (§ 2930), Illinois (c. 30, § 11), and Michigan (§ 5731) the statutory form is: "A. B. mortgages to C. D. [description], to secure the repayment of ——." without any other words of conveyance. In Wisconsin (§ 2209), "A. B., mortgagor," etc., "mortgages to C. D., mortgagee," etc., "for the sum of ——, the

benefit of creditors has, by some courts, been called a mortgage. It carries the legal title to secure the grantor's creditors. It differs from the ordinary mortgage, with power of sale, mainly in this: that its enforcement is to take place at all events, without awaiting a future default; but it often happens that the grantor, by way of composition or otherwise, satisfies all the creditors before all the lands or goods assigned have been disposed of, and in such a case the title reverts to him.[19] It differs, however, in this, from other mortgages: that the equity of redemption is presumably worthless; and the assignee is therefore expected to take possession, and to hold the legal title. The provisions by which many states guard the assignment for the benefit of creditors in order to prevent frauds, cannot be evaded by putting what is intended as a general assignment in the shape of a mortgage. If void in one form of words, it will be void in the other.[20]

Modern law writers and judges distinguish between the "old view" and the "modern view" of the mortgage.[21] The former is the com-

following tract: * * * This mortgage is given to secure," etc. Similar are the forms given by statute in California (Civ. Code, § 2948), and in Dakota (§ 1736), and in Missouri. The forms given in Iowa, Maryland, and Tennessee, though short, retain the common-law idea of a grant and defeasance. Mellon v. Lemmon, 111 Pa. St. 56, 2 Atl. 56 (a deed subject to redemption is a mortgage).

[19] Lyons v. Field, 17 B. Mon. (Ky.) 548. See, contra, Hargdine v. Henderson, 97 Mo. 375, 11 S. W. 218.

[20] Johnson's Appeal, 103 Pa. St. 373 (mortgage to many creditors not assignment within local statute). In Arkansas a number of such mortgages (mainly, though, of goods) have been held fraudulent under the insolvent assignment law. See Marquese v. Felsenthal, 58 Ark. 293, 24 S. W. 493, and cases there quoted. So in Atkinson v. Weidner, 79 Mich. 575, 44 N. W. 1042, a mortgage of all the property for all the creditors was treated as if an assignment in terms.

[21] We may append some of the statutory definitions and maxims, most of them tending to the modern view: "Transfer of an interest in property, other than in trust, made only as a security for the performance of another act, is to be deemed a mortgage." California Civ. Code, § 2924; Dakota Civ. Code, § 1724; with similar clauses in New Hampshire and Florida. "(1) Mortgage is a contract by which specific property is hypothecated for the performance of an act, without the necessity for a change of possession. (2) A mortgage of real estate can be created, renewed, or extended only by writing executed with the formalities required in the case of a grant of real

mon law, as modified by the interference of the chancellor, in allowing redemption and compelling an account of rents, but leaving to the mortgagee the right to take possession "before condition broken," unless restrained by contract; treating his interest, at least in the courts of law, as real estate, which passes to the heir, and is transferred only by a deed of conveyance, and must, upon redemption, be reconveyed, and which, by decree of foreclosure, may be turned into an unconditional fee. And this "old view" prevails almost in its full force in North Carolina, to a great extent in the six New England states, and in part, at least, in Tennessee.[22] Under the

property." California Civ. Code, § 2922; Dakota, § 1722. By Georgia Code, § 1954, it is only a security for a debt, and passes no title. Under the Mississippi Code, § 2449, the mortgagor or grantor in a deed of trust remains owner of the land, the mortgagee of the debt (so, also, by South Carolina St. § 2299) except (in Mississippi) against the mortgagee or grantee. In Michigan, an act of 1843 took the remedy by ejectment from the mortgagee. See effect in Dougherty v. Randall, 3 Mich. 581. "A mortgage may be created on property held adversely." California Civ. Code, § 2930; Dakota, § 1728. An absolute deed and defeasance together make a mortgage. Massachusetts Pub. St. c. 181, § 44; Maine, c. 90, § 1. In Kentucky, a clause in the Code of Practice of 1851, "foreclosure of a mortgage is forbidden" (now section 375), has upset the old view. Thomas v. Harkness, 13 Bush, 23: the mortgagee is not entitled to possession, is not a necessary party to an ejectment; an outstanding mortgage is no defense. Trustees Union College v. Wheeler, 61 N. Y. 88; Stewart v. Allegheny Nat. Bank, 101 Pa. St. 342, mortgagee not entitled to be made party to partition suit; contra, should be made party to a proceeding to condemn land for public use, the mortgage being "property": Aggs v. Shackelford Co., 85 Tex. 145, 19 S. W. 1085, not entitled to rents and profits against mortgagor or terre-tenant: Chelton v. Green, 65 Md. 272, 4 Atl. 271; and many other cases in many other states,—lay it down plainly, "the mortgage is not an estate, but a lien." The very able opinion of Christiancy, J., in Ladue v. Detroit & M. R. Co. (1865) 13 Mich. 390, lays down the four following maxims as constituting the modern view: (1) The debt, etc., secured is the principal, and the mortgage but an incident or accessory; (2) anything which transfers the debt (though by parol or mere delivery) transfers the mortgage with it; (3) that an assignment of the mortgage without the debt is a mere nullity; (4) payment, release, or anything which extinguishes the debt ipso facto extinguishes the mortgage. Cases are quoted in support of each point, going back as far as Green v. Hart, 1 Johns. 580, and Clearwater v. Rose, 1 Blackf. 157. A mortgage, though the mortgagee is let into possession, does not change the title. Sexton v. Breese, 135 N. Y. 387, 32 N. E. 133.

[22] The "old view" is fully explained in the second edition of Kent's Com-

modern view, the mortgagee is not entitled to possession at all, either before or after breach, nor to rents and profits. He may, at the most, better his security by having a receiver appointed to collect the rents or take the profits.[23] Hence he is not a necessary

mentaries, at places hereinbefore cited, together with the changes wrought by the Revised Statutes coming into force in 1830. In the New England states, as it is well put in the Michigan case above quoted, the old view "still rankles." Thus, a mortgagee not in possession may maintain trespass against a stranger, Leavitt v. Eastman, 77 Me. 117; is entitled to possession before default, Gatchell v. Morse, 81 Me. 205, 16 Atl. 662; the assignee of the mortgage is purchaser for value, Pierce v. Faunce, 47 Me. 513 (of course the mortgagee is, Jones v. Light, 86 Me. 437, 30 Atl. 71), and may set aside a fraudulent conveyance; Murdock v. Chapman, 9 Gray, 156 (mortgage of the land by the mortgagee is a pledge of his mortgage); Monroe v. Stephens, 80 Ky. 155 (under old chancery practice, mortgagee buying at foreclosure sale needs no deed). In North Carolina, the mortgagor's deed conveys only an equity, Parker v. Banks, 79 N. C. 480; after default the mortgagee is entitled to possession, Kiser v. Combs, 114 N. C. 640, 19 S. E. 664 (ejectment); even before default the mortgagor is considered a mere tenant, Parker v. Banks. He has the right of possession even before default, Crinkley v. Egerton, 113 N. C. 144, 18 S. E. 341. The forfeiture of a (mortgaged) lease under a clause forbidding assignment in Becker v. Werner, 98 Pa. St. 555, may be explained on the ground that the mortgage leads to a sale. Even in Massachusetts, under the old view, the legal title of the mortgagee can be transferred with the debt, without words of inheritance. Barnes v. Boardman, 149 Mass. 106, 21 N. E. 308. In Woody v. Jones, 113 N. C. 253, 18 S. E. 205, it is said (with a view to limitation) that a registered mortgage carries the legal title. Even in Connecticut it is said the mortgagor is owner for all purposes except the security of the mortgagee. Downing v. Sullivan, 64 Conn. 1, 29 Atl. 130.

[23] Woolley v. Holt, 14 Bush (Ky.) 788, where a mortgage made after a 10-years lease, the rents not being specially named, was held not entitled to the rents against a subsequent grantee of those rents. This seems illogical, for a mortgage must put in pledge exactly the same interest which an absolute deed would convey. But the celebrated case of Douglass v. Cline, 12 Bush, 608, under a railroad mortgage, which denied to the mortgage bondholders even the profits taken by the receiver after suit brought, and applied them to arrears of wages, went as far or further; and it has been generally followed in most of the state and federal courts on the winding up of railroad mortgages; but, in analogy to maritime law, the president's back salary is not preferred to the mortgage bonds. National Bank v. Carolina, K. & W. R. Co., 63 Fed. 25; Frank v. Railroad Co., 122 N. Y. 197, 25 N. E. 332 (mortgagee out of possession not entitled to profits); Angier v. Agnew, 98 Pa. St. 587 (mortgagor may cut timber); Brunswick-Balke-Collender Co. v. Herrick, 63 Vt. 286, 21 Atl. 918 (or

party to a suit for establishing a highway over the land, or condemning a strip for a railroad right of way; and though the mortgagee might be entitled to the condemnation money, which represents the value of the land, he is not entitled to damages paid for a mere injury, which does not amount to a "taking."[24] His estate, at his death, passes to the executor or administrator; it passes along with the note or bond which the mortgage is made to secure;[25] and finally there is no strict foreclosure, but only a decretal sale, conducted by a master in chancery, or by the sheriff, at which the mortgagee may bid against others, like an execution creditor at an execution sale.[26] One favor, however, is shown to the mortgagee which would not be extended to a mere lien holder, and this even in states which have carried the modern view very far; that is, when the mortgagee has taken possession lawfully, by the consent of the owner (not, however, when he has obtained it stealthily, or by force and fraud), he is allowed to hold it until he is paid in full; or until, at the instance of the mortgagor or of a junior incumbrancer, the land is sold by decree of court. This has been so held repeatedly in New York, and such seems to be the effect of the statute in Wisconsin.[27]

quarry slate, at least, where the land is described as a quarry). As to removal of buildings from mortgaged premises (which in Kansas is made criminal by statute), it is held in Harris v. Bannon, 78 Ky. 568, that the mortgagee may stop it by injunction, but cannot pursue the houses upon the lot of another party; in Partridge v. Hemenway, 89 Mich. 454, 50 N. W. 1084, and in Turner v. Mebane, 110 N. C. 416, 14 S. E. 974, that he can pursue them.

[24] Knoll v. New York, C. & St. L. Ry. Co., 121 Pa. St. 467 (damages for injury); Livermon v. Railroad Co., 109 N. C. 52, 13 S. E. 734; Goodrich v. Commissioners, 47 Kan. 355, 27 Pac. 1006 (highway); Rand v. Ft. Scott, W. & W. Ry. Co., 50 Kan. 114, 31 Pac. 683 (railroad condemnation); Chicago, K. & W. R. Co. v. Sheldon, 53 Kan. 169, 35 Pac. 405 (mortgagee not a necessary party).

[25] See cases under this head in section, infra, on "Rights of Assignees."

[26] In many cases it is said the mortgage is "merged" in the decree of sale; but it will be shown that foreclosure, or possession and lapse of time, and not a decree of sale, is still the ordinary remedy in the New England states.

[27] Russell v. Ely, 2 Black, 575; Madison Ave. Baptist Church v. Oliver St. Baptist Church, 73 N. Y. 82. Secus, when possession obtained by force or fraud. Howell v. Leavitt, 95 N. Y. 617; Reading v. Waterman, 46 Mich. 107, 8 N. W. 691 (a very poor showing for the mortgagor). See, contra, Newton v. McKay, 30 Mich. 380; Rodriquez v. Haynes, 76 Tex. 225, 13 S. W. 296. As to right to ask sale, Stewart v. Johnson, 30 Ohio St. 24; distinction between lawful and unlawful possession, Booth v. Baltimore S. P. Co., 63 Md. 39.

Under the old view, the mortgage was a conveyance,—an executed contract; and, as such, it needed no consideration. It might operate like a deed of gift. And it seems that even at this day a mortgage from a father to his son, made as a gift or advancement, could be enforced, where no interest of creditors interferes.[28] But where a gift is not intended, or is not supported by the duty of a husband or father, a mortgage should, under the modern view, being nothing but a debt secured on land, have, like a contract, a valid consideration, though forbearance to third persons would be good enough to sustain a mortgage, as it would to support a suretyship or guaranty.[29]

A first mortgagee is still deemed a purchaser for value, for the purpose of overriding secret equities, while in California and some other states, in which the equitable doctrine as to purchasers is codified, they are coupled in the statute with incumbrancers.[30] Under the modern view of the mortgage, under which the fee remains

[28] Bucklin v. Bucklin, 1 Abb. Dec. 242.

[29] Pennsylvania Coal Co. v. Blake, 85 N. Y. 226 (mortgage by wife of one of debtors), and many other cases of mortgages by debtors' wives (though the married women's acts in many states forbid and annul such securities. Though in Texas a woman cannot pledge her land for her husband's debt, a mortgage given by a Texas wife on Illinois lands is enforced in that state, Post v. First Nat. Bank, 138 Ill. 559, 28 N. E. 978); Cotton v. Graham, 84 Ky. 672, 2 S. W. 647 (mortgage to sister-in-law without consideration void); Jones v. Jenkins, 83 Ky. 391 (mortgage to defraud creditors, being executory, void between the parties); Dickson's Adm'r v. Luman, 93 Ky. 614, 20 S. W. 1038 (A. mortgaging his land for B.'s debt is his surety within the Kentucky law requiring an attorney signing a surety's undertaking to be appointed by writing); Small v. Williams, 87 Ga. 681, 13 S. E. 589 (stifling a prosecution); Devlin v. Quigg, 44 Minn. 534, 47 N. W. 258, and Williams v. Clink, 90 Mich. 299, 51 N. W. 453 (mortgage to defraud creditors avoided at mortgagor's instance). Contra, Gill v. Henry, 95 Pa. St. 388, and perhaps Plant v. Gunn, 2 Woods, 372, Fed. Cas. No. 11,205 (guilty party's mortgage to stifle prosecution). If the note is lawful in part, so is the mortgage. Hodge v. Brown, 81 Ga. 276, 7 S. E. 282 (usury); Sanford v. Starling, 69 Miss. 204, 10 South. 449. The mortgage, if for a larger amount, can be enforced for that which is really due. Parker v. Barker, 2 Metc. (Mass.) 423.

[30] So in California and the Dakotas. The mortgage is a purchase as of its date, to which title of purchaser at sale dates back. Kirby v. Moody, 84 Tex. 201, 19 S. W. 453. But mortgagee for old debt, though a "purchaser for value," takes subject to equities. Wallace v. Cohen, 111 N. C. 103, 15 S. E. 892; Brem v. Lockhart, 93 N. C. 191.

in the mortgagor, the second and following mortgagees also stand in the light of purchasers.[31] There is no dispute about this character when the security is taken for a loan made or suretyship incurred at the same time; but when a mortgage is made to secure an old debt, either of the mortgagor or of a third person, some of the states, like South Carolina, will not admit that the mere forbearance shown by taking a note or bond payable at a distant date is such "giving of value" as will put the mortgagee in the light of a purchaser. But the weight of authority seems to lie the other way; and, "if the creditor cedes any existing rights," he gains, through his mortgage, all the rights of a purchaser without notice, if he has acted in good faith, though he would hardly be judged as leniently, as those advancing money on bills and notes are judged by the law merchant.[32]

Whether a mortgagee, in or out of possession, is so far a trustee for the mortgagor that he cannot, in equity and good conscience, destroy the estate which both of them share by bidding in the land for taxes, or buying an outstanding tax title, is a disputed point. Where the old view of the mortgage prevails, he is to some extent a trustee, and his right to clothe his possession or interest thus with a hostile ownership is denied; but in states where the mortgage is a mere lien the contrary has been decided. The mortgagee is under no more obligations than any one else to save the estate, unless there is some special trust reposed in him in the particular case.[33]

[31] Under influence of registry laws (see chapter on these), second mortgages stand for this purpose on same footing with first.

[32] Summers v. Brice, 36 S. C. 204, 15 S. E. 374. Contra, Atkinson v. Greaves, 70 Miss. 42, 11 South. 688; Schumpert v. Dillard, 55 Miss. 348; Hinds v. Pugh, 48 Miss. 268; Depeau v. Waddington, 6 Whart. (Pa.) 220, 236.

[33] Hall v. Westcott, 17 R. I. 504, 23 Atl. 25 (cannot hold it); Reimer v. Newel, 47 Minn. 237, 49 N. W. 865 (can unless under special obligation, referring to Minnesota, c. 11, § 87). In North Carolina, the mortgagee, as owner of the fee, must look to the taxes. Wooten v. Sugg, 114 N. C. 296, 19 S. E. 148; Manning v. Elliott, 92 N. C. 48. It is clear that the mortgagor cannot get in a tax title against the mortgagee, for it is his duty to pay the taxes; nor buy up an old one, for the warranty in the mortgage, or the equivalent force of the granting clause, would transfer it. Neither can an assignee of the equity of redemption. Boyd v. Allen, 15 Lea (Tenn.) 81. But it is said in Broquet v. Warner, 43 Kan. 48, 22 Pac. 1004, that the husband of the mortgagor's heiress, not being in possession, may set up a tax title. In New York,

It has been maintained, as will be shown elsewhere, that one who buys land under a mortgage, with reference to it, and a recital showing that he takes "subject" to it, and therefore is allowed its amount in the price, is estopped from denying its validity or amount, as he has bought only his vendor's interest beyond this incumbrance; and the same reasoning has been applied with very much less force to a second mortgagee.[34] But the dispute as to the right of a grantee of the equity of redemption, or later incumbrancer, by mortgage or judgment, to assail an older incumbrance, has mainly turned about the defense of usury. And it may be here stated that this defense, according to the weight of authorities, must be tested by the law where the contract was made, not by the law of the situs of the mortgaged lands.[35] Many, especially the older, authorities, decided where a usurious agreement was not only unenforceable as to the excess, but carried with it a loss of the whole or a part of the principal and lawful interest, hold that the defense of usury is wholly personal, which, during the debtor's lifetime, no one can force on him, though it is agreed (and generally directed by the law on decedents' estates) that after the debtor's death the administrator of an insolvent estate must make every legal defense for the benefit of all concerned. The decisions, even as to "purging" a prior lien from usury (that is, reducing it to debt and legal interest), are not in harmony; but it seems, the parties in interest may insist that all payments of interest made on the mortgage in excess of what was legally due should be applied to the principal. The same privilege ought to belong to judgment creditors as to second mortgagees, but it has not been always granted.[36]

under chapter 387 of Acts of 1840, the purchaser at the tax sale must notify the mortgagee, and give him an opportunity to redeem within six months. See Rev. St. 1889, pp. 1142, 1143, 2462.

[34] See section on "Estoppel by Deed," hereafter. The principle is laid down broadly in Pratt v. Nixon, 91 Ala. 192, 8 South. 751; Spengler v. Snapp, 5 Leigh (Va.) 478 (usury part of price, buyer cannot object); Merchants' Exch. Nat. Bank v. Commercial Warehouse Co., 49 N. Y. 638 (distinction taken); Dolman v. Cook, 14 N. J. Eq. 56.

[35] De Wolf v. Johnson, 10 Wheat. 367; Dolman v. Cook, supra.

[36] Bensley v. Homier, 42 Wis. 631; Ready v. Huebner, 46 Wis. 698, 1 N. W. 344 (neither judgment creditor nor second mortgagee can plead); Lee v. Feamster, 21 W. Va. 108 (attack by judgment creditor disallowed); Ladd v.

In Georgia alone the mortgage in the usual form does not yield even an absolute priority to its holder, in case of the mortgagor's death. In order to obtain this the lender or creditor must resort to a form of "conditional sale" provided by the statute. For the mortgage in common form does not precede costs of administration, nor the "year's support," nor the widow's dower, nor trust debts.[37]

NOTE. A deed with warranty, express or implied, though by defeasance reduced to a mortgage, carries an after-acquired estate in the lands which are therein described, for the purpose of securing the debt, just as an absolute deed would transfer such estate to a purchaser. But it will be found that some acts, either general or special, which incorporate railroad or canal companies, go somewhat further. They authorize the corporation, in borrowing money on mortgage, to deal with the plant as a whole, so as to include lands which may thereafter be acquired for right of way, or depots, and other necessary buildings, without which the purposes of the incorporation could not be fulfilled, and the franchise would be of little or no value; without which, therefore, a foreclosure sale would be ineffectual. The Maryland cases of State v. Brown, 73 Md. 484, 21 Atl. 374, and Brady v. Johnson, 76 Md. 445, 26 Atl. 49, both growing out of the charter of a canal company, illustrate the nature and extent of such mortgages. The inclusion of after-acquired rolling stock in railroad mortgages lies without the scope of this work, as not affecting in any way the title to real estate. The following cases may also be cited: Barnard v. Norwich & W. R. Co., 14 N. B. R. 469, Fed. Cas. No. 1,007 (the whole of an after-acquired connecting railroad); Branch v. Jesup, 106 U. S. 468, 1 Sup. Ct. 495 (to same effect). To the contrary, after-acquired lands which are not essential to the working of the railroad, Calhoun v. Memphis & P. R. Co., 2 Flip. 442, Fed. Cas. No. 2,309. The subject of mortgaging after-acquired property of all kinds is discussed in Story, Eq. Jur. § 1040; and, as to railroad companies, in Parker v. New Orleans, B. R. & V. R. Co., 33 Fed. 693.

Wiggin, 35 N. H. 421 (forfeiture personal, but lien may be purged); Lyon v. Welsh, 29 Iowa, 278 (wife joining in mortgage of homestead may plead); De Wolf v. Johnson, 10 Wheat. 367 (and, having been purged, forfeiture cannot be asked); Huston v. Stringham, 21 Iowa, 36 (applying payments); Fenno v. Sayre, 3 Ala. 458 (not avoided at instance of incumbrancer); generally, Ohio & M. R. Co. v. Kasson, 37 N. Y. 218 (defense personal). Contra, McAlister v. Jerman, 32 Miss. 142 (assumption means of debt really owing); Fisher v. Kahlman, 3 Phila. (Pa.) 213 (terre-tenant may plead usury); Cleveland v. Stone, 51 Minn. 274, 53 N. W. 647 (can have older lien purged); Gaither v. Clarke, 67 Md. 18, 8 Atl. 740 (same).

[37] Georgia Code, §§ 1969–1971; Lathrop v. Brown, 65 Ga. 315; Berlin Building & Loan Ass'n v. Clifford, 30 N. J. Eq. 482 (costs of suit on second mortgage cannot come out of first except the cost of sale itself).

§ 93. Equitable Mortgages.

Every instrument in writing by which the owner of land pledges it as security for the payment of a debt, or the performance of any contract or obligation, without in fact or in form conveying the legal title, is an equitable mortgage. By the English law the deposit of the title papers was also considered an equitable mortgage, but under our registry laws no value is placed on the original deeds; hence this mode of pledging lands is wholly unknown in our practice.[38] It seems that an equitable mortgage can be enforced only by a suit in equity looking to a decree of sale.[39]

Where the owner of the land has himself only an equitable title, he can of course give only an equitable mortgage; hence, while the old doctrine as to the first mortgage prevailed, every second or later mortgage was in its own nature only equitable. An agreement to give a mortgage upon named land for a named debt, or any writing indicating that land or an interest therein is pledged or in lien to secure the payment of money, or the performance of any act, is in equity a mortgage. Where the instrument is in the usual form, a grant or conveyance of the land, with defeasance, making the deed void upon payment of a sum or sums at given dates, it may still amount only to an equitable mortgage, because it lacks some of the formalities, which, under the laws of the state in which the land lies, are indispensable for carrying the legal title; such as a seal, or attestation by witnesses, or acknowledgment before a public officer.[40]

[38] 4 Kent, Comm. 150. See an enumeration of such mortgages in Blackburn v. Tweedie, 60 Mo. 505. The learned commentator takes it for granted that there can be no such act performed in the United States as a deposit of title deeds.

[39] Bryce v. Massey, 35 S. C. 127, 14 S. E. 768 (neither seal nor attestation). See, on this subject, the sections on "Seal" and "Other Requisites" in chapter on "Title by Grant." Any informal execution of a deed in general will make an equitable mortgage; but see Arthur v. Screven, 39 S. C. 78, 17 S. E. 640, where an unsealed deed was held to be not even a "writing in the nature of a mortgage" within the recording laws. Definition of "equitable mortgage" is given in New Vienna Bank v. Johnson, 47 Ohio St. 306, 24 N. E. 503.

[40] A covenant to hold land in lien is a good security, and, not being a conveyance, is not within the New York statute avoiding, as against third parties,

Lastly, the frame of the instrument may be such, as not to carry the legal title. Such are the "lien notes," in common use in Texas, which will be mentioned hereafter; in fact, any writing, sealed or unsealed, in which the owner of land, or of any interest therein, "pledges" it by words not apt to convey land.[41] There are, however, a number of states which have prescribed a form for mortgage deed which at common law would have hardly been deemed sufficient to carry the legal title.[42]

The main advantage at the present day of a legal over an equitable mortgage is that he who takes the former for a consideration passing at the time, and without notice of equities, can override these, while the latter cannot. As among equities, that which is prior in time, prevails. But this distinction is not observed everywhere, as it comes into conflict with the policy of the registry laws in those states which allow equitable charges, bonds for title, declarations of trust, etc., to be recorded.[43] Where a charge upon land is recited in a conveyance, all persons deriving their right under that conveyance must take notice of it, as will be shown hereafter, as to express vendor's liens; but it seems that the reference to a charge may be so misleading that subsequent purchasers being unable to trace it to its source, will not be affected with notice.[44] At any rate an equitable mortgage has in nearly all the states priority over judg-

deeds not attested or acknowledged. Watkins v. Vrooman, 51 Hun, 175, 5 N. Y. Supp. 172; Gest v. Packwood, 39 Fed. 525 (agreement for security on certain property).

41 Wilson v. Russ, 17 Fla. 691 (cestui que trust, entitled to rents and profits, can mortgage them); Blackburn v. Tweedie, 60 Mo. 505; and, again, Martin v. Nixon, 92 Mo. 26, 4 S. W. 503,—enumerate the kinds of equitable mortgage. See, also, infra (in section on "Vendor's Lien"), lien notes. White Water Valley Canal Co. v. Vallette, 21 How. 414 (bonds pledging the work).

42 Such is the form in Indiana (Rev. St. § 2930): "A. B. mortgages and warrants to C. D.,"—without any words of conveyance such as are used in an absolute deed.

43 See the notes to Basset v. Nosworthy, in 2 White & T. Lead. Cas. Eq. 1. The matter will be further referred to in chapter on "Registry Laws," section on "Purchaser."

44 For the general positions, see section on "Uses and Trusts" in chapter on "Estates," supra; also, section on "Notice" hereafter, in chapter on "Registry Laws." Contra, Brownback v. Ozias, 117 Pa. St. 87, 11 Atl. 301 (a reference to a mortgage which had been kept up for 40 years was legally dis-

ments, executions, or attachments; in short, over all persons other than "purchasers in good faith and for value." [45] Any form of words which distinctly shows the intention of the parties that certain land shall be pledged for a certain debt, or the performance of any obligation, when signed by the owner of the land, or interest meant to be pledged, is an equitable mortgage. The words may be executory, such as "I agree to put in lien," just as an executory contract to sell and convey gives an equitable title in the fee.[46]

In the states which require a seal to make a deed for the conveyance of land, the omission of the seal leaves an equitable mortgage, to be enforced only by a suit in equity for the sale of the land; though in Ohio, under the very peculiar statute for the recording of mortgages, to be explained hereafter, another rule seems to prevail.[47]

Where the interest in land to be pledged is itself equitable, such as the interest which is acquired by a title bond or executory contract, an informal agreement to pledge this interest for the payment of a debt is, generally speaking, as effective as a formal mortgage thereof, unless the registry laws should make a distinction.[48] On the other hand, there have been interests in land raised by the most informal executory contracts, pledged for debt by a mortgage in good form; and such pledge must be sustained, as long as the contract itself does not come within the statute of frauds.[49] Courts of equity will even interfere, by injunction or other proper remedy, to protect the holder of such a security upon an equitable or executory estate against the loss which would ensue from the transfer of the legal title to a purchaser in good faith.[50]

charged, and stood in another name; sed quære). But a purchaser need not look into deeds, though accessible to him through the public records, which are not in the chain of title. Penn's Ex'r v. Penn, 88 Va. 361, 13 S. E. 707.

[45] Ex parte Howe, 1 Paige, 125; Robinson v. Williams, 22 N. Y. 380.

[46] Hoffman v. Ryan, 21 W. Va. 415.

[47] Atkinson v. Miller, 34 W. Va. 115, 11 S. E. 1007, solemnly overruling Pratt v. Clemens, 4 W. Va. 443, and Shattuck v. Knight, 25 W. Va. 590, 601; Alexander v. Newton, 2 Grat. (Va.) 266. See, contra, White v. Denman, 16 Ohio, 59, and Arthur v. Screven, 40 S. C. 78, 17 S. E. 640.

[48] Gamble v. Ross, 88 Mich. 315, 50 N. W. 379.

[49] Gordon v. Collett, 102 N. C. 532, 9 S. E. 486 (a description of land and under it a receipt of so many dollars on account).

[50] Northrup v. Cross, Seld. Notes (N. Y.) 115, where the holder of the title at law was enjoined before the debt was due.

On the principle that a trust must never be defeated for the want of a trustee, if in a deed of trust, i. e. in a conveyance made nominally to A., to secure a debt owing to B., the name of the trustee is left blank, whether purposely or by oversight, there remains a good equitable mortgage in favor of B. for such a debt as the deed purports to secure.[51] Again, where a deed is made by A. to B., in trust that B. shall execute a mortgage on the land conveyed to C., this is in equity a mortgage to C., upon the principle that equity will consider that to be done which ought to have been done.[52]

An executory contract to mortgage will be enforced, though a like contract to convey could not be enforced for want of certainty. Thus an agreement by which one party advances money and the other agrees to mortgage to him some part of a tract can be enforced in equity, at least against another equitable lien which rests alike on the whole tract.[53]

The discussion of equitable mortgages runs naturally into that of the vendor's lien. Where, in the same deed by which the grantee receives an estate in land, he agrees to pay money or to give other things of value to the grantor, or to another person at his request, very slight words will suffice to raise an equitable pledge of the land described. Thus, where the father conveys land to a child, who in the same deed agrees to support him, a court may, even without any words of pledge, from the necessities of the case, raise an equitable mortgage, and may, when the fulfillment of the agreement becomes impossible, even restore the land to the grantor.[54]

An equitable mortgage is a very different thing from a conveyance, which a court of equity will reduce to a mortgage, but which

[51] McQuie v. Peay, 58 Mo. 56. But a mortgage without a grantee, or with a fictitious grantee,—a sort of mortgage to bearer,—is void. Shirley v. Burch, 16 Or. 83, 18 Pac. 351.

[52] Story, Eq. Jur. §§ 972, 1036b, 1196; Perry, Trusts, § 217. In Cooper v. Whitney, 3 Hill (N. Y.) 95, a deed authorizing a grantee to sell and pay named debts with the proceeds is said not to be a mortgage, but the lien of the creditors is not denied. However, this principle was disregarded in Town of Ripton v. McQuivey's Adm'r, 61 Vt. 76, 17 Atl. 44, on grounds which the writer cannot perceive.

[53] Payne v. Wilson, 74 N. Y. 348, relying on Stafford v. Van Rensselaer, 9 Cow. 316, and on Sir Simon Stewart's Case, quoted 2 Schoales & L. 381.

[54] Chase v. Peck, 21 N. Y. 581.

upon its face is absolute, and of which much will be said hereafter. The former gives to the creditor not even the appearance of the legal estate, which the ordinary mortgage carries; the latter gives him a stronger appearance of such an estate, with the power to create an unimpeachable fee by a conveyance to a purchaser in good faith and for value.[55]

§ 94. Power of Sale.

The great and repeated extensions of time for redemption which the English chancery used to grant to the mortgagor after a decree nisi, settling the amount due upon the mortgage, led, towards the end of the eighteenth century, to the introduction of a clause which confers upon the mortgagee, in case of default in the payment of principal or interest, the power of selling the land outright, upon terms, after notice, and in the manner agreed upon in the deed, and out of the proceeds of sale to pay himself, while the surplus, if any, would go to the mortgagor, or the deficiency arising after, and measured by the result of, the sale would remain owing upon his bond. Such a power was held to be valid,[56] though Lord Eldon spoke of it as dangerous, and suggested that it would be safer to introduce a third person as trustee for both parties. Though Chancellor Kent thought the introduction of this third party (generally the clerk or attorney of the lender) needless and cumbersome, it soon became very common in Virginia and some other states, and mortgages made in this form became generally known under the name of "Deeds of Trust." [57]

[55] This remark is made because in many digests the two kinds of securities are thrown together, tending to mislead the unwary reader; and the incorrect use of the words "equitable mortgage" sometimes occurs, as in Dodd v. Neilson, 90 N. Y. 243.

[56] Corder v. Morgan, 18 Ves. 344; Croft v. Powel, Comyn, 603, where the power was held allowable, but it had not been well exercised. The trustee by dint of his legal title is a "purchaser for value." Custard v. Bowles, 24 W. Va. 730. But the deed of trust like the mortgage is always redeemable, before sale actually made. Webster v. Peet, 97 Mich. 326, 56 N. W. 558; Belt Silver & Copper Min. Co. v. First Nat. Bank, 156 U. S. 470, 15 Sup. Ct. 440.

[57] 4 Kent, Comm. 146, where Lord Eldon is gently chidden for discountenancing the power of sale, as he does in Anon. 6 Madd. 9. The secured creditor is a real mortgagee, though the deed be made to a trustee. The former

In the absence of legislation to the contrary, such as we find only in Kentucky (a remnant of the relief legislation of 1820),[58] the power of sale, whether conferred on the mortgagee or on a stranger, is recognized by the courts of the several states according to the English precedents; but in many of them the statute recognizes this power and regulates the conduct of the sale, which must be by public auction, and more especially the giving of the notice, fixing the number of days or weeks, for which a notice must be published, the place of printing or publishing the newspaper containing such notice, and the contents, as to name of parties, description of the land, and place of sale.[59]

can sue in chancery for a sale, in his own name. Hutchinson v. Myers, 52 Kan. 290, 34 Pac. 742.

[58] In a Kentucky act of 1820, part of the relief laws of the time, land conveyed by "deed of trust" was not to be sold by the trustee, except with the written assent of the grantor or by decree of a competent court. See Stat. 1894, § 2356, somewhat modified from the old law. Though not intended for insolvent assignments, the law was for a long time applied to them in daily practice; though it was held already in Ogden v. Grant, 6 Dana, 476, that it does not apply where the trustee is bound, by covenant to the grantor, to make sale. See, also, Prather v. McDowell, 8 Bush, 46. Since June, 1894, assignments in Kentucky may be wound up in the county court, and the old law is only of interest as to sales already made. A power of attorney to sell for payment of debts, not conferring an estate, was never within the law. Reed v. Welsh, 11 Bush, 450. "Deeds of trust," in the sense of the text, were about 1880 authorized for a short time by a special law for Jefferson county; but, lenders not believing that the courts would respect titles made under it, it fell at once into disuse, and was soon repealed. The latest decision defeating a sale under power in a mortgage is Wilson v. Aultman & Taylor Co., 91 Ky. 299, 15 S. W. 783. In Kentucky Trust Co. v. Lewis, 82 Ky. 579 (and in an earlier case), a clause in a legislative trust company charter, enabling some one company to take deeds of trust with powers of sale, was held unconstitutional as granting an unearned privilege.

[59] So in Missouri (Rev. St. §§ 7091–7093, and though the statute is as to the validity of the power only declaratory), a county court lending out the county funds may have a power of sale inserted. Walters v. Senf, 115 Mo. 524, 22 S. W. 511. In Arkansas, by sections 4759–4762, unless waived by mortgage for a loan (section 4763), the sale of land by mortgagee or trustee must be for two-thirds of sworn appraisement; if no such bid the second time, within a year at any price; and the mortgagor has one year to redeem by paying the bid with 10 per cent. interest per annum. In South Carolina the power to the mortgagee himself is sustained in Mitchell v. Bogan, 11 Rich. Law, 686; Web-

The power of sale to the mortgagee or trustee is, as to the person who may execute it, construed like a "power" given by will or deed of settlement, of which we shall speak in another chapter. Among several executors those who have qualified may act alone. It is different with men acting in their own right or as trustees. When some of several trustees die, those remaining can generally act alone, either as survivors of the trust estate or under local statutes. Often the deed indicates that the trustees may act severally; if so, a sale and conveyance by one of them will pass a good title.[60]

The deed of trust, according to some authorities, especially those from Missouri, differs from the mortgage, properly so called, in this, that the grantor is supposed to part with the legal title; the result whereof is, that a sale by the trustee, made after default, transfers a like title upon the purchaser, though the sale had not been con-

ster v. Brown, 2 S. C. 428; Robinson v. Amateur Ass'n, 14 S. C. 148. In Massachusetts a sale under power is deemed as good as one under decree. Hall v. Bliss, 118 Mass. 560; recognized in Texas by Rev. St. 1893, article 2369; regulated in Virginia by Code, §§ 2441–2443. West Virginia, Code, c. 72, §§ 5–8; while section 9 gives form of deed by sheriff, when he acts for the trustee. The forms given in Virginia and West Virginia do not contain the power of sale and conveyance at large; it being implied and regulated by law. The so-called statutory foreclosure or foreclosure by advertisement under Mich. St. §§ 8499–8503, only regulates sales under power, when such power is contained in the mortgage. See infra, statutes of Alabama on devolution of the power, and on redemption; in Arkansas as to the latter. In Georgia, deeds with power of sale as regulated by Code, §§ 1969–1971, have even a better standing in the distribution of a decedent's estate than a common mortgage. Roland v. Coleman, 76 Ga. 652; Brice v. Lane, 90 Ga. 294, 15 S. E. 823. See, in Maryland, Code, art. 66, § 6, regulating these powers. In Massachusetts the power is regulated by statute. See chapter 181, §§ 14–17. In New York powers of sale in mortgages other than to the state have gone out of use since the sections of the Revised Statutes regulating "foreclosure by advertisement" were repealed. In Pennsylvania and Delaware the judgment for sale (see hereafter under "Enforcement") is obtained so readily that deeds of trust have hardly been in use except for corporation mortgages at long date, and are held to be valid (Bradley v. Chester Valley R. Co., 36 Pa. St. 151), and the trustee, if the deed empowers him, may on default take possession and manage the property for the bondholders.

60 Loveland v. Clark, 11 Col. 265, 18 Pac. 544. See the distinction between executors and trustees, infra, in chapter on "Powers." If some of several trustees die, there is no difficulty, as survivorship among joint trustees has been retained almost everywhere. See chapter 3, § 27.

ducted in the prescribed manner. Hence, the owner is reduced to his right to redeem, and must bring his suit for that purpose against the holder of the trustee's deed.[61] But in most of the other states, as will be shown, a trustee's deed, if the sale is not carried on as directed by law or by the terms of the empowering clause, is void in toto, and confers upon the purchaser no rights, either in equity or at law.[62]

The sale under the "deed of trust" leaves no room for either foreclosure or redemption. When the sale is made, and the deed is delivered, whether to the mortgagee (which for this purpose would include the assignee of the mortgagee), or to an outside bidder, the title passes at once.[63] And it seems, that when such a power is given, the creditor cannot (in the states which still allow it) demand a strict foreclosure, such course being contrary to the expressed intent of both parties, but might, upon the death of the trustee or his refusal to act, ask a court of equity to appoint a new trustee to make

[61] Sanders v. Soutter, 136 N. Y. 97, 32 N. E. 638 (but an assignment of "my interest" does not give title). Springfield Engine & Thresher Co. v. Donovan, 120 Mo. 423, 25 S. W. 536 (in this case the sheriff of the county was made trustee upon the death or removal of the named trustee, and acted in the sale and conveyance). Shanewerk v. Hoberecht, 117 Mo. 22, 22 S. W. 949 (power coupled with interest,—legal title which may be set up as outstanding title in an ejectment); citing 2 Perry, Trusts, § 602h; Jones, Mortg. § 1792; Kennedy v. Siemers, 120 Mo. 73, 25 S. W. 512. Sale by unlicensed auctioneer not void. Learned v. Geer, 139 Mass. 31, 29 N. E. 215.

[62] See cases below as to particular defects; also Littell v. Jones, 56 Ark. 139, 19 S. W. 497 (sale by person claiming to be trustee's delegate); Smith v. Lowther, 35 W. Va. 300, 13 S. E. 999 (delegate cannot sell). Thus in Massachusetts the statute on the mode of publishing the notice, chapter 181, § 17, speaks of the sale as invalid, if not carried on according to its requirements: and see hereafter cases from that state.

[63] Koch v. Briggs, 14 Cal. 256 (a strong exposition of the effect of a trustee's sale by Chief Justice Field, now of the United States supreme court). Nor can a junior incumbrancer redeem. Marshall v. Blass, 82 Mich. 518, 46 N. W. 947, and 47 N. W. 516. Vary v. Chatterton, 50 Mich. 541, 15 N. W. 896 (if the sale under the power miscarries, an equity suit looking to a sale may be brought). Mo. Rev. St. 1879, §§ 3298, 3299, allowed a years' redemption, when the mortgagee or his assignee was the highest bidder, on giving bond for a year's interest. See Lapsley v. Howard, 119 Mo. 489, 24 S. W. 1020; Van Meter v. Darrah, 115 Mo. 153, 22 S. W. 30; Dawson v. Eggers, 97 Mo. 36, 11 S. W. 61; Updike v. Elevator Co., 96 Mo. 160, 8 S. W. 779.

sale or conveyance, or to conduct the sale through its own master, or through the sheriff or like officer.[64]

Before default the trustee holds the legal title if at all, in trust to allow the grantor to remain in possession, and to receive the rents and profits.[65]

The delays and cost of a chancery suit looking to a sale, to which suit all persons having an interest must be made parties, and in which all rights ascertained before a sale can be guarded, recommended the "power of sale," and especially the "deed of trust," as much as the delays in foreclosure did in England. By its means, land or houses become as available for raising money as stock or bonds, or breadstuffs and meats represented by warehouse receipts. But in the notice and conduct of the sale, little or no care is taken of the interest of later incumbrancers. Hence, what the owner of land gains in the facility of borrowing on first mortgage, he loses when he seeks to contract a second loan from others on the same security.[66]

The power of sale given to the mortgagee or to a trustee is a power coupled with an interest, and is therefore irrevocable.[67]

When the mortgagor dies before a sale actually takes place (for it is immaterial that the default and preparations for the sale have happened and gone on during his lifetime), there are two views as to the effect on the power of sale. Where the mortgage is still considered, as in the New England states and in North Carolina,

[64] Springfield Engine & Thresher Co. v. Donovan, supra; Castleman v. Berry, 86 Va. 604, 10 S. E. 884.

[65] In re Life Association of America, 96 Mo. 632, 10 S. W. 69 (though the deed of trust embraced the "net income realized from the property as the rents"). The deed of trust is here put upon exactly the same footing as an ordinary mortgage. The only remedy of the trustee to get at the rents is (after default) to ask for a receiver, quoting Galveston Railroad v. Cowdry, 11 Wall. 482; American Bridge Co. v. Heidelbach, 94 U. S. 798; Frayser v. Richmond & A. R. Co., 81 Va. 388 (court winding up a railroad wields a large discretion as to income); Walker v. Summers, 9 W. Va. 533 (grantor after making deed of trust cannot dedicate streets).

[66] Personal notice to "terre-tenants," or to those having interests in the equity of redemption is never required; Hardwicke v. Hamilton, 121 Mo. 465, 26 S. W. 342; Reading v. Waterman, 46 Mich. 107, 8 N. W. 691.

[67] Bradley v. Chester Valley R. Co., 36 Pa. St. 151, and very many other cases, cited under this section; none to the contrary.

to carry the legal title to the mortgagee, or where such an effect is ascribed to a deed of trust purporting to vest the estate in a third person, as in Tennessee and Missouri, it seems that the power is "coupled with an interest," in the meaning given to that phrase by Chief Justice Marshall; that is, incident to an estate in the land. If it is, then it survives the death of the grantor.[68] But where the mortgage, or even a "deed of trust," is looked upon as creating no more than a lien, the power is unconnected with any estate, and naturally drops with the death of him who has granted it. An enforcement by chancery or probate proceedings is then the only remedy.[69]

It is usual to name, along with the trustee, some public officer, such as the sheriff of the county, by his official designation, to execute the power if the person first appointed should die, leave the state, or refuse to act; and such an alternate appointment has been always held good. When the mortgagee himself is given the power to sell, it may be conferred in the alternative upon the assignee of the mortgage, or holder of the demand; and in Massachusetts, and some other states, such a devolution of the power is provided for by statute.[70]

[68] So in New York, when these powers were in use, King v. Duntz, 11 Barb. 191 (indeed the statute contemplated a notice to the personal representatives of the mortgagor); in Massachusetts, Varnum v. Meserve, 8 Allen, 158 (following Clay v. Willis, 1 Barn. & C. 364), and Conners v. Holland, 113 Mass. 50.

[69] Robertson v. Paul, 16 Tex. 472; Buchanan v. Monroe, 22 Tex. 537; Lockett v. Hill, 1 Woods, 552, Fed. Cas. No. 8,443; Lathrop v. Brown, 65 Ga. 315 (by implication); Wilkins v. McGehee, 86 Ga. 764, 13 S. E. 84 (directly in point). Both sides rely on Hunt v. Rousmanier, 8 Wheat. 175. What effect the grantor's death has under the peculiar deed authorized by Georgia (Code, § 1969), is left undecided in Brice v. Lane, 90 Ga. 294, 15 S. E. 823.

[70] Many of the sales in cases cited from Missouri were made by the sheriff. In North Carolina, Acts 1887, c. 147, extends the power to the mortgagee's executor, and it was held in Yount v. Morris, 109 N. C. 520, 13 S. E. 892, that he had it before the act. In Alabama (Code, § 1844), the power goes to the assignee of the debt, and the assignment need not contain words of conveyance, Johnson v. Beard, 93 Ala. 96, 9 South. 535; McGuire v. Van Pelt, 55 Ala. 344; and on the mortgagee's death to his administrator, Lewis v. Wells, 50 Ala. 198; it is said to be part of the security and to pass with it, Buell v. Underwood, 65 Ala. 285; but a foreign administrator who has not qualified, cannot act; Sloan v. Frothingham, Id. 593. In Virginia, the county court can appoint a successor to the dead trustee, Fisher v. Dickenson, 84 Va. 318, 4 S.

The power of sale cannot cover any greater interest than that which the mortgagor owns at the time when he confers the power. Hence, when the land is at that time subject to one or more previous mortgages, only the "equity of redemption" can be sold. The whole estate cannot be sold with the understanding that the elder mortgagees are to be paid off out of the purchase money. This may, perhaps, be done, with the assent of these mortgagees, if they are willing to transfer their own interest at the same time with the parties to the power; or a sale thus made may be ratified by the mortgagor, but otherwise it is not a valid sale.[71]

In order to give validity to a sale under a power, the terms of the deed conferring it must be strictly complied with; and the first and foremost requisite is that there should have been a default, and generally not only that an installment should not be paid when it falls due, but, further, that it should remain unpaid after demand made, or for a given number of days. These further conditions, if laid down in the deed, must be complied with.[72] And where the power is conferred on a third party the prerequisite in the deed that the sale shall be made at the request of the holder of the secured debt, or the beneficiary, is deemed imperative; and when such beneficiary of the power is dead, and his executor or administrator has not qualified, there can be no valid request for a sale, and, if made nevertheless, it is invalid.[73] A recital in the trustee's deed that all the conditions for selling have taken place, and that the sale has

E. 737. In Maryland, the court can appoint a successor on resignation, Western Maryland Railroad Land & Imp. Co. v. Goodwin, 77 Md. 271, 26 Atl. 319; this substitution need not be recorded, like an assignment under article 21, § 32, Pub. Gen. Laws.

[71] Donohue v. Chase, 130 Mass. 137; Dearnaley v. Chase, 136 Mass. 288; secus, with consent of prior incumbrancers, Cook v. Basley, 123 Mass. 396.

[72] Tipton v. Wortham, 93 Ala. 321, 9 South. 596; Shippen v. Whittier, 117 Ill. 282, 7 N. E. 642 (but possession of the note is prima facie proof of default); Towner v. McClelland, 110 Ill. 542; Wood v. Colvin, 2 Hill (N. Y.) 566.

[73] Magee v. Burch, 108 Mo. 336, 18 S. W. 1078 (sale void, when no request by holder). See, however, Wood v. Augustine, 61 Mo. 46, where it was said there need be no such request, where the deed of trust does not demand it. In Alabama, the power of sale goes with the assignment of the debt, Code, § 1844; Hartley v. Matthews, 96 Ala. 224, 11 South. 452; taking possession is not a prerequisite, though the deed of trust empowers the trustee to take possession and sell, Hamilton v. Halpin, 68 Miss. 99, 8 South. 739.

been conducted in the proper way, whether the recital be made in general terms, or by enumeration of all the events and steps in the proceeding, is no proof of the facts stated, unless the clause in the deed of trust conferring the power makes it proof;[74] and even then it concludes the grantor, and those claiming under him, only as to the steps taken by the trustee in advertising and conducting the sale, but not as to the default incurred, or as to the request made by the creditor.[75]

Whether the manner of advertising and conducting the sale be fixed by the terms of the power, or by a statute applicable to all such sales alike, the terms must be strictly followed; especially as to the length of the published notice, and of the time by which it must precede the sale. Otherwise the sale is ineffectual, and leaves all parties in the same condition in which they were before, except that the purchaser with whose money the mortgagee or beneficiary of the trust has been paid would be substituted to the rights of the latter, to the extent of his payment.[76] But, where the terms of the law or power have been literally complied with, an inquiry into the conduct of the sale can, in the absence of unfairness or fraud, go no further, and the sale cannot be set aside because it was not advertised in a more widely circulated newspaper, or with greater effort at publicity, though, in case of doubt, some weight

[74] Neilson v. Charlton Co., 60 Mo. 386. But after a lapse of time (say four or five years) a lawful advertisement is presumed, Dryden v. Stephens, 19 W. Va. 1; perhaps the burden of proof is always on the assailant of the trustee's deed, Fulton v. Johnson, 24 W. Va. 95 (but quære, if this be law elsewhere); Sinclair v. Learned, 51 Mich. 335, 16 N. W. 672 (no presumption that advertisement was made, it being an act of a party, not of an officer). The recital is, however, in Mississippi, considered prima facie proof of the steps taken by the trustee, Tyler v. Herring, 67 Miss. 169, 6 South. 840, and perhaps in some other states. In Mississippi, if the deed names no other place, the sale must be had at the place for sheriff's sales, Goodman v. Durant Bldg. & Loan Ass'n, 71 Miss. 310, 14 South. 146.

[75] Savings & Loan Soc. v. Burnett (Cal.) 37 Pac. 180.

[76] Bigler v. Waller, 14 Wall. 297 (advertisement for 60 days required and not made); Shillaber v. Robinson, 97 U. S. 68; (New York law requiring advertisement for 12 weeks referred to, and only 6); s. p. Lawrence v. Farmers' Loan & Trust Co., 13 N. Y. 200; Bragdon v. Hatch, 77 Me. 433, 1 Atl. 140 (newspaper "printed" in the county required, one "published" in it not sufficient).

has been given to the result as whether the sale was well or ill attended by bidders, and whether or not the price was grossly inadequate.[77] But inadequacy of price, unless it be so gross as to indicate fraud, is not a ground for avoiding the sale, if it was rightly conducted in all respects. In fact, when the debtor is insolvent, a sale at a merely nominal price may be quite fair to him, and of advantage to the creditor, as lessening the commissions to the trustee.[78] The terms of sale cannot be varied from those prescribed, and it will not do to say that a sale on credit, instead of cash, or on longer instead of shorter credits, is of more benefit to the debtor, as some bidders may seek for an immediate investment of their money. But the grantor cannot complain of a deviation so clearly for his benefit, as giving to the successful bidder the right, after depositing a part of the price, to withhold the rest till the title is examined, instead of paying the whole price at once.[79]

Of the contents of the notice, the most important is the description. Unless the mortgage or deed of trust be itself void for the uncertainty of the description, the notice may denote the premises to be sold as they are denoted in that instrument, even though, by outward changes—for instance, in the naming and numbering of streets, or of the names of adjoining lot owners—between the deed of trust and the publication of the notice the description given in the former is no longer strictly true in all its parts, provided that the inaccuracy is not such as to mislead probable bidders.[80]

[77] Stevenson v. Hans, 148 Mass. 616, 20 N. E. 200. Compare Thompson v. Heywood, 129 Mass. 401; Briggs v. Briggs, 135 Mass. 306. The advertisement need not mention improvements put on the ground by the mortgagor. Austin v. Hatch, 159 Mass. 198, 34 N. E. 95. A change in the name and place of publication of the newspaper cannot invalidate the sale. Perkins v. Keller, 43 Mich. 53, 4 N. W. 559; Roberts v. Loyola Perpetual Bldg. Ass'n, 74 Md. 1, 21 Atl. 684 (land brought into city, well advertised in city paper).

[78] And where gross inadequacy might show fraud, the right to set aside the trustee's deed is equitable only, not enforceable against purchaser in good faith from the purchaser. Dryden v. Stephens, 19 W. Va. 1.

[79] Model Lodging House Ass'n v. City of Boston, 114 Mass. 136; Baldridge v. Walton, 1 Mo. 520 (terms of sale can be changed only by new deed); but see, as to ratification of irregular sale, Kennedy v. Siemers, 120 Mo. 73, 25 S. W. 512.

[80] Dickerson v. Small, 64 Md. 395, 1 Atl. 870 (name of town omitted, being the town of publication, immaterial); Loveland v. Clark, 11 Colo. 265, 18 Pac.

The place of sale may be fixed by the terms of the deed; or discretion may be given to the trustee to name the place along with the time in the published notice. It is usual to name the door of the courthouse or of some other public building; and if, between the execution of the deed and the default in payment, such courthouse, post office, etc., should be abandoned or destroyed, the sale may properly be held at the new building used for that purpose; and any doubt on the subject may be removed by denoting the place with certainty in the advertisement.[81] The time, that is, the day and hour of the sale, must also correspond with the terms of the deed, and, of course, with those of the advertisement, for thus alone can the attendance of bidders be secured; and, generally speaking, the trustee need not adjourn the sale in order to obtain a larger attendance of bidders, which indeed would often do more harm than good. A public sale can of course not take place on a Sunday; but it is not void because it takes place on a "bank holiday." [82]

The notice of sale must identify the deed under which the sale takes place. This is generally done by stating the parties, the date, sometimes by giving its place in the registry, by number of deed book, and page; but the names of parties and the date are generally sufficient. The date of recording is generally immaterial. It must also give the name of the assignee, when the mortgage is assigned.[83] It should indicate the manner of selling; whether for cash or on credit, and the terms of credit; whether subject to prior liens, and what these liens are; and, above all, the amount of money to be raised; but much liberality has been shown in all these respects, in order that trustee's sales be not discredited.[84]

544; Model Lodging House Ass'n v. City of Boston, 114 Mass. 136; Stickney v. Evans, 127 Mass. 202; Pueblo, etc., R. Co. v. Beshoar, 8 Colo. 32, 5 Pac. 638.

[81] Stewart v. Brown, 112 Mo. 171, 20 S. W. 451.

[82] Morgan v. Joy, 121 Mo. 677, 26 S. W. 670; Stewart v. Brown, supra.

[83] White v. McClellan, 62 Md. 347 (need not give assignee's name, when he has reassigned; the omission of the mortgagee's middle initial not fatal).

[84] Curry v. Hill, 18 W. Va. 370 (need not unless required by the deed say in the notice that only as much as necessary will be sold). In Freeman v Moffitt, 119 Mo. 280, 25 S. W. 87, parol evidence had to be adduced to show under which of two trust deeds of same date the land was sold. The inclusion of an installment, not yet due, in the notice was, in Huyck v. Graham, 82

As to the mode of "foreclosure by advertisement," which is most fully regulated in detail, and which is illustrated by the greatest number of decisions, that set forth in the statutes of Michigan deserves a short mention; the method prescribed being exclusive of any other method of selling under a power. Unless the power to sell in this manner is given, the mortgage can be only enforced by suit in equity; but a clause directing another manner of advertising or selling will, if possible, be so construed as not to exclude that of the statute.[85] Under this the sale must be advertised for 12 successive weeks, at least once a week, in a newspaper printed in the county in which the land, or part thereof, is situate. The advertisement must contain the names of the mortgagor and mortgagee, and of the assignee of the mortgage, when such there is; the date of the mortgage, and when it was recorded; the amount claimed to be due at the date of the notice; and a description conforming substantially to that of the mortgage. The sale must be at public vendue, at the place where the circuit court is held, between 9 a. m. and sunset, and must be conducted by the person named in the power, or by the sheriff, or his undersheriff or deputy. It may be postponed by notice in the same newspaper in which it was first advertised.

Separate farms or lots, not jointly occupied, must be separately sold, and the sale comes to an end when the debt and expenses are raised.[86] The sale is for cash, and a late act requires the bidder

Mich. 353, 46 N. W. 781, held not to avoid the sale; and a bill to redeem was dismissed because the mortgagor did not offer to pay the whole debt when due. In Mason v. Goodnow, 41 Minn. 9, 42 N. W. 482, one advertisement for sale of several lots, pledged for separate sums, showing amount due on each, was held good.

[85] Comstock v. Howard, 1 Walk. Ch. (Mich.) 111; Bennett v. Robinson, 27 Mich. 26; Pierce v. Grimley, 77 Mich. 273, 43 N. W. 932.

[86] How. St. §§ 8499–8503; an act of 1885 (see Supp. § 8515a) provides for an attorney's fee. The assignment must be recorded; but this does not effect the devolution on the administrator. Miller v. Clark, 56 Mich. 337, 23 N. W. 35. It is left in doubt in Emmons v. Van Zee, 78 Mich. 172, 43 N. W. 1100, whether a sale under a mortgage before this act, where such a fee was included, was void on that ground, the case going off on the ground of laches. Other states regulate the advertisement and time and place of sale on similar lines. Thus, the Massachusetts law referred to supra, note 59, prescribes three advertisements, once a week, the first of them to precede the sale by at least

to produce it at the sale, in default whereof the land may be resold; but this provision has been liberally construed, so as not to repel outside bidders, and the needful time is allowed to produce the money after the bid.[87] The mortgagor, his heirs, representatives, and assigns, have one year in which to redeem from the purchaser, his executors, etc., or assigns, by paying the amount of bid, with such interest as is named in the mortgage, either on the entire premises or on any one parcel that has been sold separately; whereupon the deed given at the sale as to the whole, or as to that parcel, becomes void.[88] The statutes of Wisconsin and Minnesota on foreclosure by advertisement are borrowed from that of Michigan, and resemble it closely.[89] The holder of the demand secured by mortgage is most likely to bid at the sale, and unless a stranger bids more than the amount of the debt with interest, expense of advertisement and commissions, he is generally the successful bidder, as he has the advantage of having no outlay in money to make. Where the sale is conducted by a trustee, the mortgagee can undoubtedly bid and buy. It would be an injury to both parties if he could not. In fact, the third party is purposely introduced that the mortgagee should not be buyer and seller in one. Whether he can bid when he ex-

21 days; and generally the length of the time for advertising is much shorter than 12 weeks. The attorney's fee, limited by the Michigan law, recommends the plan for its cheapness. It is $15 for all sums up to $500; $25 for from $500 to $1,000; $35 on all for a greater amount than $1,000. The sale is void when the name of the holder of the demand is not correctly given (Lee v. Clary, 38 Mich. 223); but the legal holder of the demand may represent those equitably interested. In like manner, in Maryland, the order of court substituting a new trustee need not be recorded. Western Maryland Railroad Land & Imp. Co. v. Goodwin, 77 Md. 271, 26 Atl. 319. In Mississippi the trustee is entitled to compensation without express contract. Nicolon v. McDonald, 71 Miss. 337, 13 South. 870.

87 Converse v. Clay, 86 Mich. 375, 49 N. W. 473.

88 Michigan, St. § 8507. Payment may be made to the register of deeds, adding his fee. Subsequent mortgagees may redeem, Lamb v. Jeffrey, 41 Mich. 719, 3 N. W. 204; purchasers, Stone v. Welling, 14 Mich. 514; guardian for his ward, Marvin v. Schilling, 12 Mich. 356; execution creditors, Harwood v. Underwood, 28 Mich. 427; a party having no interests cannot, Smith v. Austin, 9 Mich. 465; a court of equity cannot extend the time, Cameron v. Adams, 31 Mich. 426.

89 Wisconsin, Ann. St. §§ 3523–3533, 3540; Minnesota, St. c. 81, tit. 1 (section 13 gives redemption).

ercises the power himself, and can return himself as the highest and best bidder, and thus as the purchaser, is another question. As attorney for the mortgagor, it is his duty to seek for the highest price, and to so conduct matters that others may bid, and may drive him up; while it may be his interest to have no strangers bidding, and to get the mortgaged lands at the lowest possible price. It has been held, however, in several states, that the mortgagee may bid at his own sale. So in South Carolina; not so in North Carolina, where a purchase by him, either in his own name or in that of another on his behalf, is voidable (though not void), and leaves the equity of redemption unimpaired. In Alabama, the mortgagee can buy, if authorized to do so by the deed; otherwise his purchase is voidable.[90]

Sales have been sustained where more land was sold than needed to discharge the debt, the surplus being returned to the grantor, upon the simple ground that the deed of trust authorizes the sale of "the land"; while a sale of a smaller quantity, such being sufficient to satisfy the demand, has also been held valid, as being of advantage to the grantor, who thus saved a part of his land.[91] The harshness of the remedy, which knows of no delay, and is wielded altogether by the creditor, or a trustee of his choice, has induced the legislatures in several states to introduce a limited right of redemption. Thus,

[90] Robinson v. Amateur Ass'n, 14 S. C. 148. Contra, Averitt v. Elliot, 109 N. C. 560, 13 S. E. 785; Whitehead v. Whitehurst, 108 N. C. 458, 13 S. E. 166. In McMillan v. Baxley, 112 N. C. 578, 16 S. E. 845; a purchase by the mortgagee's partner was sustained, though "sales under a power are looked on with suspicion." When the deed authorizes it, a purchase by the mortgagee is as good as that of a stranger. Knox v. Armistead, 87 Ala. 511, 6 South. 311; Lindsay v. American Mortg. Co., 97 Ala. 411, 11 South. 770. The mortgagee can better his title by suit in chancery, giving the mortgagor a chance to redeem. Orr v. Blackwell, 93 Ala. 212, 8 South. 413; American Freehold Land Mortg. Co. v. Sewell, 92 Ala. 163, 9 South. 143. And the mortgagor cannot complain that credit is given to the purchaser, if he is at once credited with the bid, and there is no surplus. Durden v. Whetstone, 92 Ala. 480, 9 South. 176.

[91] Millard v. Truax, 50 Mich. 343, 15 N. W. 501 (sale not necessarily void for excess). But a sale of several lots, pledged for separate sums, as a whole, is void. Bitzer v. Campbell, 47 Minn. 221, 49 N. W. 691. In Curry v. Hill, 18 W. Va. 370, the trustee, it is said, may use his discretion whether to sell more than what will bring the exact amount.

in Arkansas, since 1879, the former owner has one year from the sale in which to redeem. But this remedy aggravates matters, as it shuts off all prospect of competition, and of a fair price being bid. It has been held in that state that, if the old owner comes forward with the money, he may redeem by paying or tendering the bid with 10 per cent. interest; but, if he comes into equity for relief, he must pay the whole mortgage debt, but that a tender made during the year may be followed up by a suit to redeem after the year.[92]

In Alabama the same two-years redemption is given upon all sales of land made for the collection of debts, whether made under a power of sale in a mortgage, under a decree in chancery, or under execution. The purchaser is, however, put into possession in 10 days after the sale, unless the money is tendered by that time. After that the amount of the bid, with interest at the rate of 10 per cent., and all lawful charges, may be tendered to the purchaser or his vendee, and payment or tender works a reinvestment of the title. Any creditor who before or within two years after the sale has recovered judgment (except a judgment by confession), and who will credit his judgment with at least 10 per centum of the price bid at the sale, may redeem in like manner, and is subrogated to all the rights of the purchaser (e. g. to set aside prior unrecorded or fraudulent conveyances). One who is not, by purchase or judgment lien, in privity with the former owner, cannot redeem. A tender cannot be pleaded, either in attack or defense, unless it is followed up by payment into court. Where a mortgagee bids land in for less than his debt, the difference is considered "lawful charges." In other words, the owner cannot redeem without paying the whole mortgage debt, with interest and costs.[93]

[92] Compare note 59, supra; Wood v. Holland, 57 Ark. 198, 21 S. W. 223; Id., 53 Ark. 69, 13 S. W. 739; Dailey v. Abbott, 40 Ark. 275 (purchaser liable for rents and timber like mortgagee in possession); Robards v. Brown, Id. 423. The act of 1879 is void as to deeds of trust made before its date.

[93] Alabama, Code, §§ 1879–1883. Equity cannot extend the time beyond two years, Seals v. Pheiffer, 77 Ala. 278; but, when the purchaser is absent from the state, suit to redeem, with payment into court, can be had without previous tender, Lehman v. Collins, 69 Ala. 127; tender to purchaser himself good, when no notice of sale by him, s. c. (see what recording not notice); Caldwell v. Smith, 77 Ala. 157, and Alexander v. Caldwell, 61 Ala. 543 (tender to be followed up); Harris v. Miller, 71 Ala. 26 ("lawful charges"); Holden v.

Equity will not permit the trustee or mortgagee to sell under a power when the clouded state of the title, arising from conflicting liens which claim priority over the deed of trust, or otherwise, or where an uncertainty of the debts which the deed or mortgage is given to secure, must necessarily deter bidders, and lead to a sacrifice of the estate; and the power of the chancellor may be invoked by the owner, or by his lien creditors. This doctrine, in Virginia and in Michigan, at least, is fully established, and is applied in Michigan to the "statutory foreclosure" which is there in vogue.[94]

A deed of general assignment for the benefit of creditors is truly a "deed of trust," and the assignee is a trustee with power of sale, except where the local statute demands that the trust be wound up in a court, and that all sales of land be made under its orders, which is now demanded by the laws of nearly every state.[95]

Rison, 77 Ala. 515 (want of privity); Lehman v. Shook, 69 Ala. 486 (subrogation to all rights); Gordon v. Smith, 10 C. C. A. 516, 62 Fed. 503 (redemption by mortgagee of insolvent owner; exact tender excused by refusal of purchaser to state correct amount). When a vendee from the purchaser is in open possession, the tender should be to him, Camp v. Simon, 34 Ala. 126; it may be made by an agent by letter, Couthway v. Berghaus, 25 Ala. 393; one holding judgment against the executor may redeem, Garner v. Foster, 49 Ala. 167; the original creditor may redeem from purchaser for unsatisfied part of his judgment, Posey v. Pressley, 60 Ala. 243.

[94] Miller v. Mann, 88 Va. 212, 13 S. E. 337; Cole v. McRae, 6 Rand. (Va.) 644 (whatever leads to sacrifice); Wilkins v. Gordon, 11 Leigh, 547 (debts not fully stated); Shultz v. Hansbrough, 33 Grat. 567 (compare Shepard v. Richardson, 145 Mass. 32, 11 N. E. 738, to be noticed hereafter). So, if the grantor has only an equitable estate, but a right to the legal title, the trustee must get it in before selling. Rossett v. Fisher, 11 Grat. 492; Strong v. Tomlinson, 88 Mich. 112, 50 N. W. 106 (mortgages having been partly set aside by decree); Dohm v. Haskin, 88 Mich. 145, 50 N. W. 144 (assignment not well recorded); Olcott v. Crittenden, 68 Mich. 230, 36 N. W. 41; O'Brien v. Oswald, 45 Minn. 59, 47 N. W. 316 (under a statute requiring sale to be enjoined immediately, but a month was not deemed too long). In Massachusetts, a bill to redeem stops the proceeding to sell under power, if notified on the registry of deeds. See chapter 175, § 1; Clark v. Griffin, 148 Mass. 540, 20 N. E. 169; Atkinson v. Everett, 114 N. C. 670, 19 S. E. 659; Newkirk v. Newkirk, 56 Mich. 525, 23 N. W. 206 (against purchaser at execution sale, seeking to annul the mortgage for fraud, it cannot be foreclosed under the power).

[95] The laws for this purpose are framed more or less closely upon that of Connecticut, first enacted in 1843; and about the latest of them is that of Kentucky, coming into force June 12, 1894. The feature of the best of these

The distinguishing feature of such a deed is that redemption is not expected. There are sometimes partial assignments made; that is, an owner of some one tract of land conveys it to a trustee, with directions to sell and to pay off certain named debts. This is a mortgage, for, should the grantor himself pay the debts, he would be entitled to a reconveyance; and the same right a debtor has who, after making a general assignment, makes a settlement or composition with his creditors, paying them in cash or secured notes, as often happens. Yet the trustee or assignee can, by his sale and conveyance, pass a good title to the purchaser; and the statutory provisions made for the ordinary deed of trust, which is executed upon a loan, would not apply to a deed of trust in which the conversion of the land into money is the prime end and object.[96]

A deed conveying land to a trustee, to hold for named creditors of the grantor, in the proportion of their demands against him, is neither a deed of assignment nor a "deed of trust" within the meaning of this section. If the creditors accept, they become simply the owners of the land, in proportion to their demands, with the naked legal estate in the trustee, where the law permits naked trusts.[97]

§ 95. Future Advances.

A mortgage, or a "deed of trust," or mortgage with power of sale may be so written as to cover "future advances,"—that is, such loans of money as the mortgagee, or the creditor secured by the deed of trust, may advance after its delivery,—or to secure indemnity to the mortgagee or to the beneficiary in the deed of trust for such responsibilities, as the one or the other may incur on behalf of the mortgagor or grantor after such delivery.[98] Indeed, the same prin-

statutes is that "an assignment is an assignment,"—that is, the debtor can simply convey his property to a trustee for equal distribution, with such priorities as the law prescribes, and without having any choice as to the management of the property, after it comes to the hand of the trustee. Bond must be given, an oath taken, and an inventory filed by the latter in the probate court; and the winding up of the assignment is carried on under the supervision of that court, from the oath and bond to the final distribution and the trustee's discharge.

[96] Wilson v. Parshall, 129 N. Y. 223, 29 N. E. 297.

[97] Catlett v. Starr, 70 Tex. 485, 7 S. W. 844.

[98] U. S. v. Hooe, 3 Cranch, 73; Shirras v. Craig, 7 Cranch, 34; Conrad v.

ciple has been extended to judgments which have been confessed and docketed to serve as securities for future advances, and have been recognized as giving a valid lien from the day on which ordinary judgments would create it.[99]

There is no question that a mortgage, deed of trust, or docketed judgment can be thus made available between the original parties, either by stating expressly in the mortgage, that it shall cover future loans, indorsements, etc., of a given description,[100] or by professing to secure a lump sum, or a note or bond for a lump sum, and then proof may be given, written or verbal, to show that the sum named in the condition, or the note or bond which is secured, were to stand as security for advances or responsibilities, and that such advances were made or responsibilities undertaken, and that the former were not paid, or the latter not made good, by the mortgagor. In such cases the sum named serves as the outer limit for the ad-

Atlantic Ins. Co., 1 Pet. 448; Leeds v. Cameron, 3 Sumn. 492, Fed. Cas. No. 8,206 (good at common law); Ward v. Cooke, 17 N. J. Eq. 98; Brooks v. Lester, 36 Md. 65 (advances may be in goods); Rice v. Groves, 70 Hun, 74, 23 N. Y. Supp. 936 (the future advances may be to others). It has been held in Gleason v. Kinney's Adm'r, 65 Vt. 560, 27 Atl. 208, that a mortgage for future "debts" will cover a claim for money which the mortgagor received for goods taken by trespass from the mortgagee.

[99] Truscott v. King, 6 N. Y. 147; Parmentier v. Gillespie, 9 Pa. St. 86 (though the plaintiff did not know of the judgment, until he began to make advances). In Vermont and some other states these mortgages are known as "continuing."

[100] Lyle v. Ducomb, 5 Bin. (Pa.) 585 (no consideration is more meritorious). It has been held in Pennsylvania (Woods v. People's Bank, 83 Pa. St. 57) that national banks have, under the national bank law, no capacity to receive a mortgage of land for future advances. Nor is the mortgage for securing future advances fraudulent against the wife's alimony. Newkirk v. Newkirk, 56 Mich. 528, 23 N. W. 206. In New Hampshire, however, the statutes (chapter 139, §§ 2, 3), based on an act of 1829, forbid mortgages for future advances, or indorsements. But where a sum is already due, and this is identified by the mortgage, it is good for that amount, notwithstanding a clause seeking to secure liabilities arising thereafter. See Fessenden v. Taft, 65 N. H. 39, 17 Atl. 713; Benton v. Sumner, 57 N. H. 117, and cases therein quoted. Colby v. Dearborn, 59 N. H. 326 (note may be identified by parol); even if misdescribed, Cushman v. Luther, 53 N. H. 563. The clause is not readily construed to cover claims which the mortgagee may buy up. Lashbrooks v. Hatheway, 52 Mich. 124, 17 N. W. 723 (here the size of the revenue stamp was taken as countervailing a printed "omnibus clause").

vances,[101] but when the mortgage in so many words secures further advances, it is not necessary (though it is usual) to name an upper limit; and this rule is quite correct, for it would be easy enough to name a limit far above the value of the land that is hypothecated.[102]

There has been some dispute and difficulty, when further advances have been made under a mortgage of this sort after new rights have accrued to purchasers or incumbrancers. A distinction is made between further advances that are obligatory (i. e. made under a covenant entered into at the time of the mortgage), and those which are voluntary (that is, each of which the mortgagee makes according to his free choice at the time). Covenants for advances up to a named amount are often made by capitalists to men who have bought land for building purposes; the mortgagor not desiring to have the money any quicker than the work of building progresses, while the lender is unwilling to advance any more than what the progress of the work already done secures.[103] A mortgagee in such a position has the right to go on and make his advances on the security of his mortgage, though incumbrances are put upon the land, and are brought to his actual knowledge.[104]

[101] Lyle v. Ducomb, supra (two judges dissenting); Gordon v. Preston, 1 Watts, 385; Huckaba v. Abbott, 87 Ala. 409, 6 South. 48; Simons v. First Nat. Bank, 93 N. Y. 269; Louisville Banking Co. v. Leonard, 90 Ky. 106, 13 S. W. 521; Tully v. Harloe, 35 Cal. 302; Moroney's Appeal, 24 Pa. St. 372. The single sum may be intended for several creditors. Shirras v. Craig, supra; Lawrence v. Tucker, 23 How. 14, 26 (note stands as collateral for future advances). Nor is it an objection that notes given under the "future advances" clause of a mortgage, represent an older debt; D'Oyly v. Capp, 99 Cal. 153, 33 Pac. 736; Stoddard v. Hart, 23 N. Y. 556. But the agreement must be contemporary; no new terms can be introduced to affect third parties. Grady v. O'Reilly, 116 Mo. 346, 22 S. W. 798. But in Burt v. Gamble, 98 Mich. 402, 57 N. W. 261, an old debt was ruled out, though a new note was given for it.

[102] M'Daniels v. Colvin, 16 Vt. 300 (what he may owe on books); Witczinski v. Everman, 51 Miss. 841. Naming a larger sum in the mortgage than was lent may be induced by motives of fraud against creditors, but it is not in itself proof of such intent. Allen v. Fuget, 42 Kan. 672, 22 Pac. 725.

[103] Discussed in Tapia v. Demartini, 77 Cal. 383, 19 Pac. 641. The agreement to make future advances may be oral. In Lyle v. Ducomb, 5 Bin. (Pa.) 585, there was a covenant by the mortgagee to give further aid.

[104] Moroney's Appeal, 24 Pa. St. 372 (advances for building, preference over mechanic's lien). "A mortgage for obligatory advances is a lien from the date of its execution, and will therefore secure such advances, although other

There is another kind of involuntary advances which, upon loans of money by loan and trust companies, banks, etc., are now always secured in the mortgage or deed of trust,—the premiums of fire insurance, the taxes and street assessments, sometimes also the cost of necessary repairs, which the mortgagee may have to pay in order to save himself from loss by the destruction of the buildings, or by their dilapidation, or to save the land from being forfeited or sold for a trifle. Such outlays are then treated as an incident of the debt secured, like interest and costs.[105]

incumbrances are put upon the property before such advances are in fact made, and such advances are not affected by the mortgagee's knowledge of the subsequent incumbrances. But where the mortgagee is not bound to make the advances, and has actual notice of a later incumbrance, such later incumbrance will take precedence of the first mortgage, as to all advances made under such notice." Tapia v. Demartini, supra; Young v. Omohundro, 69 Md. 424, 16 Atl. 120 (mortgagor agrees to pay taxes, but fails, mortgagee can pay and recover); Griffin v. Burtnett, 4 Edw. Ch. 673; Wilson v. Russell, 13 Md. 495 (though put on other grounds); in Gross v. McKee, 53 Miss. 536, an agreement to make future advances, when it was not intended to do so, is said to be a fraud, rendering the whole mortgage void; if not fraudulent, as in Coleman v. Galbreath, Id. 303, the damage done to the mortgagor by refusing the advances must be credited on the mortgage. In Hyman v. Hauff, 138 N. Y. 48, 33 N. E. 735, and Rowan v. Sharps' Rifle Manuf'g Co., 29 Conn. 282, there was no formal undertaking to make further advances, but a practical necessity to make them, or to incur loss, and they were allowed notwithstanding actual notice by the subsequent incumbrancer. In the latter case the first mortgagee held apparently the absolute deed.

[105] In Ohio any lien holder has the statutory right (section 2853) to pay taxes and assessments, and to claim them as first charge on the land. See Bates v. People's Sav. & Loan Ass'n, 42 Ohio St. 655 (if tax is valid on its face, lienor may pay it and recoup himself, though it turns out invalid). So under an agreement, Williams v. Graver, 152 Pa. St. 571, 25 Atl. 874 (receipt for interest to date does not bar paid taxes as against purchaser); Hall v. Westcott, 17 R. I. 504, 23 Atl. 25 (is allowed cost of tax title); Jackson v. Relf, 26 Fla. 465, 8 South. 184 (taxes paid by mortgagee after default allowed him, without provision in the deed). In Minnesota, St. c. 11, § 104, the mortgagee can pay taxes and add them to his own lien. See Webb v. Lewis, 45 Minn. 285, 47 N. W. 803; also, St. c. 81, § 1. Townsend v. J. I. Case Threshing Mach. Co., 31 Neb. 841, 48 N. W. 899 (mortgagee, without agreement, may pay tax and add to his debt); Sidenberg v. Ely, 90 N. Y. 257 (mortgagee need not wait for tax sale). In Massachusetts an agreement to pay "all taxes" includes those on the mortgage. Hammond v. Lovell, 136 Mass. 184. Contra, Schmidt v. Smith, 57 Mo. 135 (trustee in "deed of trust" cannot pay taxes or lift prior

In California the constitution provides for taxing the interest of the mortgagor and the mortgagee of the land separately, and it renders void, and punishes moreover with the forfeiture of interest, any stipulation exacted by the mortgagee that the tax on his interest is to be paid by the mortgagor.[106]

But where the further advances rest with the free choice of the mortgagee, the rule seems to be this: Whenever a new right arises, either by deed, judgment or attachment, and actual notice is brought home to the first mortgagee, he can then make no further advances that will take rank from the delivery or registry of the mortgage.[107] Yet the mere registry of the junior conveyance or incumbrance, or the docketing of a judgment in the proper office, does not affect the senior mortgagee with constructive notice; for, as will be seen hereafter, the registry laws are intended to give notice to subsequent, not to older, purchasers or incumbrancers.[108]

But the courts of Pennsylvania, Ohio, Illinois, Connecticut, and

incumbrances, unless authorized by the deed). Fire insurance may be paid by the mortgagee on his interest and charged, without contract therefor, by Connecticut, Gen. St. § 3009. In Sidenberg v. Ely, 90 N. Y. 257, both insurance and taxes were allowed, though not provided for.

[106] Const. Cal. art. 13, § 5; Burbridge v. Lemmert, 99 Cal. 493, 32 Pac. 310 (where an ineffectual attempt was made to construe away such an agreement); but it may be agreed that the mortgagee will pay the tax on the land, and charge it with his mortgage, Marye v. Hart, 76 Cal. 291, 18 Pac. 325.

[107] Hopkinson v. Rolt, 9 H. L. Cas. 514 (overruling Gordon v. Graham, 2 Eq. Cas. Abr. 598; London & County Banking Co. v. Ratcliffe, 6 App. Cas. 722, here the first mortgage was equitable); Bradford Banking Co. v. Briggs, 12 App. Cas. 29 (corporate stock); Finlayson v. Crooks, 47 Minn. 74, 49 N. W. 398, 645.

[108] Jarman, in a note to Bytherwood, Conveyancing, says: "No person ought to accept any security subject to a mortgage authorizing future advances without treating it as a mortgage for an actual advancement to that extent." Tapia v. Demartini, supra (lien by relation back from time of its execution); M'Daniels v. Colvin, supra (recording of second mortgage not notice); Truscott v. King, supra; Robinson v. Williams, 22 N. Y. 380; Ackerman v. Hansicker, 85 N. Y. 46 (docketing judgment not notice); s. p., Ward v. Cooke, 17 N. J. Eq. 93, 99; Witczinski v. Everman, supra (crop mortgage). The New York cases overrule a dictum in Livingston v. McInlay, 16 Johns. 165. The early Kentucky case, Nelson v. Boyce, 7 J. J. Marsh. 401, was, like Burdit v. Clay, 8 B. Mon. 287, influenced by the "old view" of the mortgage, and would probably not be followed now. Shirras v. Craig, 7 Cranch, 34, is sometimes cited for this view; but there was not even record notice.

Michigan have taken what seems to be the common-sense view of the subject,—that the mortgage for future advances is a blank piece of paper till the advances are actually made; that therefore each advance is practically a new mortgage, as of its own date, and if another incumbrance has been put on the land in the meantime and has been registered, such registry is notice to one who makes a further advance, because in so doing he becomes a subsequent purchaser; and that, therefore, where the future advances are voluntary, a subsequent lienor (by mortgage or judgment) can, by recording or docketing his incumbrances, keep the former mortgage down to the advances actually made without giving actual notice.[109]

To conclude this subject: An agreement is often found in mortgages that, if an action for enforcing the mortgage shall, by the debtor's default, become necessary, the mortgagee shall be allowed his reasonable attorney's fees, and recover them with his demands for principal and interest; and the measure of this fee, either as a gross sum or as a percentage, is sometimes named in the note, bond, or deed. It has been contended, that such a stipulation, when the interest otherwise agreed upon comes up to the limit of the law, is wholly usurious; but the creditor is in no case to receive this additional fee. He would prefer that the mortgagor should save it by promptness, and it is, at least in theory, in the latter's power to save it. Hence, in most of the states, such agreements have been held not obnoxious to the usury laws.[110] In some states the measure

[109] Ladue v. Detroit & M. R. Co., 13 Mich. 390, reviewing all English and American cases bearing on the point, down to 1865; Spader v. Lawler, 17 Ohio, 371; Collins v. Carlile, 13 Ill. 254; Montgomery County Bank Appeal, 36 Pa. St. 170, and Ter Hoven v. Kerns, 2 Pa. St. 96. The opposite view is said to rest mainly on the old English case of Gordon v. Graham, perhaps misreported and since overruled; and this rested probably on the doctrine of tacking. Also, but rather a dictum, Boswell v. Goodwin, 31 Conn. 74 (each advance a new mortgage).

[110] Lindley v. Ross, 137 Pa. St. 629, 20 Atl. 944 (no demand is necessary to charge with the fee). In this case $200 was allowed on a mortgage of $14,000, and a case is cited in which only $150 was allowed on $11,180, L'Engle v. L'Engle, 21 Fla. 131; Huling v. Drexell, 7 Watts, 126; Lewis v. Germania Sav. Bank, 96 Pa. St. 86; National Sav. Fund & Bldg. Ass'n v. Waters, 141 Pa. St. 498, 21 Atl. 666 (no attorney's commission allowed where sci. fa. issued in unfair haste); but, if the defendant wishes to object on account of such haste, he must pay promptly after suit, Lewis v. Germania Sav. Bank,

of the fee that may be agreed upon is fixed by statute. In Kentucky, however, the agreement has been held to be unlawful and void,—partly on the ground that the parties cannot make their own law of costs, while the general law allows a docket fee of five dollars only; partly on the ground that a court should not enforce a penalty.[111]

§ 96. Absolute Deed as Mortgage.

In measure as courts and lawmakers relaxed the terrors of the mortgage, and made it more difficult for the mortgagee to obtain either possession of the land, or a perfect title, lenders sometimes became less willing to advance money to landowners on the usual terms, and insisted often on what they thought a better security; that is, an absolute deed of conveyance, without any defeasance, either in the body of the deed, or by a separate writing, and with no assurance to the borrower that the title would revert to him by payment of the debt, even should such payment be made on the very day agreed upon, except by a verbal understanding, which would not be enforceable under the statute of frauds. Now equity takes hold of these apparently absolute sales, examines them according to rules of its own, and when, according to these rules, an absolute deed appears to have been intended to perform the work and office of a mortgage, it is declared to be a mortgage, and the grantor is given an opportunity to redeem the land by the payment of principal and interest. And this seems to be the law throughout the Union, except in four states.[112] But in Pennsylvania this law was radically changed in

96 Pa. St. 86; Speakman v. Oaks, 97 Ala. 503, 11 South. 836 (clause for attorney's fee covers that paid to defeud injunction suit); American Freehold Land Mortg. Co. v. McCall, 96 Ala. 200, 11 South. 288 (power of sale given, cannot charge for fee in suit unless suit was needed); and several other cases, e. g. Bedell v. New England Mortg. Sec. Co., 91 Ala. 325, 8 South. 494.

111 Thomason v. Townsend, 10 Bush, 114; Gaar v. Louisville Banking Co., 11 Bush, 180, where it is said that the objection to the penalty must be pleaded. It is believed, though, by many, that by the introduction into the mortgage of a trustee, who must be allowed his expenses, the effect of these decisions might be avoided.

112 The leading American case for the general position is Strong v. Stewart, 4 Johns. Ch. 167. In Horn v. Keteltas, 46 N. Y. 605, the doctrine is said to have been too firmly established to admit of doubt. In some of the cases

1881. Where an absolute deed of land is put on record, nothing is admitted to turn it into a mortgage, except a defeasance in writing, signed, sealed, and delivered, acknowledged and recorded. This act of 1881 has been so strictly carried out that a written, signed, and attested defeasance was held invalid, even between the immediate parties to it; for, if good between them, it must be good against purchasers with notice, and volunteers, also. But the act does not

the departure from the statute of frauds, in allowing the defeasance to be proved by parol, is justified on the ground that the grantee is guilty of a fraud by insisting upon holding absolutely the land conveyed to him only as a security for debt. In most of the later cases, the grounds for the doctrine are no longer discussed. The older authorities, collected in Babcock v. Wyman, 19 How. 299, on the general proposition, beside those mentioned above or elsewhere in the notes to this section, are: 4 Kent, Comm. 143 ("a deed absolute on its face, though registered as a deed, will be effectual as a mortgage between the parties, if it was intended by them to be merely a security for a debt, though the defeasance was by an agreement resting in parol"); Foy v. Foy, 2 Hayw. (N. C.) 131; Boyd v. McLean, 1 Johns. Ch. 582 (resulting trust established against denials of answer); Hayworth v. Worthington, 5 Blackf. (Ind.) 361 (bill of sale of goods, which is stronger than if it were case of land); Overton v. Bigelow, 3 Yerg. (Tenn.) 513 (bill of sale of slaves). Mr. Justice Catron, dissenting, relies mainly on the application of the statute of frauds made by Lord Hardwicke in Montacute v. Maxwell, 1 P. Wms. 618, while the leading English case for the position of the text is Floyer v. Lavington, Id. 268. Such a deed was held not to be a change of title within the meaning of an insurance policy, Barry v. Hamburg-Bremen Fire Ins. Co., 110 N. Y. 1, 17 N. E. 405. Other cases on the competency of parol evidence are: Kemp v. Small, 32 Neb. 318, 49 N. W. 169 (where five older Nebraska cases on the subject are quoted, and the question is said to be no longer open); McCormick v. Herndon, 86 Wis. 449, 56 N. W. 1097; Cutler v. Steele, 93 Mich. 204, 53 N. W. 521; Beroud v. Lyons, 85 Iowa, 482, 52 N. W. 486; Crane v. Buchanan, 29 Ind. 570; Eames v. Hardin, 111 Ill. 640; Lewis v. Bayliss, 90 Tenn. 280, 16 S. W. 376; Sims v. Gaines, 64 Ala. 392; Darst v. Murphy, 119 Ill. 344, 9 N. E. 887 (contemporary statements come in); Crutcher v. Muir, 90 Ky. 422, 13 S. W. 435; Nye v. Swan, 49 Minn. 431, 52 N. W. 39; Umbenhower v. Miller, 101 Pa. St. 71 (parol proof that a defeasance of later date was agreed on at the time); Paige v. Wheeler, 92 Pa. St. 282; First Nat. Bank of Florida v. Ashmead, 23 Fla. 379, 2 South. 657, 665; Schradski v. Albright, 93 Mo. 42, 5 S. W. 807. In some cases the grantee seeks to prove himself a mere mortgagee, as pointed out in notes hereafter. Thus, in Lovell v. Wall, 31 Fla. 73, 12 South. 659, having exchanged a mortgage for a deed under misrepresentation.

apply to deeds made before its passage.[113] The New Hampshire statute goes still further, as it does not permit a deed to be defeated, except by a defeasance inserted therein. This defeasance may refer to a bond or note without describing it, if the same may be otherwise identified.[114] In North Carolina, without the intervention of any statute other than the statute of frauds, as it affects trusts in land, it has been held, in contrast to nearly all other states, that an absolute deed cannot be turned into a mortgage by parol proof of the surrounding circumstances, unless these show either fraud or mistake; that is, unless it appears that the grantor executed the absolute deed in the belief that he was only giving a mortgage.[115] In Kentucky, after some dicta to the contrary, the court of appeals went back to its older decisions, and held that only upon a showing of fraud or mistake an absolute deed between grantor and grantee can be turned into a mortgage.[116]

Where the common doctrine prevails, the first inquiry is, was there a debt? If the grantee paid money to or for the grantor at the time of making the deed, did he exact or accept a promise, written or spoken, that this money should be returned? Or if, before the arrangement for the deed, the grantor was in debt to the grantee,

[113] Act June 8, 1881, § 4 (only as to deeds made since); Reeder v. Trullinger, 151 Pa. St. 287, 24 Atl. 1104, and other late cases above. Enforced in Sankey v. Hawley, 118 Pa. St. 30, 13 Atl. 208, against a defeasance, written and attested; which is approved in Molly v. Ulrich, 133 Pa. St. 41, 19 Atl. 305. It is therefore needless to cite the cases, about the bearing of the Pennsylvania act on resulting trusts, or upon the rights of the grantor.

[114] New Hampshire, St. c. 139, § 2. Compare section 95, note 100. See, on this statute (re-enacted from one of 1829), Bassett v. Bassett, 10 N. H. 64. In Buss v. Woodward, 60 N. H. 59, a married woman, having made an absolute deed to her husband's creditor, saves her land altogether under the statute, disallowing contracts by a married woman as security or guarantor of her husband.

[115] Green v. Sherrod, 105 N. C. 197, 10 S. E. 986; Norris v. McLam, 104 N. C. 159, 10 S. E. 140; Egerton v. Jones, 102 N. C. 278, 9 S. E. 2.

[116] Thomas v. McCormack, 9 Dana, 108; Harper v. Harper, 5 Bush, 179; Vanmeter v. McFadden, 8 B. Mon. 435; Crutcher v. Muir, 90 Ky. 142, 13 S. W. 435, disregarding the dictum in Seiler v. Northern Bank of Kentucky, 83 Ky. 128, 5 S. W. 536. But it will be seen that, where the deed is not direct from the owner, and as to "conditional sales," the Kentucky courts go as far as any other in working out equities.

did the latter, upon the delivery of the deed, release the debt, or give up the notes or bonds evidencing it? If he took a promise for repayment; if he failed to give up the notes or bonds for an old debt,—the presumption arises that no more than a mortgage was intended.[117] If he did not accept of a promise to pay in one case, or if, in the other, he gave up the securities for the old debt, or released it, the presumption is that there was a sale.[118] Where the conveyance has been made, not to pay a debt or to obtain a loan, but to indemnify a surety, who may never be compelled to pay anything, the intent of having a mortgage is conclusively shown.[119] However, the intent and fact of a loan or forbearance may well exist without any personal debt on the part of the grantor. Where the value of the land is ample security, and the grantor otherwise poor, his obligation to pay comes to nothing. Hence the court will inquire, did the negotiation between grantor and grantee begin by the former's seeking a loan? If such a proposition was ever entertained, the burden rests on the grantee to prove that it was abandoned, and an actual sale was substituted for it.[120] Next, the court will in-

[117] Hurst v. Beaver, 50 Mich. 612, 16 N. W. 165 (loan of money); Nearpass v. Newman, 106 N. Y. 47, 12 N. E. 557 (sale of remainder to life tenant); Cole v. Cole, 110 N. Y. 630, 17 N. E. 682 (where the grantee sought to prove himself mortgagee); Helm v. Boyd, 124 Ill. 375, 16 N. E. 85; Campbell v. Dearborn, 109 Mass. 130 (no price made is the best proof of debt and mortgage); Brant v. Robertson, 16 Mo. 139 (duty to pay, though no bond or note); Hart v. Eppstein, 71 Tex. 752, 10 S. W. 85 (note to A., real creditor, deed to B. is a mortgage); Hurst v. Beaver, 50 Mich. 612, 16 N. W. 165 (and was not allowed to rely on a tax title).

[118] Bridges v. Lindon, 60 Iowa, 190, 14 N. W. 217 (acquittance given); Morton v. Woodford (Ky.) 16 S. W. 528; Kahn v. Weill, 14 Sawy. 502, 42 Fed. 704; Edwards v. Wall, 79 Va. 321 (where absence of time to pay was made to outweigh other circumstances); Forrester v. Moore, 77 Mo. 651; Ganceart v. Henry, 98 Cal. 281, 33 Pac. 92 (bill to redeem must show when the debt became due). But the absence of a note or bond is not conclusive, Goodman v. Grierson, 2 Ball & B. 279; Russell v. Southard, 12 How. 139 (where the right of repurchase was bought for a small sum); Morgan's Assignee v. Shinn, 15 Wall. 105 (here the grantee wanted to have it a mortgage); Floyer v. Lavington, supra.

[119] Ashton v. Shepherd, 120 Ind. 69, 22 N. E. 98 (replevin bail); Workman v. Greening, 115 Ill. 479, 4 N. E. 385 (in Illinois, however, the remedy is in equity only); Smith v. Parks, 22 Ind. 59.

[120] Morris v. Nixon's Ex'rs, 1 How. 118. Contra, no loan applied for, Holmes v. Grant, 8 Paige, 243.

quire into the comparative value of the land which is apparently sold, and the amount paid for it, or the consideration which has passed between the parties. When the value of the land does not exceed this consideration to such an extent that a sale for the price would be a sacrifice,—if the price is no smaller than could have been obtained in the open market,—it is fair to presume that the deed, absolute in form, was so also in substance and intent; that there was really a sale;[121] while a great disproportion between the value of the land and price given would indicate a hope of redemption, and argue a mortgage.[122]

Another strong mark of an actual sale is the immediate change of possession, while the retention of the land by the grantor, though it be disguised under a lease back to him by the grantee, is an indication of a mortgage; and the collection of rents by the grantor after deed made is even a stronger indication than his bodily occupation.[123]

Great delay in behalf of the grantor is also, and justly, deemed a point against a grantor seeking to redeem, not only on the general ground of laches, but because a rise in the value of the land may have suggested his dissatisfaction with a sale thought fair at the time.[124] But many decisions hold that, if the absolute deed was really intended for a mortgage, it is so for all purposes, and that the equity of redemption cannot be lost or parted with by acquiescence, or mere word of mouth, or by anything short of what would bar a redemption reserved by written defeasance in the ordinary way.[125] With these rules to guide them, courts of equity have

[121] Adams v. Pitcher, 92 Ala. 474, 8 South. 757; Kahn v. Weill, supra (two points working together); Conway's Ex'rs v. Alexander, 7 Cranch, 218 (irredeemable mortgage).

[122] Babcock v. Wyman, 19 How. 289 (grantee resold for fourfold price); Wright v. Mahaffey, 76 Iowa, 96, 40 N. W. 112; Hartley's Appeal, 103 Pa. St. 23 (great stress laid on inequality of price); Morris v. Nixon, 1 How. 118; Gray v. Shelby, 83 Tex. 405, 18 S. W. 809 (this and other tests).

[123] Kraemer v. Adelsberger, 122 N. Y. 467, 25 N. E. 859 (possession with the grantee); all three badges of mortgage found in Wilson v. Giddings, 28 Ohio St. 554; Smith v. Smith, 81 Tex. 45, 16 S. W. 637 (not estopped by taking lease).

[124] Miller v. Green, 138 Ill. 565, 28 N. E. 837 (other grounds besides great delay concurred); Fisher v. Witham, 132 Pa. St. 488, 19 Atl. 276.

[125] Worley v. Dryden, 57 Mo. 226 (previous agreement to waive right to redeem); Odell v. Montross, 68 N. Y. 499 (equity divested only by a writing

wielded a very free and ample discretion; taking into consideration also the power which the grantee had over the grantor, either through confidential relations, or through the latter's necessities.[126] At all events, he who seeks to turn a deed absolute in form into a mortgage undertakes, not only the burden of proof, but, as his proof is to overcome his own solemn deed, it ought to be clear and convincing. When it is weak or contradictory, or when the facts are almost as compatible with an absolute sale as with a security for the grantor's debt, the words of the deed must prevail.[127]

good under statute of fraud); Hart v. Epstein, 71 Tex. 752, 10 S. W. 85 (deed made under circumstances making it clearly a mortgage); Smith v. Brand, 64 Ind. 427 (not to be strictly foreclosed, but by sale like common mortgage). In Shubert v. Stanley, 52 Ind. 46, the mortgage of this kind is afterwards by new arrangement turned into a sale. Smith v. Smith, 80 Cal. 323, 21 Pac. 4, 22 Pac. 186, 549 (such deed gives no right to possession); McClure v. Smith, 14 Colo. 297, 23 Pac. 786 (good as a mortgage as to other creditors; not fraudulent); Brighton v. Doyle, 64 Vt. 616, 25 Atl. 694 (meant for present debt of husband, does not cover future advances). But such a deed passes the legal title, Gallagher v. Giddings, 33 Neb. 222, 49 N. W. 1126.

[126] Tower v. Fetz, 26 Neb. 706, 42 N. W. 884 (deed of one tract obtained by threatening foreclosure on another); Conant v. Riseborough, 139 Ill. 383, 28 N. E. 789 (agent and confidential friend); purchase of equity suspicious, same case, and Russell v. Southard, 12 How. 139, supra; Nicolls v. McDonald, 101 Pa. St. 514; Davis v. Brewster, 59 Tex. 93 (question of intention); Villa v. Rodriguez, 12 Wall. 323 (difference in knowledge of business, relationship; specious reason given for sale); Jameson v. Emerson, 82 Me. 359, 19 Atl. 831 (question of fact for the trial judge); Locke v. Moulton, 96 Cal. 21, 30 Pac. 957 (where evidence on both sides shows there was a mortgage, the supreme court should reverse a judgment for absolute deed); Mahoney v. Bostvick, 96 Cal. 53, 30 Pac. 1020 (on conflict the trial judge should be affirmed). Gumpel v. Castagnette, 97 Cal. 15, 31 Pac. 898 (deed may be declared mortgage on the ground of mistake); Crowell v. Keene, 159 Mass. 353, 34 N. E. 405 (previous debt raises no presumption either way); Johnson v. Quarles, 46 Mo. 423 (must be no room for reasonable doubt); Ringo v. Richardson, 53 Mo. 385 (s. p.; authorities collected); Forrester v. Moore, 77 Mo. 651; Rogers v. Jones, 92 Cal. 80, 28 Pac. 97 (a contemporaneous written memorandum is always enough).

[127] Ensminger v. Ensminger, 75 Iowa, 89, 39 N. W. 208; Langer v. Meservey, 80 Iowa, 158, 45 N. W. 732; Bentley v. O'Bryan, 111 Ill. 62 (evidence vague and contradictory); Bailey v. Bailey, 115 Ill. 553, 4 N. E. 394; Hanks v. Rhoads, 128 Ill. 404, 21 N. E. 774; Corliss v. Conable, 74 Iowa, 58, 36 N. W. 891; Andrews v. Hyde, 3 Cliff. 516, Fed. Cas. No. 377 (uncorroborated testimony of complainant, grantee dead); Penney v. Simmons, 99 Cal. 380, 33 Pac. 1121; Lewis v. Bayliss, 90 Tenn. 280, 16 S. W. 376 (proof must be clear and

The sale of the equity of redemption by the mortgagor to the mortgagee is looked upon with particular suspicion. The latter should be "frank and fair," and should not hold out false hopes, inducing the former to believe that a sale will save the property, enabling him the better to redeem it at a future day.[128]

According to the weight of authorities, equity will work out this right of redemption for one party, and turn the fee of the other party into a mortgage, though the land was not conveyed by the former to the latter, but by a third person, with whom the former bargained for it, while the latter advanced the money either in whole or in part, taking the title for his security. Whether he will be held to hold such title in trust, subject to a mortgage in his own favor, or will be allowed to retain it, depends mainly on the same tests, given above, between grantor and grantee.[129] There is a line of cases, mainly from Kentucky and Indiana, turning buyers at judi-

agreement contemporary); Winston v. Burnett, 44 Kan. 367, 24 Pac. 477 (there should be a "clear preponderance"). But conflicting or rebutting testimony does not of itself defeat the claim, Rowand v. Finney, 96 Pa. St. 196; Hartley's Appeal, 103 Pa. St. 23. Redemption must be made on equitable terms, Eiseman v. Gallagher, 24 Neb. 79, 37 N. W. 94.

[128] Russell v. Southard, 12 How. 139 (where $100 was paid for a valuable right to repurchase); Villa v. Rodriguez, 12 Wall. 323 (very strong on this point); Shear v. Robinson, 18 Fla. 379 (treated like any other absolute deed); Clark v. Landon, 90 Mich. 83, 51 N. W. 357 (though possession given); Ferris v. Wilcox, 51 Mich. 105, 16 N. W. 252. Such deeds are upheld in Wilson v. Van Stone, 112 Mo. 315, 20 S. W. 612; Rue v. Dole, 107 Ill. 275. Also in Walker v. Farmers' Bank, 8 Houst. (Del.) 258, 10 Atl. 94, and 14 Atl. 819, on the ground that there is no fiduciary relation between mortgagor and mortgagee. Also in Adams v. Pilcher, 92 Ala. 474, 8 South. 757, where part of the land was bought by the mortgagee and part of the debt canceled.

[129] Carr v. Carr, 52 N. Y. 251; Cunningham v. Hawkins, 24 Cal. 409 (the whole price was advanced, but soon recouped with heavy interest by partial sales); McPherson v. Haywood, 81 Me. 329, 17 Atl. 164; Hoile v. Bailey, 58 Wis. 434, 17 N. W. 322; Turner v. Wilkinson, 72 Ala. 361; Baker v. Firemen's Fund Ins. Co., 79 Cal. 34, 21 Pac. 357 (party thus advancing and taking deed, with agreement to convey only upon prompt payment, but not releasing old owner from liability to pay, held mortgage); Reeder v. Trullinger, 151 Pa. St. 287, 24 Atl. 1104; Lindsay v. Matthews, 17 Fla. 575; Knaus v. Dreher, 84 Ala. 319, 4 South. 287 (evidence must be consistent and convincing). Of New York cases, Hill v. Grant, 46 N. Y. 496, is unfavorable to this equity; while Carr v. Carr, 52 N. Y. 257, favors it. A written acknowledgment makes it a mortgage, Dodd v. Neilson, 90 N. Y. 243.

cial sales into such trustees and mortgagees for the old owner, when they have assured him that they would save the property for him, have lulled him into security, and prevented others from bidding; the small price at which the land is struck off to the officious friend being a strong circumstance in determining whether he may keep his purchase, or whether it shall be redeemed or resold.[130] In Iowa, however, this equity is not recognized, except to turn the old owner's own deed into a mortgage. Where a friend buys for taxes, and takes his tax deed, proof of a parol understanding that he shall hold for the former owner is excluded, under the statute of frauds.[131]

A deed absolute on its face may be accompanied by a written agreement, sealed or unsealed, executed by the buyer, that he will, for a stated price, if it be tendered within a named time, sell the land back to his grantor. Such an arrangement is called a "conditional sale." The price at which the buyer agrees to sell may be simply a sum of money lent by the self-styled buyer to the seller, or already owing by the latter, and the whole business nothing but a thinly-disguised mortgage.[132] Should the agreement be taken literally,—that is, should the seller not be allowed to buy back his land at the stated price after the day named,—we should have nothing else but a mort-

[130] Crutcher v. Hord, 4 Bush (Ky.) 360; Miller v. Antle, 2 Bush (Ky.) 408; Green v. Ball, 4 Bush (Ky.) 591; Beatty v. Brummett, 94 Ind. 76 (execution sale, the element of discouraging other bidders seems not to have entered). There were such cases in Pennsylvania, as Saunders v. Gould, 134 Pa. St. 445, 19 Atl. 694; Gaines v. Brockerhoff, 136 Pa. St. 175, 19 Atl. 958 (without any element of fraud). Similar is Banning v. Sabin, 51 Minn. 129, 53 N. W. 1; Sullivan v. Sullivan, 86 Tenn. 376, 6 S. W. 876. Contra, Kratt v. Smith, 117 Pa. St. 183, 11 Atl. 370; but the act of 1881 (see note 113) probably shields the sheriff's deed from attack. Phelan v. Fitzpatrick, 84 Wis. 240, 54 N. W. 614 (purchase from sheriff at owner's request); Fix v. Loramger, 50 Mich. 199, 15 N. W. 81; Downing v. Woodstock Iron Co., 93 Ala. 262, 9 South. 177. See, also, Scheffermeyer v. Schaper, 97 Ind. 70; Butt v. Butt, 91 Ind. 305. But a parol agreement after the purchase amounts to nothing, Hamilton v. Buchanan, 112 N. C. 463, 17 S. E. 159. Execution bidder made a mortgagee when the price was greatly inadequate, Ryan v. Dox, 34 N. Y. 307. Also, Fishback v. Green, 87 Ky. 107, 7 S. W. 881. In Cullen v. Carey, 146 Mass. 50, 15 N. E. 131, an agreed foreclosure was opened on like grounds.

[131] Hain v. Robinson, 72 Iowa, 735, 32 N. W. 417.

[132] Such an arrangement is not a mortgage within the registry laws of New York. See hereafter under that head. The name "conditional sale" is found as early as Skinner v. Miller, 5 Litt. (Ky.) 86.

gage, as it stood in the fourteenth century, before the chancellor established the right of redemption in equity. Hence these conditional sales are closely watched. If there is a doubt in any case whether such a sale is only a disguise for a loan, it will be resolved so as to turn the sale into a mortgage, for it already differs from it but slightly in form and expression.[133] Otherwise the same tests apply as to absolute deeds without any agreement to resell; the holding or canceling of the seller's note or bond; adequacy or inadequacy of price; possession by the buyer or by the seller.[134] Yet there are cases in which a deed from A. to B., with an agreement by B. to reconvey back to A. for a named price, and within a given time, have been treated according to the letter.[135]

In Georgia conditional sales have, since 1871, been regulated by statute. When a conveyance of land is made to secure a loan or

[133] Davis v. Stonestreet, 4 Ind. 101; Edrington v. Harper, 3 J. J. Marsh. 353; Dey v. Dunham, 2 Johns. Ch. 189; Peterson v. Clark, 15 Johns. 205; Lentz v. Martin, 75 Ind. 228; Murphy v. Calley, 1 Allen, 107 (agreement to reconvey on repayment makes a mortgage, though not under seal); McCamant v. Roberts, 80 Tex. 316, 15 S. W. 580, 1054 (doubt resolved in favor of mortgage); Grand United Order of Odd Fellows v. Merklin, 65 Md. 579, 5 Atl. 544 (deed, lease back at 10 per cent. of price, bond to convey within two years); Thomas v. Holmes Co., 67 Miss. 754, 7 South. 552 (badges of mortgage found).

[134] Voss v. Eller, 109 Ind. 260, 10 N. E. 74 (old debt not canceled); Hanlon v. Doherty, 109 Ind. 37, 9 N. E. 782.

[135] Thomas v. Holmes Co., 67 Miss. 754, 7 South. 552 (conditional sale sustained, being at the time more favorable to the old owner than the mortgage of which it took the place); John's Appeal, 102 Pa. St. 59 (a peculiar trade between husband and wife); Slowey v. McMurray, 27 Mo. 113 (conditional sale means strict compliance). In Vincent v. Walker, 86 Ala. 333, 5 South. 465, a conditional sale by a married woman was sustained as such because, by the law at that time, her mortgage would have been void. In Peagler v. Stabler, 91 Ala. 308, 9 South. 157, also, a conditional sale was enforced as such. Chandler v. Chandler, 76 Iowa, 574, 41 N. W. 319; the line of decisions in this state is altogether less favorable to the mortgage side. The sale had been for $2,000; the agreement to reconvey, at $2,500, if tendered within 15 months. Though this looks like a loan at a pretty high interest, especially if the grantee had the profits, the court failed to see a debt. Slutz v. Desenberg, 28 Ohio St. 371 (no debtor and creditor found); Calhoun v. Lumpkin, 60 Tex. 185 (old debt released, no new obligation); Northern Bank v. Deckebach, 83 Ky. 154 (where the agreement was to sell partly on long credits).

other indebtedness, and the vendee makes his bond for conveying the title back to the vendor upon the payment of such debt, the title passes to the vendee (provided the consent of the wife has been obtained), until the debt is fully paid; and it is held not a mortgage, but an absolute conveyance, with the right reserved by the vendor to have the land reconveyed upon payment of the debt agreeably to the terms of the contract. The vendee may convey the land back to his vendor, and levy his execution at law upon the land, which will take precedence over all intervening judgments. The construction of the law has, however, been such that the conveyance and bond really make a mortgage, for even after eviction the old vendor can redeem.[136] If he has no wife, of course none has to consent. If there is a wife, her consent can be given in writing without the formalities of a privy examination. If the debt is tainted with usury, the title does not pass by the deed. A judgment creditor may redeem the land to subject it to his execution.[137] (By Code Amendment of October 16, 1885, the wife's consent is dispensed with.)

Though subsequent declarations and conduct of the grantee are admissible, they are so only to show the intention of the parties at the time when the deed passed between them. If it was absolute, then, both in form and intention, it cannot be turned into a mortgage by an oral agreement made afterwards, nor by any writing not sufficient to divest the grantee's estate.[138]

The equity of turning an absolute deed into a mortgage can, of course, not be enforced against a purchaser in good faith for value; but it is good against all volunteers, and against purchasers with notice.[139] One holding an executory title, such as a lessee with an

[136] Georgia Code, §§ 1969, 1970; Kieth v. Catchings, 64 Ga. 773 (sale to corporation); transfer of the title bond to third party immaterial, New England Mortg. Security Co. v. Tarver, 9 C. C. A. 190, 60 Fed. 660; Broach v. Barfield, 57 Ga. 601 (with interest, at any time).

[137] Broach v. Barfield, supra; Wynn v. Ficklen, 54 Ga. 529; Jarvis v. Burke, 59 Ga. 232 (judgment creditor); Carswell v. Hartidge, 55 Ga. 412; Johnson v. Griffin Banking & Trust Co., Id. 691 (usury).

[138] Hassam v. Barrett, 115 Mass. 256; Caverly v. Simpson, 132 Mass. 462; and passim in other cases cited.

[139] Wagner v. Winter, 122 Ind. 57, 23 N. E. 754 (what is notice); Graham v. Graham, 55 Ind. 23; Amory v. Lawrence, 3 Cliff. 523, Fed. Cas. No. 336;

option to buy at a stated price, is not a purchaser for value; and here, also, the question comes up whether the grantee in a quitclaim deed under the grantee in the disputed conveyance can claim such a character.[140]

The right to treat an absolute deed as a mortgage passes, like an ordinary equity of redemption, to heirs and to assigns (unless prevented by a champerty law, when the grantee is in adverse possession), and may be made available by the administrator for the payment of the owner's debts.[141] As stated above, it should be, in all respects, treated like the estate of a mortgagor. Yet, as the grantee is generally in possession, which he has lawfully obtained, and the owner is put to his suit, courts have often insisted on his offer to redeem, being unwilling to put the person in possession to the expense of a sale, and thus giving to a mortgagee who holds a deed absolute in form, or claims under a "conditional sale," the benefit of a strict foreclosure.[142]

§ 97. The Vendor's Lien.

When deeds of bargain and sale for a short time, and deeds of lease and release more permanently, had in England, and the former

Pancake v. Cauffman, 114 Pa. St. 113, 7 Atl. 67. Mortgagee without notice is preferred to the extent of his debt only, Turman v. Bell, 54 Ark. 273, 15 S. W. 886.

140 Villa v. Rodriguez, supra (although the lessee had made valuable improvements on the strength of the option). The insufficiency of a quitclaim deed is also affirmed here by the supreme court, as well as in Oliver v. Piatt, 3 How. 363; May v. LeClaire, 11 Wall. 217. See decisions in courts of the states on one and the other side of this question, where "purchasers for value" are discussed under the registry laws. Forrester v. Moore, 77 Mo. 651 (possession of farm lands in working season is notice). A fortiori where the alienee takes with express notice, Lindsay v. Matthews, supra.

141 In Villa v. Rodriguez, supra, the right was assigned. Reed v. Reed, 75 Me. 264 (suit by administrator). In several of the other cases above, suit was brought by the heirs. The guardian of a non compos may sue to redeem, Warfield v. Fisk, 136 Mass. 219. In Brooks v. Kelly, 63 Miss. 616, a junior mortgagee was allowed to open the purchase of the equity of redemption.

142 Calhoun v. Lumpkin, 60 Tex. 185. This is a great hardship, as it may be wholly impossible for the equitable owner to raise the cash for redemption until he has a decree in his favor, and not even then while that decree is subject to reversal.

species of deeds had in America, become the ordinary instruments for passing the title in lands from seller to buyer, the forms of these deeds soon became fixed and unchangeable. The purchase price was always recited thus (with a little more or less verbiage): "For and in consideration of ——— pounds, good and lawful money of England, well and truly paid by (the bargainee) to (the bargainor or releasor) before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, and whereof the said (bargainor) releases and acquits, &c., fully by these presents." This clause having sunk into an unmeaning form, it became usual in England, if not in America, to indorse on the deed a separate receipt for the purchase money. But soon this also was considered so far as a mere form that if the whole or any part of the purchase money was not paid in fact, courts of equity would not deem this, any more than the receipt in the body of the deed, an estoppel on the grantor; but they would allow him to show what part of the purchase money was unpaid, and give him a lien on the land sold; which, however, like all secret equities, could not be upheld against a purchaser for valuable consideration without notice.[143]

The lien is a remnant of the vendor's original estate, and is complete without the vendee's promise or covenant. Hence, where land has been sold to a married woman, to an infant, or to a person of unsound mind, the vendor's lien is more convenient than a mortgage for the purchase money, and may be useful in cases where such a mortgage is actually given, but is void for want of power, or for noncompliance with prescribed forms.[144]

143 4 Kent, Comm. 151: "The vendee becomes a trustee to the vendor for the purchase money, or so much as remains unpaid. This equitable mortgage will bind the vendee and his heirs and volunteers, and all purchasers * * * with notice." Mackreth v. Symmons, 15 Ves. 329, 1 White & T. Lead. Cas. Eq. 289, decided by Lord Eldon after the doctrine had been recognized for more than a century, is considered the leading case. 2 Sugd. Vend. is high authority. The lien is sometimes called a "trust" by which the vendee holds the title for the vendor (in Texas, a resulting trust, not within the registry laws, Briscoe v. Bronaugh, 1 Tex. 330), sometimes a "natural equity." Analogies have been found for it also in the Roman law. Messrs. Hare & Wallace, in closing their note to Mackreth v. Symmons, point out that the lien arose in England at a time when a sale of land for an unsecured debt could not be obtained, and that the whole doctrine is therefore in America needless and unsuitable.

144 Chilton v. Braiden, 2 Black, 458; Kent v. Gerhard, 12 R. I. 92 (void

The doctrine of the implied vendor's lien has much about it that is uncertain and inconvenient, and after more or less of a struggle it has been wholly rejected in Maine, Massachusetts, Pennsylvania, North and South Carolina, Nebraska, and Kansas. In Vermont and Georgia, where the courts recognized the implied lien, it was abolished by statute; and in Connecticut, New Hampshire, and Delaware there has been an unwillingness to recognize its existence, the courts preferring to let cases involving it go off on their special demerits.[145] Other states have restricted the lien, as will be seen hereafter. In states, in which the implied lien is fully recognized, its retention in any particular sale is denied when the seller has

mortgage); Armstrong v. Ross, 20 N. J. Eq. 109 (same); Davis v. Wheeler (Tex. Civ. App.) 23 S. W. 435.

[145] Gilman v. Brown, 1 Mason, 192, Fed. Cas. No. 5,441. See statement as to law of Massachusetts on page 220, 1 Mason, and Fed. Cas. No. 5,441; Philbrook v. Delano, 29 Me. 410; Ahrend v. Odiorne, 118 Mass. 261; Kauffelt v. Bower, 7 Serg. & R. 64; Hepburn v. Snyder, 3 Pa. St. 72; Womble v. Battle, 3 Ired. Eq. 182; Wragg v. Comptroller-General, 2 Dessaus. Eq. 509; Edminster v. Higgins, 6 Neb. 265; Simpson v. Mundee, 3 Kan. 172; Vermont, St. § 1937 (no lien unless created by deed); Georgia, Code, § 1997. Even in these states a lien expressly reserved would bind the grantee and those holding him by estoppel, Bear v. Whisler, 7 Watts, 144; Smith v. Rowland, 13 Kan. 245. See, for Connecticut, Chapman v. Beardsby, 31 Conn. 115; Atwood v. Vincent, 17 Conn. 576; for New Hampshire, Arlin v. Brown, 44 N. H. 102; and for Delaware, Budd v. Busti, 1 Har. (Del.) 69. The existence of the doctrine was regretted by the supreme court of the United States in Bayley v. Greenleaf, 7 Wheat. 46, but has since been approved (see note 147). It is recognized doubtingly in Florida. Marks v. Baker, 20 Fla. 920. California, Civ. Code, §§ 3046–3048, and Dakota, Civ. Code, §§ 1801–1803, declaring the lien, are construed as simply recognizing the English-American law in all its details. Claiborne v. Castle, 98 Cal. 30, 32 Pac. 807. The lien is law in Colorado. Francis v. Wells, 2 Colo. 660. In Slide & Spur Gold Mines v. Seymour, 153 U. S. 509, 14 Sup. Ct. 842, from Colorado, the supreme court says that this lien appeals strongly to the consideration of equity. In Texas the lien is usually named in the deed or in the purchase notes; but an omission to do so, and acknowledging the receipt of the price, does not defeat the lien. Clark v. Collins, 76 Tex. 33, 13 S. W. 44. References in notes following will show the states in which the doctrine is recognized. Its central point is stated in Ogden v. Thornton, 30 N. J. Eq. 569, that the acknowledgment of receipt in or upon the deed does not exclude the lien. In Indiana the lien is only enforced after exhaustion of personalty. Lord v. Wilcox, 99 Ind. 491; Bottorf v. Conner, 1 Blackf. 287.

trusted to other security,—either to the obligation of a third person, along with, or in place of the buyer, or the pledge of other land or of goods or effects.[146] But the presumption of waiver arising from the taking of a security is open to rebuttal. Such at least has been the opinion of the highest authorities; and "if, under all the circumstances, the waiver remains in doubt, then the lien attaches."[147] The intention not to rely on the lien is shown most clearly, when the seller insists upon and obtains a mortgage upon a part of the land sold, or on the whole land sold, for only a part of the debt.[148] The single obligation of the buyer, whether by note, bill of exchange, check not covered by funds, or by bond, whether at short or long maturity, is not regarded as a waiver of the lien. English cases

[146] Baum v. Grigsby, 21 Cal. 172; Wells v. Harter, 56 Cal. 342; Dudley v. Dickson, 14 N. J. Eq. 252; Wilson v. Sawyer, 74 Ill. 473 (personal security); Haskell v. Scott, 56 Ind. 344 (stranger giving note for married woman); McLearn v. McLellan, 10 Pet. 628, 640 (mortgage on other land); Wisconsin M. & F. Ins. Co. Bank v. Filer, 83 Mich. 496, 47 N. W. 321 (note of third person pro tanto); Sears v. Smith, 2 Mich. 244; Hammett v. Stricklin, 99 Ala. 616, 13 South. 573; Richards v. McPherson, 74 Ind. 158; Dietrich v. Folk, 40 Ohio St. 635; Brown v. Christie, 35 Tex. 691; Chicago G. W. R. Land Co. v. Peck, 112 Ill. 408; Conover v. Warren, 1 Gilm. 498; Cowl v. Varnum, 37 Ill. 181; Boynton v. Champlin, 42 Ill. 57 (acceptance of bill); Ilett v. Collins, 103 Ill. 74 (pro tanto). Secus, where husband gives notes on purchase by wife, Strohm v. Good, 113 Ind. 93, 14 N. E. 901; Petry v. Ambrosher, 100 Ind. 510; or the real buyer gives the note and has deed made in another's name, Corlies v. Howland, 26 N. J. 311; Beal v. Harrington, 116 Ill. 113, 4 N. E. 664; Crampton v. Prince, 83 Ala. 246, 3 South. 519; Burrus v. Routhac's Adm'x, 2 Bush (Ky.) 39 (where subpurchaser's note is received on resale); similar, Whetsel v. Roberts, 31 Ohio St. 503; Boyd v. Jackson, 82 Ind. 525 (see, contra, Scott v. Mann, 36 Tex. 157). But the parties may agree that outside security shall not waive the lien. Lord v. Wilcox, 99 Ind. 491. In Kirkham v. Boston, 67 Ill. 599, the husband's mortgage note defeated the lien on land sold to wife.

[147] Story, Eq. Jur. § 1224; Cordova v. Hood, 17 Wall. 1; Slide & Spur Gold Mines v. Seymour, 153 U. S. 509, 517, 14 Sup. Ct. 842, where a clause in the contract of sale to convey "free from charge and incumbrance" was made to mean any incumbrance paramount to vendor's deed.

[148] Brown v. Gilman, 4 Wheat. 255; Fish v. Howland, 1 Paige, 20; Meigs v. Dimock, 6 Conn. 458 (life lease back as part consideration). But Dusenbury v. Hulbert, 59 N. Y. 541 (lien good till mortgage made for purchase money). And taking such mortgage a few days after the sale does not let in a judgment rendered meanwhile. Boos v. Ewing, 17 Ohio, 500.

have even upheld the vendor's lien in favor of his executors, where the bond was made payable after his death.[149] The American cases generally have not attached the lien to a consideration which cannot be expressed in a sum of money; for instance, to a covenant to support the vendor during his life time; though there is perhaps no form of purchase price of which the payment ought to be more carefully guarded and enforced.[150] When the consideration is to be paid by exchanging other lands for those sold, or in merchandise of any kind, opinions are divided; but it seems that when the amount is expressed in units of money, a choice given to the buyer to pay in goods or effects or in some irregular currency, or to pay off an incumbrance, does not defeat the lien.[151] The security taken, either in the

[149] Evans v. Goodlet, 1 Blackf. (Ind.) 246; Garson v. Green, 1 Johns. Ch. 308; White v. Williams, 1 Paige, 502; Aldridge v. Dunn, 7 Blackf. (Ind.) 249 (and extending time on such note does not extinguish the lien); Vandoren v. Todd, 3 N. J. Eq. 397 (note payable after third person's death); Johnson v. Scott, 34 Mo. 129 (renewal no waiver). Giving time indefinitely, Walter v. Hanson, 33 Minn. 174, 24 N. W. 186. Money left with vendee as indemnity against inchoate dower, lien attaches. Redford v. Gibson, 12 Leigh (Va.) 332 (a bond with yearly interest during the vendor's life, the principal to be paid thereafter; liens given by Lord Lyndhurst, reversing the master of the rolls in Winter v. Lord Anson, 3 Russ. 488). But an agreement to wait for payment out of the sale of shares of stock, or of lots in a subdivision, excludes the lien. In re Brentwood Brick & Coal Co., 4 Ch. Div. 562; Kettlewell v. Watson, 26 Ch. Div. 501.

[150] McKillip v. McKillip, 8 Barb. 552 (one objection was, that a third person was also to be supported); Himes v. Langley, 85 Ind. 77 (no price agreed on, no lien). Contra, Patterson v. Edwards (s. p.), 29 Miss. 67; Beal v. Harrington, 116 Ill. 113, 4 N. E. 664, where the failure to convey lots, estimated at a fixed sum, was enforced by vendor's lien; Koch v. Roth, 150 Ill. 212, 37 N. E. 317 (unliquidated, no lien, nor where prices of land and of chattels are intermingled).

[151] For assuming claims to others, no lien was allowed in Chapman v. Beardsley, 31 Conn. 115 (but Connecticut does, perhaps, never allow it); Hiscock v. Norton, 42 Mich. 325, 3 N. W. 868 (building houses on land, etc., no lien); nor for agreement to put up fences, Parrish v. Hastings (Ala.) 14 South. 783; Kelly v. Karsner, 81 Ala. 500, 2 South. 164 (exchange of lands under the circumstances); Meyer v. Smith, 3 Tex. Civ. App. 37, 21 S. W. 995 (though price payable in goods); Deason v. Taylor, 53 Miss. 697 (payable in certificates); Plowman v. Riddle, 14 Ala. 169 (in leather); Acton v. Waddington, 46 N. J. Eq. 16, 18 Atl. 356 (agreeing to pay vendor's husband); Strohm v. Good, 113 Ind. 93, 14 N. E. 901 (to pay off mortgage); Elliott v.

obligation of third persons or in the pledge of other land or chattels, may be worthless at the time, or turn out so upon an attempt to realize upon it, and may yet work a waiver; but if it is a void obligation, as that of a married woman, having no power to make contracts, or a void conveyance or mortgage, e. g. one by a married woman, without the lawful forms or consent of the husband, it will not have that effect.[152] And where securities, valid but worthless, have been palmed off on the vendor by fraud or misrepresentation, equity will relieve him, and restore the lien.[153]

However, the courts exercising this jurisdiction have wielded a very wide discretion in either allowing or disallowing the lien, according to the circumstances of each case, as governing the supposed intention of grantor and grantee. Thus a lien can hardly be intended in a conveyance between wife and husband, where the seeming object of the deed was to give him a basis for credit; or in a deed of land to one who enters a partnership, and needs it as his share of the assets; and so in any case, where in conscience the seller ought not to set up a lien against third persons who might, whether with or without knowledge of the lack of payment, deal with the vendee.[154] This equity is good against the vendee himself, his heirs

Plattor, 43 Ohio St. 198, 1 N. E. 222 (mortgage on land given in exchange). Contra, Richards v. Lumber Co., 74 Mich. 57, 41 N. W. 860 (sale of timber for paying taxes on land no lien).

[152] Otis v. Gregory, 111 Ind. 504, 13 N. E. 39; Gilbert v. Bakes, 106 Ind. 558, 7 N. E. 257; Bakes v. Gilbert, 93 Ind. 70; Felton v. Smith, 84 Ind. 485; Martin v. Cauble, 72 Ind. 67.

[153] Fouch v. Wilson, 60 Ind. 64; McDole v. Purdy, 23 Iowa, 277; Tobey v. McAllister, 9 Wis. 463; Maddern v. Barnes, 45 Wis. 135; Yeomans v. Bell, 79 Hun, 215, 29 N. Y. Supp. 502; Seymour v. McKinstry, 106 N. Y. 230, 12 N. E. 348, and 14 N. E. 94; Himes v. Langley, 85 Ind. 77; Nysewander v. Lowman, 124 Ind. 584, 24 N. E. 355.

[154] Dunton v. Outhouse, 64 Mich. 419, 31 N. W. 411 (the intent to retain the lien need not appear affirmatively, but want of certainty in terms of payment points against it); s. p., Waterfield v. Wilber, 64 Mich. 642, 31 N. W. 553. In Huston v. Waldron, 96 Mich. 49, 55 N. W. 610, it is a question of intention; so in Lehndorf v. Cope, 122 Ill. 317, 13 N. E. 505; Hubbard v. Buck, 98 Ala. 440, 13 South. 364 (to partner); Donovan v. Donovan, 85 Mich. 63, 46 N. W. 163 (wife to husband); Reynolds v. City Nat. Bank, 71 Hun, 386, 24 N. Y. Supp. 1134 (same); Fox v. Fraser, 92 Ind. 265 (understanding that vendee will apply to pay debts); Mitchell v. Shaneberg, 149 Ill. 420, 37 N. E. 576 (intent to waive shown); Wasson v. Davis, 34 Tex. 167. In Manning v. Frazier,

and devisees, and against all volunteers, i. e. all those taking by gift.[155] It is also good against judgment or attaching creditors, unless the local registry laws positively forbid the setting up of an unrecorded lien.[156] Where the deed of sale recites the nonpayment of the purchase money, and, a fortiori, where it reserves a lien for it, every purchaser is affected with notice; for every man is supposed to have knowledge of every instrument under which he derives title.[157] The lien is not good against "purchasers for value without notice," which embraces also those incumbrancers who take a legal security, that is, a mortgage; and in some states "purchasers and incumbrancers" are named together in the statutes as being secure against secret equities.[158] But it has been held that one who takes a mortgage for an old debt is not a "purchaser for value," and certainly a trustee in an assignment for the benefit of creditors is not.[159]

96 Ill. 279 (sale of mine on quarterly payments, as coal is sold), the leave to sell was deemed only a waiver pro tanto.

[155] Upshaw v. Hargrove, 6 Smedes & M. (Miss.) 286 (donee); Garson v. Green, 1 Johns. Ch. 308 (heirs); Warner v. Van Alstyne, 3 Paige, 513 (where ancestor had made improvements). As to dower, see under "Dower." Butterfield v. Okie, 36 N. J. Eq. 482 (against all subsequent equities); Porter v. Woodruff, Id. 174 (against donees).

[156] Hunter v. Hunter, 1 Civ. Law B. 101 (good against attachment); Rees v. Ludington, 13 Wis. 276 (superior to mechanic's lien). See other cases hereafter, in section on "Lien of Judgment."

[157] See cases below, under statutes of West Virginia, Iowa, and Kentucky, and cases, infra, from Texas. Also, Croskey v. Chapman, 26 Ind. 333; Lincoln v. Purcell, 2 Head (Tenn.) 143; Lucas v. Hendrix, 92 Ind. 54 (such a clause in the conveyance is called an "equitable mortgage," but is really an express lien).

[158] E. g. California Civ. Code, § 3048, Dakota Ter. Civ. Code, § 1803. For purchaser with notice, see Gault v. Trumbo, 17 B. Mon. (Ky.) 682 (arose before statute on the subject); Redford v. Gibson, 12 Leigh (Va.) 332 (knowledge of debt for land is enough without notice that a lien is claimed); Ledos v. Kupfrian, 28 N. J. Eq. 161. In Armstrong v. Ross, 20 N. J. Eq. 109, it was intimated that a mortgage valid as to vendee's husband was notice to purchasers. Koch v. Roth, 150 Ill. 212, 37 N. E. 317; Clift v. Nay, 105 Ind. 355, 5 N. E. 1 (notice before payment of price); Higgins v. Kendall, 73 Ind. 522 (s. p.); Durette v. Briggs, 47 Mo. 356; McKnight v. Bright, 2 Mo. 110. Possession by vendor is notice, Seymour v. McKinstry, supra; Pell v. McElroy, 36 Cal. 268.

[159] Burlingame v. Robbins, 21 Barb. (N. Y.) 327; High v. Batte, 10 Yerg. (Tenn.) 186, 335 (value given must be set forth and proved); Perkins v. Swank, 43 Miss. 349 (settlement of old debt not "value," quaere); Chance v.

The vendor's lien is always held superior to any homestead right of the purchaser; not only as it antedates the latter, and is a remnant of the vendor's fee in the land, but also in many states by the very words of the statutes which regulate the homestead exemption.[160]

Often the vendor retains the legal title as a security, agreeing to convey on some later day, or when the purchase money is paid. He then has a lien at law, which equity will not disturb. He cannot be compelled to part with the title, until he is paid; and if the agreement is such that he shall convey before payment in full it would be held to mean that he shall have the usual security of a mortgage or express lien for the unpaid part of the price. The lien of such a vendor is of the same dignity with a mortgage, and stands good even against all purchasers.[161]

In a country in which purchases of land in either town or country are, in the great majority of cases, made partially on credit, and where sales are very frequent, the doctrine of the vendor's lien is highly inconvenient. Too much land is subject to a secret lien. The conservatism of scriveners and conveyancers would not let them introduce in deeds of land the truth as to the payment of the consideration. In a few states, however, namely, the Virginias, Kentucky, and Texas, common sense bore off the victory; and deferred payments are often, in Kentucky always, secured by a lien expressly reserved in the deed.[162] In the Virginias, in Kentucky, and in

McWhorter, 26 Ga. 315 (mortgage for old debt is not); Seymour v. McKinstry, supra (want of notice must be alleged); Warren v. Fenn, 28 Barb. 333 (deed for benefit of creditors not); Blankenship v. Douglas, 26 Tex. 225; and Orme v. Roberts, 33 Tex. 773 (creditor buying at his own execution sale). See, also, Adams v. Buchanan, 49 Mo. 64. For purchasers overcoming lien, see Wenzel v. Schultz, 100 Cal. 250, 34 Pac. 696; First Nat. Bank of Sheffield v. Tompkins, 6 C. C. A. 237, 57 Fed. 20; McCarty v. Pruett, 4 Ind. 226; White v. Fisher, 77 Ind. 65 (knew of sale on credit, but notes were overdue); Bartlett v. Glasscock, 4 Mo. 62 (stranger buying at execution sale); Selby v. Stanley, 4 Minn. 65 (Gil. 34).

160 Chapman v. Abrahams, 61 Ala. 108; McHendry v. Reilly, 13 Cal. 75; Phelps v. Conover, 25 Ill. 272.

161 Lewis v. Caperton, 8 Grat. 148; Yancey v. Mauck, 15 Grat. 300; Stuart v. Abbott, 9 Grat. 252 (see difference between this and the equitable lien in Rogers v. James, 33 Ark. 77); Bridge v. Young, 9 Tex. 401 (payment is condition precedent of conveyance); Robinson v. Appleton, 124 Ill. 276, 15 N. E. 761.

162 The usual form is: "In consideration of $———. paid or to be paid as

Iowa the statute has wisely stepped in to regulate this lien. The object of these statutes is not to protect purchasers for value without notice, for they were never affected by the lien; but judgment creditors, purchasers who are not quite free from notice, even volunteers. The Iowa statute disallows the lien unless it is reserved by the conveyance, or unless a suit is brought for its enforcement before a conveyance by the vendee. Between the original parties, therefore, the old equity subsists; but volunteers and purchasers with notice, other than the notice of a pending suit, are free from it.[163] In the Virginias there is, under the statute, no lien unless it "be expressly reserved on the face of the conveyance," which seems to let in the lien of a judgment, when that of the vendor is not thus expressed.[164] In Kentucky, where the reserved lien has wholly taken the place of mortgages for the price of lands, the grantor has no lien for the unpaid part "against bona fide creditors and purchasers, unless it is stated in the deed what part of the consideration remains unpaid." Thus the old equity still stands good between the vendor on the one hand and the vendee and volunteers under him.[165] When the lien is (as usual) expressly reserved, the amount

follows: $——. part thereof, in cash, $——. the residue thereof, in notes at —— months, each for $——," etc.,—"for the securing of which notes a lien is hereby retained, and the receipt of which money and notes is hereby acknowledged." Such reservations are recognized in other states as mortgages in effect. Park v. Snyder, 78 Ga. 571, 3 S. E. 557.

[163] Iowa, § 1940. Doubt had been expressed before the Code first containing the section whether the lien was in force in the state, Porter v. City of Dubuque, 20 Iowa, 440; it could not affect the right of third parties, Allen v. Loring, 34 Iowa, 499; but was good between vendor and vendee, Johnson v. McGrew, 42 Iowa, 555. For effect of the statute, see Rotch v. Hussey, 52 Iowa, 694, 3 N. W. 727, recognized in Fisher v. Shropshire, 147 U. S. 133, 13 Sup. Ct. 201. As to effect on judgment creditors, see hereafter, under head of "Lien of the Judgment."

[164] Virginia Code, § 2474; West Virginia, c. 75, § 1; Stoner v. Harris, 81 Va. 451; Smith v. Henkel, Id. 524 (the lien is not a matter of discretion, but of right); Stoner v. Harris, Id. 451 (statute does not affect vendor holding on to title).

[165] Gen. St. Ky. c. 63, art. 1, § 24, now St. 1894, § 2358. The Revised Statutes of 1852 did not contain the words "against creditors and purchasers," disallowing the implied lien altogether; otherwise now. Ross v. Adams, 13 Bush (Ky.) 370. The Revised Statutes also wanted it "expressly" stated how much was due. Ledford v. Smith, 6 Bush (Ky.) 129; Long v. Burke, 2 Bush (Ky.) 90.

remaining unpaid need not be exactly stated, and the note of a third person will be secured as well as that of the buyer; but when it is not the lien does not extend beyond the latter's own liability.[166] In the absence of the proper words in the deed the Kentucky courts have allowed a lien on the ground that they were omitted by mistake or fraud.[167]

The sales of land under decrees of a court, including those known as an "administrator's licenses," are generally made upon credit, with a provision in the law, or in the judgment ordering the sale, that the deferred payments are to be secured by mortgage or an express lien. If this requirement should not be followed, the lien would attach nevertheless, as equity considers that to be done which ought to be done.[168] Upon the sale of land, held by equitable title, such as a title bond or a certificate of purchase at a sheriff's sale, the lien attaches as much as upon the sale of the legal estate. The sale is made by transfer of the title bond. As such transfer carries the legal title to the bond, perhaps the next transferee might set up the rights of a purchaser for value.[169]

It is an American, not an English, refinement upon the implied vendor's lien law, that the right or equity is personal to the seller of the land, and it is the rule (except in Indiana, Missouri, and Texas)

[166] Keith v. Wolf, 5 Bush (Ky.) 646; Beyland v. Sewell, 4 Bush (Ky.) 637; Pack v. Carder, Id. 121, where both sides introduced parol proof to show whether a lien was intended or waived.

[167] Worley v. Tuggle, 4 Bush (Ky.) 168 (one judge dissenting, and disapproved by the bar of the state); Phillips v. Skinner, 6 Bush (Ky.) 662.

[168] Thus the Kentucky Code of Practice (section 699) says: "A lien shall exist on real estate sold by order of court." Jolly v. Stallings, 78 Tex. 605, 14 S. W. 1002; Woods v. Ellis, 85 Va. 471, 7 S. E. 852; Martin v. Neblett, 86 Tenn. 388, 7 S. W. 123 (must take notice of decree, though lien not reserved in the deed), quoting Mertins v. Jolliffe, 1 Amb. 311, and Moore v. Bennett, 2 Ch. Cas. 246, for principle that every man has notice of every link in his title.

[169] Calvin v. Duncan, 12 Bush, 102; Bybee v. Smith, 88 Ky. 648, 11 S. W. 722; Amory v. Reilly, 9 Ind. 490 (the lien better than on sale of legal estate, because there can be no "purchaser"); Johns v. Sewell, 33 Ind. 1; Barrett v. Lewis, 106 Ind. 120, 5 N. E. 910; Palmer v. Bennett, 81 Tex. 451, 19 S. W. 304 (pre-emption land, no patent issued, lien applies); Bledsoe v. Games, 30 Mo. 448; Gee v. McMillan, 14 Or. 268, 12 Pac. 417 (trust estate; refers to Pease v. Kelly, 3 Or. 417, for the recognition of this lien in Oregon, and to the name "grantor's lien," which some writers give it in the case of the sale of an equity).

that the transfer of the demand, or of the note and bond representing the demand, for the purchase money, does not carry with it the lien to the assignee. As the lien cannot live separately from the demand which it subserves, an outright assignment thereof would therefore destroy it.[170] But there is a very broad exception: The vendor may assign his demand to a creditor as a collateral, or pledge it to one or more creditors, or perhaps he may sell and indorse it even for ready money, undergoing the obligation of an indorser; for in any of these cases he retains an interest in having the note or bond paid; but he must on no account sell without recourse.[171] At any rate, when the assigned note or bond is dishonored, and the vendor has to take it up, and does so, the lien revives in his hands.[172] But where the lien is expressly reserved, or set forth in the deed in the manner pointed out by statute, or where the vendor holds the legal title for his security, such lien or security follows the demand without question.[173] And in such a case, if the surety for the

[170] Morshier v. Meek, 80 Ill. 79 ("an established rule in equity"); Gruhn v. Richardson, 128 Ill. 178, 21 N. E. 18; Law v. Butler, 44 Minn. 482, 47 N. W. 53; Hammond v. Peyton, 34 Minn. 474, 27 N. W. 72; Shall v. Biscoe, 18 Ark. 142, reviewing the English cases; Williams v. Young, 21 Cal. 227 (in its nature is assignable); Iglehart v. Armiger, 1 Bland (Md.) 519 (same phrase); Law v. Butler, 44 Minn. 482, 47 N. W. 53 (not generally); in Tennessee a number of cases, from Green v. Demoss, 10 Humph. (Tenn.) 371, to Pillow v. Helm, 7 Baxt. (Tenn.) 545. Contra, Johns v. Sewell, 33 Ind. 1 (quoting older Indiana cases as settling the rule); Sloan v. Campbell, 71 Mo. 387 (as positive for Missouri); Hodges v. Roberts, 74 Tex. 517, 12 S. W. 222. In Alabama, section 1764 of the Code makes this lien assignable. The decree to be obtained on the lien can be assigned. Woolley v. Wickerd, 97 Cal. 70, 31 Pac. 733.

[171] Tanner v. Hicks, 4 Smedes & M. (Miss.) 300; Carlton v. Buckner, 28 Ark. 66; Crawley v. Riggs, 24 Ark. 563; Hallock v. Smith, 3 Barb. (N. Y.) 267; Cate v. Cate, 87 Tenn. 41, 9 S. W. 231. In Schnebly v. Ragan, 7 Gill & J. (Md.) 120, the court of appeals of Maryland puts its decision against the lien mainly on the ground that the demand had been sold without recourse. A fortiori, the remedy passes to executors, etc. Conover v. Warren, 1 Gilman, 498; Burger v. Potter, 32 Ill. 66.

[172] Cotten v. McGehee, 54 Miss. 510; Lindsey v. Bates, 42 Miss. 397.

[173] Blair v. Marsh, 8 Iowa, 144; Dingley v. Bank of Ventura, 57 Cal. 467; Elmendorf v. Beirne, 4 Tex. Civ. App. 188, 23 S. W. 315; Adams v. Cowherd, 30 Mo. 458; Carpenter v. Mitchell, 54 Ill. 126; Stevens v. Chadwick, 10 Kan. 406. But the assignee is liable to all set-offs and equities, Gordon v. Rixey, 76 Va. 694.

buyer, is compelled to pay the price (as happens frequently upon bonds with surety given at judicial sales), he is subrogated to the lien; and this has been done for the surety, even as to the secret and implied lien, and by courts which held this to be unassignable.[174] But a person who has simply advanced the money to pay for the land cannot claim to be subrogated, though an equity has been worked out for one who has not only advanced the money but managed the purchase, on the ground that he stands in the light of a seller to the person to whom the land is conveyed.[175]

Purchase notes are in some states (especially in Texas) often given for the price, expressing on their face that they are secured by lien on the land, conveyed on the same day by the payee to the maker. If the reference to the deed is sufficiently clear to satisfy the statute of frauds, or if the land is identified in the body of the note itself, then that note is simply an equitable and generally an unrecorded mortgage, deriving its force from the signature of, and delivery by, the maker, the owner of the purchased lands; and it is enforced against all, except purchasers for value without notice.[176]

[174] Burk v. Chrisman, 3 B. Mon. (Ky.) 50 (express lien for bonds at decretal sale); Roberts v. Burce, 91 Ky. 379, 15 S. W. 872 (though several renewals of note); Ballew v. Roler, 124 Ind. 557, 24 N. E. 976 (implied lien); Brick v. Bual, 73 Tex. 511, 11 S. W. 1044 (joint buyer overpaying his share); Tompkins v. Mitchell, 2 Rand. (Va.) 428; Meluy v. Cooper, 2 Blaud. (Md.) 199, note; see disallowed as to implied lien in Henley v. Stemmons, 4 B. Mon. (Ky.) 131. And one paying off mortgages or other incumbrances might stand in the same light, Lockwood v. Bassett, 49 Mich. 547, 14 N. W. 492.

[175] Marquat v. Marquat, 7 How. Prac. 417; Kelly v. Kelly, 54 Mich. 30, 19 N. W. 580 (none for paying mortgages); Wood v. Wood, 124 Ind. 545, 24 N. E. 751 (stranger paying price not subrogated); Truesdell v. Callaway, 6 Mo. 609; Demeter v. Wilcox, 115 Mo. 634, 22 S. W. 613. Contra, Williams v. Rice, 60 Mich. 102, 26 N. W. 846; Price v. Courtney, 87 Mo. 387, 395; Wooldridge v. Scott, 69 Mo. 669; Coe v. New Jersey M. Ry. Co., 31 N. J. Eq. 105, 135 (inclines to extend subrogation); Dwenger v. Branigan, 95 Ind. 221 (virtual seller); Carey v. Boyle, 53 Wis. 574, 11 N. W. 47 (s. p.); Jones v. Parker, 51 Wis. 218, 8 N. W. 124 (s. p.). See, also, Jones v. Lockard, 89 Ala. 575, 8 South. 103.

[176] Cundiff v. Corley (Tex. Civ. App.) 27 S. W. 167; Bergman v. Blackwell (Tex. Civ. App.) 23 S. W. 243 (where notes were given for share of an heir in whole estate, and the lien was apportioned by the court between lands and chattels); Moran v. Wheeler (Tex. Civ. App.) 26 S. W. 297; Case v. Bumstead, 24 Ind. 429; Shanefelter v. Kenworthy, 42 Ind. 501. As to description

The lien, whether implied or reserved, is not barred by taking a judgment at law for the debt,[177] nor by the bankruptcy of the vendee. Indeed, the law gives the lien because the judgment at law might prove unavailable, and because the purchaser may become a bankrupt.[178] But, by selling the land under an attachment or general execution in proceedings in personam, the vendor loses his lien, and the purchaser at the sheriff's or master's sale does not obtain the benefit thereof.[179]

The vendor's lien must be confined on the one hand to the estate sold, on the other hand to the price agreed upon; that is, none but the vendor of the estate, or one representing him, can enforce the lien, and he can enforce it only for its value, as agreed between him and the buyer, but not for other charges, such as advances or services rendered.[180] A mortgage given for the purchase money is, whenever equity requires that it should be, regarded like the vendor's lien, as a remnant of the estate sold, and therefore superior to any lien, whether by judgment, or by mortgage of after-acquired property, against the estate of the vendee.[181]

or identification of the land, see Slade v. Young, 32 Tex. 668; Harris v. Crittenden, 25 Tex. 325; Davenport v. Chilton, 25 Tex. 518; McConkey v. Henderson, 24 Tex. 212; Daugherty v. Eastburn, 74 Tex. 68, 11 S. W. 1053; lien note to party who advances purchase money good, Johnson v. Townsend, 77 Tex. 639, 14 S. W. 233; good between parties, though not for price, Wright v. Campbell, 82 Tex. 388, 18 S. W. 706; but not against maker's wife, McCamly v. Waterhouse, 80 Tex. 340, 16 S. W. 439; s. p., Claes v. Dallas Homestead & Loan Ass'n, 83 Tex. 50, 18 S. W. 421.

[177] Coe v. New Jersey M. Ry. Co., 31 N. J. Eq. 105; Graves v. Coutant, 31 N. J. Eq. 763; previous judgment at law not necessary, Scott v. Crawford, 12 Ind. 410; Clark v. Hunt, 3 J. J. Marsh. 553 (judgment and stay bond no bar). Proving against estate no waiver, Delassus v. Poston, 19 Mo. 425.

[178] Graves v. Coutant, supra.

[179] Nutter v. Fouch, 86 Ind. 451; Meyer v. Paxton, 4 Tex. Civ. App. 29, 23 S. W. 284; but not when the bid is set aside, Adams v. Buchanan, 49 Mo. 64. See Craus v. Board, 67 Ind. 102, as to levy on other lands. Watt v. White, 33 Tex. 421 (attachment to be exhausted), is not quite clear.

[180] Hardinger v. Ziegler, 6 Cin. Law B. 326 (unassigned dower, not estate, no lien); Fordice v. Hardesty, 36 Ind. 23 (part owner for his share); but see Oglesby v. Bingham, 69 Miss. 795, 13 South. 852, where widow was allowed by the heirs to take a note for a child's share; Redford v. Gibson, 12 Leigh, 332 (not price, not enforceable); O'Connor v. Smith, 40 Ohio St. 214. See, also, Wynn v. Flannegan, 25 Tex. 778.

[181] U. S. v. New Orleans & O. R. Co., 12 Wall. 362; a married woman's mort-

§ 98. Liens Akin to the Vendor's Lien.

We class those liens as being akin to the vendor's lien which attach to the land, or estate therein, at the very moment when it comes to the hands of the owner, and which arise because the ownership is acquired on the terms of paying a sum of money, or of doing some act, the performance of which can be valued in money. The foremost instances are these: A devise of land, out of which or for which the devisee is to pay a legacy, a named debt, or a charge on the testator's estate; a share in the parent's land falling to a child or grandchild, against which advancements are charged in favor of the other children or grandchildren; owelty of partition, whether in pais, by deed, or by the judgment of a court; a sale of land, on which the buyer has paid the purchase money, either in whole or in part, and which sale, upon any ground, is set aside, becomes inoperative or is rescinded when a lien arises for the return of the money paid; in the same class of cases, also, a lien for the value of improvements which the purchaser has in the meanwhile put upon the land, and for taxes and assessments paid by him.[182]

gage for purchase money binds the land, Schnyder v. Noble, 94 Pa. St. 286; Chase v. Hubbard, 99 Pa. St. 226. Such a mortgage need not show on its face what it is for, Appeal of City Nat. Bank, 91 Pa. St. 167. But where the mortgage is made to a third person, who advances the price, its character cannot be shown against a bona fide purchaser, Albright v. Lafayette Bldg. & Sav. Ass'n, 102 Pa. St. 411. In several states the statute takes special care of these mortgages, if given at the time of purchase, giving them preference over previous judgments or attachments against the mortgagor: New York, Code Civ. Proc. § 1254; New Jersey, "Conveyances," § 77; Indiana, Rev. St. § 1089; and so in Kansas, Maryland, and Mississippi; still broader are the provisions of the California laws (Civ. Code, § 2898), and in the Dakotas (Civ. Code, § 1712). As to the conflict of the purchase money with dower, see hereafter, under "Dower" and "Lien of Judgment." A person buying land expressly in trust for another can bind it by purchase-money mortgage. Strong v. Ehle, 86 Mich. 42, 48 N. W. 868; Aultman & Co. v. Silha, 85 Wis. 359, 55 N. W. 711 (after-acquired property bound by purchase-money mortgage in preference to grantee's mortgage on future acquisitions); Sawyer v. Northan, 112 N. C. 261, 16 S. E. 1023 (father buying in his son's name, and deceptively giving mortgage for purchase money in his own, holds good).

182 In the notes to Mackreth v. Symmons, 1 White & T. Lead. Cas. Eq. 447, the lien of the purchaser for money advanced on the sale is discussed, and cases are quoted.

Among these liens, that for owelty of partition stands nearest to that of the vendor; for the cotenant to whom a purpart larger than his true share is assigned is made to buy this excess with the money. His fellow, or the one to whom this money is to go, is truly the vendor of this excess. The lien is therefore superior to any which the cotenant who receives the land has created, even before the partition.[183] And, where several of the part owners are awarded an owelty of partition against one purpart, their liens are of equal rank, and none of them can enforce that in his own favor to the prejudice of the others.[184] The simplest way to secure the owelty of partition would be an order making the payment thereof a condition precedent for the vesting of the larger purpart; but probably courts or commissioners in partition have not the power to impose such terms, under laws governing partition.

The lien of the purchaser who is, by the vendor's fault, defeated in his purchase, carries with it the right to retain the possession lawfully obtained under the ineffectual sale until the money paid on the purchase is repaid, or until it is recouped out of the rents and profits, the lienor having the same rights as a mortgagee lawfully in possession.[185] A fair instance of such a lien arises when the land on which only a part has been paid is sold or levied upon under execution. The purchaser may be unwilling to enforce his executory contract against the creditor; the vendor, being in the wrong, cannot insist on the purchase being carried out; hence a lien for what has been paid is the readiest and most equitable solution.[186] But no lien arises where the purchase is unlawful, and can, for that reason, not be carried out. For instance, if a sheriff or his deputy

183 McCandless' Appeal, 98 Pa. St. 489.

184 Meyers v. Rice, 107 N. C. 24, 12 S. E. 66. In states in which one part owner may, under some circumstances, take the whole tract, upon paying off the others, the like lien would attach to the undivided part thus gained. Freeman v. Allen, 17 Ohio St. 527.

185 Payne v. Wallace, 6 T. B. Mon. 380 (decided, however, at a time when the mortgagee's right to possession had a stronger hold than now); Anderson v. McCormick, 18 Or. 300, 22 Pac. 1062.

186 Geoghegan v. Ditto, 2 Metc. (Ky.) 437, where the vendor by title bond had "given a levy" on the land. In Miller v. Hall, 1 Bush, 238, on the other hand, land sold under decree of court had to be returned after a reversal, and a lien was allowed for some payments made.

bids at his own sale, and pays for land which he cannot lawfully acquire, and must therefore abandon, he has no lien for his protection; for to allow it would assist him in a violation of the law, and equity will not assist him.[187]

Where the vendee under a parol sale has taken possession, paid a part or the whole of the purchase money, and has erected lasting improvements, and the vendor taking advantage of the statute of frauds, turns him out (as he may do wherever the doctrine of "part performance" is not received), the former not only can recover back all his outlays, but he has a lien for them, and for the value of his lasting improvements, after deducting therefrom rents or profits, proceeds of timber or minerals, and waste. For the details of each of these items the reader is referred to works on Equity.[188]

The outlays which one of several cotenants makes, beyond his own share, in buying up outstanding titles, discharging incumbrances, and paying taxes, are, either on the ground of subrogation (of which hereafter), or by reason of an equity somewhat akin to that of the vendor, a lien on the shares of the other cotenants. This is a matter of common agreement. As to the lien of a cotenant for repairs and improvements, the authorities are divided.[189]

A lien closely allied to that of the vendor is that which the will devising land to A., and ordering him to pay a sum of money to B., lays upon the land; for this legacy may be said to be a part of the consideration by which A. acquires the devised land. We assume the question to be settled, by a proper construction of the will, that B.'s legacy is to come out of A.'s devise, and consider here only whether A. becomes only personally liable by accepting the devise, or if the legatee has a lien. The views entertained in the several

187 Etlinger v. Tansey, 17 B. Mon. 369.

188 McCampbell v. McCampbell, 5 Litt. (Ky.) 92, 98; McCracken v. Sanders, 4 Bibb (Ky.) 511, where the chancellor enjoined the judgment in ejectment until the compensation was paid, and thus gave an effectual lien, which in modern practice in most of the state courts, but not in the federal courts, could be reached by an equitable defense to the action at law for the land. In Dean v. Cassiday, 88 Ky. 572, 11 S. W. 601, the court sold the land involved in the rescission, and out of the proceeds paid the vendee for his improvements.

189 Tucker v. Tucker (1803) Print. Dec. (Ky.) 302 (lien enforced by enjoining partition until it is paid); Venable v. Beauchamp, 3 Dana, 330 (for removing incumbrances and adverse titles).

states are by no means in harmony. In Kentucky the statute declares every legacy which a devisee is directed to pay a lien upon the thing devised. In North Carolina the same rule has been settled by repeated decisions of the courts; also by a late case in Iowa.[190] In New York and in New Jersey, also, the devise of land to one on condition that he pay the legacies by the will makes them a charge on the devised lands, unless there is something in the will to show a different intention.[191] But in Pennsylvania, Maryland, and Rhode Island, a direction to the devisee to pay legacies does not raise a lien. It was objected that a lien for a small annuity (a shape which such legacies often take) is oppressive, but it may be answered that denial of the lien will often be the denial of justice.[192]

In Indiana, Illinois, and other states, the question seems not to have come up in this clear-cut form of a direction given to, or condition laid upon, the devisee, and it is doubtful how it will be answered.[193]

[190] Kentucky St. 1894, § 2066; Aston v. Galloway, 3 Ired. Eq. 126 (devise to A., "he paying to C. and D. $—— at their coming of age," lien enforced against purchaser). Devereux v. Devereux, 78 N. C. 386, follows this. But a request that B. may live with A., the devisee, does not put a lien for B.'s board on the devisee's land. Martin v. Goode, 111 N. C. 288, 16 S. E. 232; Henry v. Griffis (Iowa) 56 N. W. 670 ("the boys is to pay" legacy to daughter, gives lien).

[191] Birdsall v. Hewlett, 1 Paige, 32; Harris v. Fly, 7 Paige, 421; Loder v. Hatfield, 71 N. Y. 92. Bevan v. Cooper, 72 N. Y. 317, has been cited to the contrary; but that deals with the incidence of the bequest, not with the lien. In Maine, the inclination is the same, Merrill v. Bickford, 65 Me. 118. Wyckoff v. Wyckoff, 48 N. J. Eq. 113, 21 Atl. 287 (tract of land devised to three sons, they to pay annuity to widow, held a charge). The court says there is a charge in two cases: First, when the devisee is directed to pay; second, when the legacy is followed by a residuary devise,—and cites Schanck v. Arrowsmith, 9 N. J. Eq. 314, 330; Cox v. Corkendall, 13 N. J. Eq. 138; also, English precedents, Cross v. Kennington, 9 Beav. 150; Gallemore v. Gill, 8 De Gex, M. & G. 567; and others, going back through the Veseys.

[192] Larkin v. Larkin, 17 R. I. 461, 23 Atl. 19; Cable's Appeal, 91 Pa. St. 327; Sauer v. Mollinger, 138 Pa. St. 338, 22 Atl. 89; Owens v. Claytor, 56 Md. 129 (says, of giving the lien in all cases, "such a position cannot be maintained on principle or authority").

[193] Haskett v. Alexander, 134 Ind. 543, 34 N. E. 325 (legacy to be paid after sale of land); Davidson v. Coon, 125 Ind. 497, 25 N. E. 601 (equitable lien raised, but there was more than a direction).

Where the legacy is taken out of a residuary devise of land, or out of the whole residuary mass of both land and personalty, the lien, in the former case for the whole amount, in the latter for the deficit after exhausting the personalty, follows as a matter of course. The only way to deduct money from the land, is to raise a lien thereon for its payment.[194]

A direction that the residuary devisee shall pay the debts of the testator, more especially if the residue of lands and personalty is thrown together, is no more than what the statute law, which subjects lands generally to the payment of all debts alike, would require; hence such a direction would not authorize any proceeding to subject the land to sale, other than that which, under the statute, could be instituted without any such clause in the will.[195] It is, however, competent for the testator to charge his debts upon his lands, or upon some part of them, in such definite words that the lien could not be cleared away except by the payment of the debts, or through a sale of the lands in an administration suit.[196]

§ 99. Rights of Assignees.

The assignee of a regular mortgage is not considered as a purchaser of the land described therein. Even where a conveyance of the land by the mortgagee carries the debt, still his grantee is only the assignee of the debt, and cannot claim the rights of a purchaser of the land in good faith. The mortgagee, by selling the note or bond, divests himself of all interest, so far that in most states he is no longer even a proper party to a suit to enforce or to assail

194 Lewis v. Darling, 16 How. 1; Bench v. Biles, 4 Madd. 188; In re Campbell (1893) 3 Ch. Div. 468. In modern American practice under this head, when the incidence of the legacy is admitted, there is no difficulty about the right to subject the land.

195 Turner v. Gibb, 48 N. J. Eq. 526, 22 Atl. 580, where the real and personal property were blended into one mass.

196 If, however, the devisees are allowed to sell the land so charged, the lien is gone; for, as shown hereafter, under the head of "Powers," the purchaser is not bound to see to the application of the purchase money. Grotenkemper v. Bryson, 79 Ky. 353. But the lien can, at any rate, be enforced by suit. Drake v. Ellman, 80 Ky. 434 ("all of which are to be paid out of my estate" was the language of the will).

the mortgage.[197] The assignee of the note or bond must meet all defenses to it, and if it is not negotiable, and taken by him before maturity in due course of trade, he stands no better than his assignor; if he cannot collect the debt by process in personam, he cannot enforce the security on the land.[198] But when the demand is negotiable, and the party whose land is pledged is the maker of the negotiable paper, and is liable as such, there is no strong reason why a holder of the paper "for value and in course of business," as the law merchant has it, should not be allowed to recover by foreclosure or decree of sale in chancery, if he could recover at law, and, waiving the mortgage, take the land under execution; though, indeed, intervening liens or the homestead exemption would often defeat the levy. The supreme court of the United States has taken

[197] Stephens v. Weldon, 151 Pa. St. 520, 25 Atl. 28 (assignee not purchaser). Even in North Carolina, any delivery of the note, with or without an indorsement, carries the mortgage. Jenkins v. Wilkinson, 113 N. C. 532, 18 S. E. 696; Lambertville Nat. Bank v. McCready Bag & Paper Co. (N. J. Ch.) 15 Atl. 388 (executor of trustee holding mortgage for creditors); Mathesou v. Thompson, 20 Fla. 790 (mortgagee, having assigned the debt, not necessary party); Keister v. Myers, 115 Ind. 312, 17 N. E. 161 (mortgagee who has sold note not a necessary party to suit on mortgage); Moreland v. Houghton, 94 Mich. 548, 54 N. W. 285 (assignment signed by agent not appointed in writing); a mortgage is avoided by alteration, while a conveyance is not, McIntyre v. Velte, 153 Pa. St. 350, 25 Atl. 739 (quoting from Wilson v. Shoenberger, 31 Pa. St. 299, in strong words, the modern view); Jordan v. Sayre, 29 Fla. 100, 10 South. 823 (conveyance of the land by the mortgagee, without more, is inoperative); s. p., Watson v. Hawkins, 60 Mo. 550. Even in the New England states, the mortgage is assets in the hands of the executor, if not foreclosed in the mortgagee's lifetime; e. g. Vermont, St. § 2150. The interest in a "deed of trust" (see for its definition hereafter) goes in like manner with the transfer of the debt by law. Tingle v. Fisher, 20 W. Va. 497. The arrangement in use in Georgia under the law cited above (section 96, note 136) would make the grantee from the so-called "vendee" by deed of the land a bona fide purchaser, who could hold the land till the debt named in the bond is paid. One holding the note for the debt by delivery only cannot take this position. Planters' Bank v. Prater, 64 Ga. 609. The gift of a secured note, by delivery of the mortgage without the note, was held void in McHugh v. O'Connor, 91 Ala. 243, 9 South. 165.

[198] Chauncey v. Arnold, 24 N. Y. 330; Cooley v. Harris, 92 Mich. 126, 52 N. W. 997; Wood v. Ludlow, 110 N. Y. 154, 17 N. E. 726; Reineman v. Robb, 98 Pa. St. 474; Briggs v. Langford, 107 N. Y. 680, 14 N. E. 502; Miller v. Zeimer, 111 N. Y. 441, 18 N. E. 716; Rapps v. Gottlieb, 142 N. Y. 164, 36 N. E 1052.

this view,[199] while the opposite view is held in Ohio, Illinois, and Minnesota.[200] When the mortgage is given by a third party, not bound on the commercial paper, such as a married woman, authorized to convey or mortgage land, but not capable of binding herself personally, it seems right that the defense of the mortgage should not be cut off by the negotiation of the paper, which it secures.[201] But even when the instrument, or its transfer, does not fall within the law merchant, an assignee without notice will not be affected by such equities of the mortgagor as do not bear upon the debt; but this is really a question of how far the doctrine of recoupment, or of equitable set-off will be carried, and affects the land only as an incident to the debt.[202]

A distinction has been drawn between a contest in which the mortgagor opposes what are known as "equities" to an assignee in good faith, and rights which third persons may have, either in the

[199] Carpenter v. Longan, 16 Wall. 271. The note and mortgage were given in Colorado in 1867 by husband and wife, evidently on land belonging in whole or in part to the latter. The report does not show whether in 1867 the wife's note, by the local law, was binding. If it was thus, the decision is plainly right, as it would be absurd to admeasure the rights of the parties otherwise in the equity suit on the mortgage than in an action of law by which the same land might be sold under execution; but it would be very different if Mrs. Longan's note was void, and her land was taken for an obligation which she did not justly owe, when she did not and could not subject herself to the law merchant. In Laster v. Stewart, 89 Ga. 181, 15 S. E. 42, a mortgage unlawfully given by a married woman as surety for her husband was sustained in the hands of a purchaser for value, etc., though such a course might defeat the law against such suretyships entirely. In Watson v. Wyman, 161 Mass. 96, 36 N. E. 692, assignee of negotiable note with mortgage, though it is equitably discharged, is preferred to second mortgagee. A misrepresentation of the debts by the mortgagor works a privity between him and the assignee, entitling him to recover. Houseman v. Bodine, 122 N. Y. 158, 25 N. E. 255.

[200] Bailey v. Smith, 14 Ohio St. 396; Johnson v. Carpenter, 7 Minn. 176 (Gil. 120); Hostetter v. Alexander, 22 Minn. 559 (not shaken by Blumenthal v. Jassoy, 29 Minn. 177, 12 N. W. 517); Olds v. Cummings, 31 Ill. 188 (statute of Anne does not apply to mortgages); Haskell v. Brown, 65 Ill. 29 (agreement by railroad company to pay interest out of the dividends was allowed as defense against mortgage); Shippen v. Whittier, 117 Ill. 282, 7 N. E. 642 (it is not commercial paper).

[201] There seems to be no direct decision on the point.

[202] McMasters v. Wilhelm, 85 Pa. St. 218.

assigned bond and mortgage or in the land on which it rests. When the demand is not negotiable, it is agreed that the assignee, of necessity, takes it subject to all the equities of the former kind; but the courts in the greater number of states hold that he does not take the mortgage subject to the equities of third persons, either in the demand, or in the land.[203] In New York, however, in New Jersey, and, it seems, also in Illinois, this distinction is not recognized, and the assignee stands against "equities"—that is, a latent ownership in the assigned demand, or a latent ownership in or lien upon the mortgaged land—in no better plight than his assignor. If the latter by reason of having notice, or on any other grounds, is affected, so is the assignee.[204] But, where a real-estate note is made up, between the ostensible owner of land, against which a latent equity or unrecorded title is outstanding, and a confederate, who transfers it to a bona fide purchaser, the latter ought to occupy as good a position as if the mortgage had been made directly to him in form, as it was in effect; especially in a case in which the owner of the outstanding title was at fault in not spreading it on record. Yet here the decisions in Illinois and in New York differ.[205]

[203] Crosby v. Tanner, 40 Iowa, 136; Newton v. Newton, 46 Minn. 33, 48 N. W. 450; Murray v. Lylburn, 2 Johns. Ch. 441 (Chancellor Kent), and Livingston v. Dean, Id. 479 (same judge), overruled in his own state. He says: "The assignee of a chose in action takes it subject only to the equities of the obligor, but not to the equities residing in third persons against the assignor,"—remarking on the ease of finding the truth as to the former, and the impossibility of finding the others. So, also, Redfearn v. Ferrier, 1 Dow. 50 (Lord Eldon); Dulin v. Hunter, 98 Ala. 539, 13 South. 301; Tison v. People's Saving & Loan Ass'n, 57 Ala. 323; Mott v. Clark, 9 Pa. St. 399; Pryor v. Wood, 31 Pa. St. 142.

[204] Bebee v. Bank of New York, 1 Johns. 529 (Kent, C. J., dissenting; a dispute about the ownership of the mortgage); Bush v. Lathrop, 22 N. Y. 535 (the former assignment was collateral only, and had been redeemed); Decker v. Boice, 83 N. Y. 218 (assignor had notice of unrecorded mortgage); Conover v. Van Mater, 18 N. J. Eq. 481; Hoagland v. Shampanore, 37 N. J. Eq. 588 (unrecorded mortgage); Shippen v. Whittier, 117 Ill. 282, 7 N. E. 642 (rather a defense by the obligor, but put upon similar grounds). And such seems to be the latest tendency in Pennsylvania. Stephens v. Weldon, supra, note 197.

[205] Silverman v. Bullock, 98 Ill. 11 (the case must probably be put on that ground, as Illinois inclines in this matter to Chancellor Kent's opinion). To the contrary is Viele v. Judson, 82 N. Y. 32, where the court refused to look upon the buyer of a kite mortgage note as being himself the mortgagee, and thus a purchaser for value.

But the most troublesome questions are those arising between the assignee and the mortgagor, who has paid the original payee of the mortgage debt; and it must be said that the law on this subject is rather confused, and the decisions hard to reconcile. As most of the states have provided as well for the entry of satisfaction as for noting assignments on the record books, the matter often depends on the wording or on the construction of the registry laws, and it will again be referred to under that head. Aside of the registry laws, and of the laws on commercial paper it seems that the debtor may, until he is notified of a change in the ownership of the demand, pay the money to his original creditor, and that a deed of release given, or satisfaction entered by the mortgagee, cancels both debt and lien.[206] Where the demand is evidenced by a negotiable bill or note, which the mortgagee has sold before maturity, in due course of business, the indorsee could recover on the note or bill at law; and under the ruling of the supreme court, he could shut out a defense of payment to the mortgagee, before or after the assignment, just as he might shut out an equity in the creation of the note, not only in the suit at law, but also in the enforcement of the mortgage; and in Massachusetts, it has been held that, even where the law merchant does not come in, the mortgagor is at fault in paying the mortgagee, especially before the maturity of the debt, without demanding to see the note or bond, which represents the debt.[207]

[206] Sellers v. Benner, 94 Pa. St. 207 (here the assignee was at fault, seeing a deed from the mortgagor to a purchaser on record, in which nothing was said about the mortgage). A fortiori, where the mortgage is assigned after having been paid, though no satisfaction entered, Redin v. Branhan, 43 Minn. 283, 45 N. W. 445; mortgagor may pay mortgagee till notified of assignment, Foster v. Carson, 159 Pa. St. 477, 28 Atl. 356. See, for a case where the assignee was bound by the mortgagee's release, Goodale v. Patterson, 51 Mich. 532, 16 N. W. 890.

[207] Biggerstaff v. Marston, 161 Mass. 101, 36 N. E. 785 (especially if note paid before maturity, the assignee need not notify him). See, also, Massachusetts, St. 1882, c. 237; In re Tarbell, 160 Mass. 407, 36 N. E. 55; Peaks v. Dexter, 82 Me. 85, 19 Atl. 100; Williams v. Keyes, 90 Mich. 290, 51 N. W. 520 (payment to administratrix without asking for the note invalid against assignee holding it). There may be fraud between one assignee and the next one from him, as in Wiscomb v. Cubberly, 51 Kan. 580, 33 Pac. 320, where the mortgagor, having paid an assignee whose transfer was put on record without acknowledgment, after he had passed the note and mortgage to another,

The assignment is itself often in the nature of a pledge, the mortgage being assigned only by way of collateral security, to return to the mortgagee or former holder upon payment of the debt for which it is pledged.[208]

We have so far dealt only with an assignment of the whole demand which a mortgage secures. It often happens that when several notes secured by the same mortgage or vendor's lien mature at several times the owner of these notes sells or pledges some of them to a third person, retaining others, or that he assigns the several notes to different persons, either at the same time or more usually at different times. "In the states in which a mortgage is deemed only an incident to the debt, the assignment of one of the notes by itself, without a transfer of the mortgage, is an assignment pro tanto of the mortgage. Each assignee is, through the mortgage, charged with notice of the equitable interests of all the other assignees. The holder of a part of the notes with a formal assignment of the mortgage has no advantage from holding the mortgage." [209] The prevailing rule is that in case the property under lien turns out insufficient to pay off the whole demand each note will be satisfied pro rata, without regard to the time when the notes mature, or to the order of time in which they were sold by the original holder.[210] In Indiana and Iowa, and few, if any, other states, however, the parts of the mortgage belonging to each note are considered as successive incumbrances; and, upon an insufficiency of proceeds from

was held not justified in paying, because he who exacted it showed no authority. The mortgagor cannot well be deceived, for both the rules of equity practice and the modern Codes require the production of the note in a suit for foreclosure or sale. Schumpert v. Dillard, 55 Miss. 348.

[208] Coffin v. Loring, 9 Allen, 154.

[209] Pattison v. Hull, 9 Cow. (N. Y.) 747; Studebaker Bros. Manuf'g Co. v. McCargur, 20 Neb. 500, 30 N. W. 686; Anderson v. Baumgartner, 27 Mo. 80 (rights of partial assignee purely equitable); Henderson v. Herrod, 10 Smedes & M. (Miss.) 631.

[210] Jennings v. Moore, 83 Mich. 231, 47 N. W. 127; Bartlett v. Wade, 66 Vt. 629, 30 Atl. 4 (no regard to maturities); Shields v. Dyer, 86 Tenn. 41, 5 S. W. 439; Andrews v. Hobgood, 1 Lea (Tenn.) 693 (no regard to either maturity or time of assignment); Whitehead v. Morrill, 108 N. C. 65, 12 S. E. 894; Keyes v. Wood, 21 Vt. 339; Phelan v. Olney, 6 Cal. 478; Todd v. Cremer, 36 Neb. 430, 54 N. W. 674. See an arrangement of priorities by contract, McLean's Appeal, 103 Pa. St. 255.

the sale of the land, those who hold the first maturing notes are first satisfied.[211] Where the original holder retains any of the original notes, there is no reason why he should not share equally with his assignees, unless he has (as is indeed usually the case) indorsed them in such a way as to render himself liable upon the dishonor of the paper, in which case he will be postponed, upon the well-known principle that equity seeks to prevent the multiplicity of suits.[212]

§ 100. Extinction or Subrogation.

As every mortgage or lien is only an incident to a debt, or to the performance of the condition, to secure which it is given, it comes to an end whenever the debt is paid or the condition (such as the payment of sums of money for which no one is personally bound) has been fulfilled, as has been explained at the outset of this chapter. The mortgage also falls to the ground when the debt is released by the creditor, or when it is blotted out by his wrongful act. Whether the mortgage or lien comes to an end by the running of limitation will be discussed in the chapter on "Title by Prescription." But there may be an extinguishment of the debt by operation of law. Thus, where there is a debt due to a man from a woman a marriage between them puts an end at once to the lien of a mortgage given for such debt.[213] And when the liability is once paid off the writing which has thus become dead cannot be quickened into new life by a redelivery as security for another demand.[214]

211 Rankin v. Major, 9 Iowa, 297; Walker v. Schreiber, 47 Iowa, 529 (like successive mortgages); Hough v. Osborne, 7 Ind. 140; Stevenson v. Black, 1 N. J. Eq. 338.

212 Donley v. Hays, 17 Serg. & R. (Pa.) 404; Burrus v. Roulhac, 2 Bush (Ky.) 39.

213 Farley v. Farley, 91 Ky. 491, 16 S. W. 129. Contra, satisfaction of mortgage releases debt, Fleming v. Parry, 24 Pa. St. 47; whatever releases the debt, such as neglect in presenting a check, releases the mortgage, Home Bldg. & Loan Ass'n v. Kilpatrick, 140 Pa. St. 405, 21 Atl. 397; Id., 119 Pa. St. 30, 12 Atl. 754; the mortgage is at an end by payment alone, without any release or entry of satisfaction, Blake v. Broughton, 107 N. C. 220, 12 S. E. 220; when the note secured becomes void by an alteration, the mortgage is gone, Walton Plow Co. v. Campbell, 35 Neb. 174, 52 N. W. 883.

214 Thompson v. George, 86 Ky. 311, 5 S. W. 760; Loverin v. Humboldt Deposit & Trust Co., 113 Pa. St. 6, 4 Atl. 191. The Pennsylvania courts have

A tender, also, good as to time, place, and amount, made by the mortgagor, or any one who derives title to the equity of redemption from him, at the very moment when it is made, destroys the lien of the mortgage; and the lien does not come to life thereafter, though the tender is not kept up; but keeping it up, by payment into court, is necessary, in order to obtain affirmative relief against the mortgagee.[215]

A payment to either one of two mortgagees, holding the demand in their own right, and therefore a tender to either of the two, is sufficient, and releases the lien.[216] And generally whether the debt is barred must depend on the authority of him who has received, or has given his receipt for, the money.[217] One of several executors or administrators can always give a valid receipt, while, as a rule, several trustees must join. Where executors are empowered to invest the funds of an estate, any they put it out on mortgage, they retain their character so far that any one of them can receipt for

gone, however, pretty far in allowing a mortgage to stand as security in pursuance of the intent of the parties at the time when it was really paid. Kuhn v. North, 10 Serg. & R. (Pa.) 399; Moore v. Harrisburg Bank, 8 Watts (Pa.) 138; Wilson v. Murphy, 1 Phila. (Pa.) 203, cited supra. See below as to subrogation. See, also, Millard v. Truax, 50 Mich. 343, 15 N. W. 501. But where a note was "raised," and thus made void, the mortgage, still describing the debt truly in the defeasance, was held valid. Cheek v. Nall, 112 N. C. 370, 17 S. E. 80.

[215] Jackson v. Crafts, 18 Johns. 110; Merritt v. Lambert, 7 Paige, 344; Tuthill v. Morris, 81 N. Y. 94 (must be kept good, for affirmative relief); Nelson v. Loder, 132 N. Y. 288, 30 N. E. 369; Kortright v. Cady, 21 N. Y. 343. See effect of tender accepted in Fisher v. Holden, 84 Mich. 494, 47 N. W. 1063; but the tender must be followed up, to get any affirmative relief against the mortgagee, Haynes v. Thom, 28 N. H. 386, 400; Werner v. Tuch, 127 N. Y. 217, 27 N. E. 845; Post v. Springsted, 49 Mich. 90, 13 N. W. 370 (tender to destroy lien must be open and fair); Renard v. Clink, 91 Mich. 1, 51 N. W. 692 (if fair, it does).

[216] Oatman v. Walker, 33 Me. 67; Flanigan v. Seelye, 53 Minn. 23, 55 N. W. 115.

[217] Shane v. Palmer, 43 Kan. 481, 23 Pac. 594 (general loan agent presumed to have authority); McPherson v. Rollins, 107 N. Y. 316, 14 N. E. 411; Halpin v. Phenix Ins. Co., 118 N. Y. 165, 23 N. E. 482 (only authorized to collect interest); Brewster v. Carnes, 103 N. Y. 556, 9 N. E. 323; Doolittle v. Lewis, 7 Johns. Ch. 45 (foreign administrator may collect; but this matter is now to a great extent regulated by statute). A mortgage being assigned to "A. B.,

the mortgage, and give a release, or "satisfaction piece." [218] When a mortgage is made to a trustee for bondholders, a satisfaction entered or release given by him, when the bonds have not been paid, is void, as against the parties in interest, though, if the deed authorizes him to collect the debt or to enter satisfaction, a purchaser in good faith, acting upon such an entry, would be protected.[219] Whatever discharges the debt, also takes the lien off the land. Hence when a surety is discharged by giving, without his consent, time to the principal, or by abandoning the creditor's hold on the principal's property, a mortgage on the surety's land is released; and this will happen though the surety has only pledged his or her land, being perhaps, as a married woman, incapable of incurring a personal liability.[220]

To take a new note for an old one, or for the balance due on the old note, or a bond for the simple contract debt, is not payment within the meaning of the defeasance. Nor is the right to proceed on the mortgage affected by the recovery at law for the debt, except in this: that as a matter of good pleading the bill for enforcing the mortgage should refer to the judgment as the debt to be collected. Taking personal security on the new notes, or a mortgage on other property, or even including an additional demand in the new note, does not release the mortgage, though the last-named circumstance may indicate such an intent. In short, a mortgage given to secure a demand will remain in force for all renewals.[221] But

trustee," A. B.'s release is good. Carter v. Van Bokkelen, 73 Md. 175, 20 Atl. 781.

[218] Fesmire v. Shannon, 143 Pa. St. 201, 22 Atl. 898 (one executor). See Townley v. Sherborne, 2 White & T. Lead. Cas. Eq. 1738, and notes, for distinction between executors and trustees. Also, infra, in chapter on "Powers."

[219] Hollister v. Stewart, 111 N. Y. 644, 19 N. E. 782 (trustee cannot postpone the mortgage); Lincoln v. Purcell, 2 Head (Tenn.) 142 (release by naked trustee void).

[220] Earl of Huntingdon v. Countess of Huntingdon, 2 Bro. Parl. Cas. 1, 3 White & T. Lead. Cas. Eq. 1922; Niemcewicz v. Gahn, 3 Paige, 614; Hinton v. Greenleaf, 113 N. C. 6, 18 S. E. 56; Loomer v. Wheelwright, 3 Sandf. Ch. (N. Y.) 135. For what will release a surety, see Rees v. Berrington, 2 White & T. Lead. Cas. Eq. 1867, and notes. So, where the mortgagee arranged for the mortgagor's debtor to pay the secured debt, and indulged him so long, without the mortgagor's consent, that the debt was lost, the mortgage was held released. Dedrick v. Den Bleyker, 85 Mich. 475, 48 N. W. 633.

[221] Heard v. Evans, 1 Freem. Ch. (Miss.) 79; Bank of Utica v. Finch, 3

there may be such a change in all the relations between mortgagor and mortgagee, as to amount to a "novation," and thus to an extinction of the debt and mortgage; and when new rights of third parties have arisen under the fairly grounded belief that such a novation has taken place it will not lie in the power of the mortgagor or mortgagee, or of both combined, to reinstate the old security.[222] When the party ultimately bound for the mortgage debt has repaid it, the security cannot be kept alive; but when some other person, who is under an obligation to do so, or under a necessity by reason of his interest in the land, pays the debt under such obligation, or for the protection of his interest, he may be subrogated to the mortgagee's remedies. This right belongs thus to any surety or guarantor for the mortgagor, in the widest sense of the word.[223]

There is, however, this important limit to the right of a surety to be subrogated to the liens belonging to the creditor: He cannot share the lien with him so as to diminish the benefit which the latter would draw from the security; otherwise the object of having the personal suretyship, namely to supply the deficiencies in the mort-

Barb. Ch. 293; Cissna v. Haines, 18 Ind. 496 (new note with mortgage on other lands held no abandonment, but, judgment having been obtained on the new note, suit should have been brought on the latter); Dunshee v. Parmelee, 19 Vt. 172 (part paid, and new note for residue). See, also, State v. Hemingway, 69 Miss. 491, 10 South. 575. For contested cases over further advances, see notes to section 95. The lien for renewals is always admitted. The position is elementary.

222 Savings & Loan Soc. v. Burnett (Cal.) 37 Pac. 180; California Loan & Trust Co. v. Hammell, 101 Cal. 252, 35 Pac. 765; Joyner v. Stancill, 108 N. C. 158, 12 S. E. 912 (novation may take place, but not favored); Wilhelmi v. Leonard, 13 Iowa, 330; Billingsley v. Harrell, 11 Ala. 775 (another trustee, time granted, other creditors included, old mortgage gone). Taking an absolute deed for the debt extinguishes the mortgage, Patterson v. Evans, 91 Ga. 799, 18 S. E. 31; where one mortgage to two creditors was changed into two separate mortgages to each, held a novation, Dubuque Nat. Bank v. Weed, 57 Fed. 513.

223 The leading American case is Hayes v. Ward, 4 Johns. Ch. 123, which traces the rule back both in the civil law and in English precedents. See the English and American note on subrogation of sureties under Dering v. Earl of Winchelsea, 1 White & T. Lead. Cas. Eq. 100. Compare cases above, under "Vendor's Lien." See, however, in chapter on "Prescription," as to the limitation of time on the subrogated security.

gage or lien, would be defeated. Hence, if A.'s land is mortgaged to B. for a sum payable in installments, or on which interest is payable from year to year, and C. is surety for A. on all or any of the installments, or for the payment of interest, C. does not, by paying an installment or a gale of interest, acquire any interest in the mortgaged lands, except such as is subordinate to the lien which B., the creditor, has for the unpaid residue of his debt.[224] So, also, any junior incumbrancer, who must discharge the superior lien to prevent a sale or foreclosure with loss to himself, has the right to be subrogated.[225] We have already referred, under another head, to the most frequent case of such subrogation,—the payment of taxes, or lifting of inchoate tax titles, by incumbrancers, for the protection of the estate; but these differ therein, that generally speaking a full and exact subrogation may not here take place, as the tax lien is sui generis.[226] Where a cotenant or joint owner of land pays the whole of a mortgage debt, it is, as to his own share, the satisfaction of his own debt. As to the residue of the debt, he pays under compulsion, for the benefit of the other joint owners, and is subrogated to the lien upon their shares of the land.[227] It is possible, however, even for the original mortgagor to become subrogated upon payment; namely, when he has sold the land to another, who has, as part of the purchase price, undertaken to discharge the incum-

[224] Columbia Finance & Trust Co. v. Kentucky Union Ry. Co., 9 C. C. A. 264, 60 Fed. 794; Hollingsworth v. Floyd, 2 Har. & G. (Md.) 91; Kyner v. Kyner, 6 Watts, 222; Stamford Bank v. Benedict, 15 Conn. 437; Harlan v. Sweeny, 1 Lea (Tenn.) 682; Magee v. Leggett, 48 Miss. 139.

[225] Emmert v. Thompson, 49 Minn. 386, 52 N. W. 31; Clark v. Mackin, 95 N. Y. 346; Warner v. Hall, 53 Mich. 371, 19 N. W. 40 (holder of equitable estate); State v. Brown, 73 Md. 484, 21 Atl. 374 (bondholders in old mortgage). In fact, the old system of strict foreclosure, where there were successive mortgages, rested wholly on the subrogation of the junior when he redeemed the older mortgage. Where the mortgagee pays to his assignee the amount of an interest coupon, an intent to reacquire, not to extinguish it, is presumed. Champion v. Investment Co., 45 Kan. 108, 25 Pac. 590.

[226] See section 95, note 105, where the tax paid off appears rather as a further advance, and thus as an addition to the mortgage.

[227] Damm v. Damm, 91 Mich. 424, 51 N. W. 1069. On the other hand, a mortgagee on an undivided half, who has paid the cotenant's lien for advances, can add it to his own. Darling v. Harmon, 47 Minn. 166, 49 N. W. 686. The position of cotenant compels him to lift the mortgage.

brance. In such a case the first debtor has in effect become a surety, and the new purchaser is now the principal debtor and the purchased lot the primary fund for payment.[228] But, when the true debtor pays off a mortgage given for his own debt by another, he not only cannot be subrogated, but even an assignment to him of the note and mortgage would be held void in a court of equity.[229] And when one who is neither personally bound for the debt nor possessed of an interest in the land which he must shield from loss pays a mortgage off, without taking an assignment thereof at the time (which happens sometimes, through inadvertence or through a misunderstanding of the legal relations), the mortgage lien is gone.[230] Subrogation has been allowed to an underwriter who has insured the mortgagee's interest alone against loss by fire, on grounds which we cannot here stop to discuss.[231] Whenever the party making payment is entitled to subrogation, he will be given it by a court of equity, though a formal deed of release have been given or satisfaction have been entered of record.[232]

Where a party has, on the faith of a new mortgage, furnished the money to take up an old one, overlooking an intermediate lien, and has allowed the old lien to be discharged, relief has been given in some cases, but has been refused in others; that is, he has been given subrogation to the old mortgage, its satisfaction and cancellation being set aside, in some cases, but not in others; and it is not easy to place the differing result on the ground of differing states

228 See this equity hereafter, under the head of "Apportionment."

229 Earl of Huntingdon v. Countess of Huntingdon, supra, where an assignment was disregarded; Loomer v. Wheelwright, 3 Sandf. Ch. (N. Y.) 135.

230 Grady v. O'Reilly, 116 Mo. 346, 355, 22 S. W. 798 (where there was subrogation as to some installments, and not as to others; there can be none as to a mortgage that has not yet taken effect); Kleimann v. Gieselmann, 114 Mo. 437, 21 S. W. 796. An expected descent is not ground enough. Kelly v. Kelly, 54 Mich. 30, 19 N. W. 580. A very harsh case, decided late in 1894, is Campbell v. Foster Home Ass'n, 163 Pa. St. 609, 30 Atl. 222, where one believing that he got a valid mortgage, but who did not, paid off the old mortgage, and was denied subrogation.

231 Sterling Fire Ins. Co. v. Beffrey, 48 Minn. 9, 50 N. W. 922; Allen v. Watertown Fire Ins. Co., 132 Mass. 480.

232 It was held in Dircks v. Logsdon, 59 Md. 176, that a receipt on the mortgage given upon payment by a third party is not in its nature a release, and may be changed into an assignment by consent.

of fact.[233] At any rate, when the old mortgage has not been canceled, so that no new rights have accrued, and no one can have been misled or prejudiced, the old mortgagee, or he who has paid him, will be allowed to retain the security, though a new one has also been executed, or other property which turns out worthless or unavailable has been set over for security.[234]

As between the original parties, a first mortgagee and a junior incumbrancer who induces him to give up his lien without payment of the debt, a release or satisfaction can of course be set aside on the ground of fraud or mistake; and still more so between the mortgagor and mortgagee.[235] But it is just as plain that the satisfaction cannot be set aside, so as to prejudice third persons, who have, on the strength of it, dealt with the land in good faith; and any one who has bought, or advanced money on, the land, relying upon the "satisfaction," may object to its recall.[236]

When a mortgage is given to indemnify a surety or indorser, we must distinguish between that which the debtor gives on his own land and a mortgage given by a third person (generally the debtor's wife) upon his or her land. The former, unless written with especial care to avoid such a result, inures at once to the benefit of the creditor, to whom the surety or indorser is bound, whereof he cannot complain, as paying the creditor does to that extent relieve the surety.[237] But it is otherwise when a third person in-

[233] Ft. Dodge Building & Loan Ass'n v. Scott, 86 Iowa, 431, 53 N. W. 283; Barnes v. Mott, 64 N. Y. 397. In Ryer v. Gass, 130 Mass. 227, the purchaser of land subject to two mortgages, but knowing only of the first, paid part of it, and was allowed to take an assignment of the whole, including the part paid, in the name of a third party, and hold it against the second mortgagee. Contra, Clark v. Moore, 76 Va. 262; Norris v. Woods, 89 Va. 873, 17 S. E. 552 (trustee refused, as against his c. q. t. under disability); Price v. Courtney, 87 Mo. 387 (loan to lift mortgage gives no right to subrogation).

[234] Drury v. Briscoe, 42 Md. 154.

[235] Shaffer v. McCloskey, 101 Cal. 576, 36 Pac. 196, relying mainly upon Rumpp v. Gerkens, 59 Cal. 496, where a first mortgagee had allowed his mortgage to be merged in a subsequent deed, in ignorance of a later recorded deed. Pearce v. Buell, 22 Or. 29, 29 Pac. 78, going back, for the general principle that equity treats an incumbrance either as extinguished or alive, according as it will answer the ends of justice, to Barnes v. Camack, 1 Barb. 392.

[236] So impliedly in Guy. v. Du Uprey, 16 Cal. 199, and Burnap v. Cook, 16 Iowa, 154.

[237] Story, Eq. Jur. §§ 502, 638; 4 Kent, Comm. 307; Sheld. Subr. § 154; Lake

cumbers his or her estate, who is under no obligation to the creditor, and against whom no equity can be worked out. The surety may release the mortgage of such third person, or if he is discharged in bankruptcy, or dies insolvent, the need for indemnifying him can no longer arise, and the mortgage is extinct.[238]

A mortgage can also be extinguished by merger. Just as a life estate is merged in the fee when it meets with it in the same person, so a mortgage or other lien on land is merged when it meets in the same person with the absolute ownership; for a man cannot hold a lien on his own land.[239] This happens regularly, when the first incumbrancer buys at a sale for enforcing the second mortgage, subject to his own, or acquires in any other way the equity of redemption; and, according to what seems the better opinion, also when one who holds a mortgage falling due in installments buys at his own sale on default of the first installment; for he buys subject to those not yet due.[240] But the doctrine of merger, if carried out in all cases, might lead to much injustice. A judgment lien or other incumbrance may have sprung up and be outstanding against

v. Craddock, 1 White & T. Lead. Cas. Eq. 183; also, Moses v. Murgatroyd, 1 Johns. Ch. 119; Bank of United States v. Stewart, 4 Dana (Ky.) 27; Saffold v. Wade, 51 Ala. 214 (surety to several creditors, they take pro rata); Morrow v. Wells, 33 Ala. 125; Kinsey v. McDearmon, 5 Cold. (Tenn.) 392 (was equitable mortgage); Saylors v. Saylors, 3 Heisk. 525 ("this deed to be void when I pay the debt"), (a much plainer case, than when the deed is conditioned on holding the surety harmless); Rice's Appeal, 79 Pa. St. 168 (though the creditor did not give credit to the mortgage); Seibert v. True, 8 Kan. 52 (creditors knew nothing of mortgage when given); (here and in Brown v. Ray, 18 N. H. 102, it inured also to cosureties); Keene Five Cents Sav. Bank v. Herrick, 62 N. H. 174 (reviewing these and other authorities); Bank of United States v. Stewart, 4 Dana (Ky.) 27; Smith v. Gillam, 80 Ala. 297.

[238] Taylor v. Farmers' Bank, 87 Ky. 398, 9 S. W. 240 (debtor's wife); s. p. Macklin v. Northern Bank, 83 Ky. 314. And see, about state guaranty, Cunningham v. Macon & B. R. Co., 156 U. S. 400, 15 Sup. Ct. 361.

[239] When the mortgagee bids in the equity for another debt, the mortgage is gone, Seaman v. Hax, 14 Colo. 536, 24 Pac. 461; Cock v. Bailey, 146 Pa. St. 528, 23 Atl. 370 (bondholders bought equity of redemption, old mortgage gone); Belleville Sav. Bank. v. Reis, 156 Ill. 242, 26 N. E. 646 (second mortgagee bidding in land subject to first mortgage). See, contra, Millerd v. Truax, 50 Mich. 343, 15 N. W. 501.

[240] In re Dull's Estate, 137 Pa. St. 116, 20 Atl. 419 (mortgage by remainderman for sum in gross, to secure interest to life tenant).

the fee subordinate to the mortgage or lien that unites with it, but before the union of the two interests. In such a case, if the older mortgage or lien were merged in the fee, and no longer considered alive, the junior lien would obtain an unjust priority over it. In all such cases, neither equity nor indeed the law recognizes a merger of the lesser interest with the full estate,[241] and for greater certainty the principle has been laid down that equity always looks to the intent, and that there can be no merger of a mortgage in the fee when, at the time of the meeting of the two, the party in whom they meet expressly or impliedly indicates the opposite intent.[242]

§ 101. Enforcement of Mortgages.

In the older elementary works we find that the mortgagee has three remedies to enforce his demand: First, an action at law for the debt; second, an action of ejectment, by which to obtain possession of the land; third, a bill for the foreclosure of the mortgage, by which the conditional fee might, upon a failure to redeem, be turned into an absolute fee.[243] But a decree of sale—the most

[241] Carpentier v. Brenham, 40 Cal. 221 (intervening mortgage); Brooks v. Rice, 56 Cal. 428; attachment or other lien, Rumpp v. Gerkens, 59 Cal. 496; so as to dower, when mortgagee, where wife has joined in the deed, buys the equity of redemption, Bryar's Appeal, 111 Pa. St. 81, 2 Atl. 344; Wilson v. Vanstone, 112 Mo. 315, 20 S. W. 612.

[242] Carrow v. Headley, 155 Pa. St. 96, 25 Atl. 889 (one retaining a one-third remainder interest in mortgage given on his land, and selling the land subject to mortgage for the whole sum; no merger); Jackson v. Relf, 26 Fla. 465, 8 South. 84; Belknap v. Dennison, 61 Vt. 520, 17 Atl. 738 (when intention is not expressed, such presumed as is most for the party's interest); Browne v. Perris, 56 Hun, 601, 11 N. Y. Supp. 97 (mortgage assigned as "muniment of title"); Spencer v. Ayrault, 10 N. Y. 202 (agreement to the contrary); In re Gilbert's Estate, 104 N. Y. 200, 10 N. E. 148 (assignee holding the mortgage as collateral bids land in; no merger); Burt v. Gamble, 98 Mich. 402, 57 N. W. 261 (sale of equity of redemption by sheriff); Ann Arbor Savings Bank v. Webb, 56 Mich. 377, 23 N. W. 51 (question of intent; to be set aside, when acceptance of the fee brought about by fraud); In re Gilbert, 104 N. Y. 200, 10 N. E. 148.

[243] In modern practice, a judgment in personam can always be obtained in the same suit in which a decree of sale is obtained, either at the same time or by way of "deficiency judgment"; and separate suits, at law on the debt, and in equity for foreclosure and sale, are forbidden or discouraged in most of the

natural remedy—was not applied by the English court of chancery (though it had always been used in Ireland), in simple cases between the mortgagor and one mortgagee, till near the middle of the nineteenth century, to the great injury of infant heirs, who, being unable to sell for themselves during the time given them to redeem, might lose a great estate for a disproportionately small sum, and also to the great annoyance of the mortgagee, who used to be put off from six months to six months, in order to prevent a sacrifice.[244] In most of the United States a suit in equity, or civil action in the nature of a suit in equity, looking to a decree of sale, is the ordinary remedy of the mortgagee, where no power of sale is contained in the deed; and in this suit all parties interested in the land are brought before the court. The purchaser at the sale expects a good title, and need not comply with his bid when the title turns out to be defective, either inherently, or when, for the lack of service of process on any necessary party, the judgment against such party is void. Where the sale is absolute (i. e. free from redemption), but upon credits, the general public bids freely, and as good prices are obtained as at other auction sales. The rights of all parties having been ascertained in the decree of sale, a mortgagee can use the decree rendered in his favor in making good his bid, but otherwise he occupies no better position than any other bidder. The mortgage is merged in the decree of sale. The idea of a real foreclosure (though the word is often used) is wholly lost sight of.[245]

states. To levy an execution for the mortgage debt on the equity of redemption is wrong in principle, and a court of equity will enjoin such a step. A sale of the land under a general execution waives the rank of the mortgage, and lets in all incumbrances preceding the writ. Horne v. Seisel, 92 Ga. 683, 19 S. E. 709.

[244] 4 Kent, Comm. 146. It was formerly the habit of American courts of equity, in suits to enforce a mortgage by sale, to enter a decree nisi, ascertaining the mortgage debt, in the first instance, and fixing therein a time within which payment must be made, in default whereof a sale would be ordered,—in analogy to the older practice of a decree nisi setting a time of foreclosure. Such a nisi decree, of either kind, is conclusive as to the amount due.

[245] No sale ordered till all rights settled, Horton v. Bond, 28 Grat. 815. A power in the deed to the mortgagee to take possession does not exclude the right to sue for a sale, Stewart v. Bardin, 113 N. C. 277, 18 S. E. 320. In Wisconsin, in analogy to the nisi decrees under the old practice, one year must elapse between judgment and sale. Rev. St. § 3162.

This system is eminently fair to all parties, especially to judgment creditors and other junior incumbrancers. The only objection is the expense, in costs of court and lawyer's fees, and the delay often caused by the great number of parties to be brought before the court.[246]

In some of these states, however, this whole proceeding is rendered almost worthless by laws which make the purchase at the decretal sale subject to redemption; thus repelling outside bidders, and preventing a sale at a fair price.[247] If the time of redemption, as usually, is fixed at 12 months, it amounts simply to an old-fashioned foreclosure, with all the costs of the public sale heaped upon the mortgage debt, and with the same secrifice of infant heirs, and of junior incumbrancers who cannot lift, or cannot afford to lift, the senior incumbrance.[248]

The details of these proceedings which lead to a decree of sale, and thence to the sale,—either, under a copy of the decree, by a master, or, under a mortgage execution, by the sheriff,—thence to

[246] This is best proved by the prevalence of "deeds of trust" and power of sale mortgages in the states pursuing this system, except in Kentucky, where they are forbidden.

[247] The United States courts pursue the state practice as to selling subject to redemption. Brine v. Insurance Co., 96 U. S. 627; Connecticut Mut. Life Ins. Co. v. Cushman, 108 U. S. 51, 2 Sup. Ct. 236. Railroads are, however, usually sold without redemption, at least in the circuit which stretches from Michigan to Tennessee. The purchaser is, while the time to redeem is unexpired, only a lien creditor. Meeker County Bank v. Young, 51 Minn. 254, 53 N. W. 630; Buchanan v. Reid, 43 Minn. 172, 45 N. W. 11. See section 94 above, for the Alabama system.

[248] The statutes on redemption will be referred to in another chapter. In several states the lawmakers might have taken a useful hint from the twenty-fifth chapter of Leviticus by distinguishing between rural lands and town lots. To the farmer or grazer the land is the tool by which he earns or literally makes his daily bread. He generally has only one considerable creditor, and it may be a wise mercy to stave off the evil day when he must part with his homestead. But the townsman's house or lot is not his tool. Millions better off than he live or do business in rented premises. His creditors are many; and mercy to him, as well as justice to creditors other than the first mortgagee, demand that, when he is unable to pay, his real estate should be sold as quickly as possible, at the best price which free competition among bidders and moderately long credits will bring. Let farms be sold on redemption, but town and city lots absolutely.

a report of sale, or return of execution, confirmation of sale, order for a deed, master's or sheriff's deed, and approval thereof, are matters of practice, and do not belong here; for they are wholly independent of the nature of the claim against the land for which suit is brought. However, it should be stated that, in all the states in which suits leading to a sale are brought upon a mortgage, the courts, either under a statute, or under their inherent powers, as a partial substitute for the old right of the mortgagee to take possession, grant him an injunction against waste, or the appointment of a receiver to collect the rents, when waste is threatened, or when it appears that without the collection of these rents the security would turn out insufficient.[249]

The ordinary remedy in Pennsylvania and in Delaware for the enforcement of a mortgage—one which, to those used to the slow and careful ways of a suit in equity, seems almost barbarous—is the writ of scire facias, which treats the registered mortgage as a sort of a record, on which, unless cause be shown to the contrary, an execution of levari facias is awarded, under which the land is sold, the lien of the execution relating back to the date of the mortgage. "Terre-tenants" (that is, all those having subordinate interests in the land) need only be notified that the judgment may be binding on them as to its merits (about which there is generally very little question); but it is not necessary to give them personal notice of the approaching sale, or an opportunity of setting up their claims to the surplus.[250]

[249] Hart v. Respess, 89 Ga. 87, 14 S. E. 910 (in Georgia, injunction and receiver may be had when the corpus alone is insufficient). In South Carolina, a receiver is given only on a showing of waste, Hardin v. Hardin, 34 S. C. 77, 12 S. E. 936; in Kentucky, on either ground by the provisions of the Code of Procedure, Hounshell v. Clay Fire Ins. Co., 81 Ky. 304. See, also, supra, section 92, note 20.

[250] Brightly's Purd. Dig. "Deeds and Mortgages," pl. 122, from an act of 1705. A scire facias lies on an unrecorded mortgage, McLaughlin v. Ihmsen, 85 Pa. St. 364; but not on an unsealed and therefore equitable mortgage, Spencer v. Haynes, 4 Wkly. Notes Cas. 152; nor until all installments are due, Fickes v. Ersick, 2 Rawle, 166. It is, by the act, not to issue after a year from default; but by express words, and by such only, either in the mortgage itself or by sealed instrument, while the mortgagor holds the equity of redemption, this privilege may be waived. Huling v. Drexell, 7 Watts, 126. Clause in bond making the whole demand due upon default in one installment

In the states of Massachusetts, Maine, Rhode Island, and New Hampshire, the ancient mode of enforcing mortgages still exists; nay, it has been modified so as to make it more favorable to the mortgagee. Where the mortgage does not contain a power of sale, the ordinary procedure on default is a writ of entry or ejectment (according to the forms in vogue in each state), by which the mortgagor gains possession. If he obtains it either thus, or peaceably, in a solemn manner prescribed by the statute, and holds possession,—in New Hampshire, for one year; in the other states, for three years (and this though the possession be held through the old owner, as tenant under rent)—the mortgagor stands foreclosed; and it thus becomes the latter's business to tender the amount due, and, upon refusal of his tender, to bring his bill to redeem before this time expires. A suit to foreclose according to the old English method is not excluded, for the courts of these states now possess pretty full equity powers, and when the remedy at law is inadequate a bill is necessary. For instance,

is not such a waiver. Whitecar v. Worrell, 1 Phila. 44. Even a married woman can thus waive. Black v. Galway, 24 Pa. St. 18. The act requires the sci. fa. to issue against the mortgagor, his heirs, executors, and administrators; but terre-tenants need not be made parties. Mather v. Clark, 1 Watts, 491. And an act of February 24, 1834, § 34, dispenses with service on the heirs and devisees. Chambers v. Carson, 2 Whart. 365. These and other terre-tenants can defend an ejectment by the purchaser at the sale on the same grounds on which the mortgagor could have defended. Mather v. Clark, supra. The proceeding is in no sense a foreclosure, for the mortgage is merged in the judgment. Fidelity Insurance, Trust & Safe-Deposit Co. v. Dietz, 132 Pa. St. 36, 38, 18 Atl. 1090. The courts have no power to "foreclose" a mortgage. Winton's Appeal, 87 Pa. St. 77. A sale under the execution awarded on the sci. fa. sur mortgage divests all subsequent liens (Rauch v. Dech, 116 Pa. St. 157, 9 Atl. 180), and the lien does not attach again, if the mortgagor gets the title from the purchaser at the sale. The position of terre-tenants (those holding the mortgaged land, or incumbrances on it, derived from the mortgagor) is fully explained in Hulett v. Mutual Life Ins. Co., 114 Pa. St. 142, 6 Atl. 554. The judgment is conclusive of all defenses arising from coverture. Michaelis v. Brawley, 109 Pa. St. 7. The free and easy way of "serving" a sci. fa. by posting, or even by two nihils, often leaves the mortgagor himself, let alone third parties interested in the mortgaged lands, in the dark about the pendency of the proceedings. Reybold v. Herdman, 2 Del. Ch. 34. The sum raised on the levari facias cannot be used to pay higher liens, as only the mortgagor's interest is sold.

on behalf of a second mortgagee, who is not entitled to possession, or when a surety is equitably entitled to the mortgage by subrogation, or where, by reason of equities with the mortgagor, the short remedy at law would be oppressive.[251] In Connecticut the ordinary method, and the only one recognized by the statute, is a suit in equity for strict foreclosure. The method is not prescribed, the old chancery practice being left in force. The land is, however, appraised for the purpose of enabling the mortgagee to sue for the deficiency after foreclosure. It is also made the duty of the mortgagee, or his assignee, when the land has become fully vested in him, to file a written statement with the town clerk, showing the state of title. When the mortgage has fallen on an executor, administrator, or trustee, and the chose in action has, by foreclosure, been turned into land, it seems that he may sell it; but unless he does, the interests of distributees, legatees, etc., in the land remain the same as they were in the fund.[252] In Vermont the mortgagee may recover possession in an ejectment, and put the mortgagor to his application to redeem, or he may himself file his "petition" in chancery, of which a short form is given in the statute, or his "bill,"—in either case, for a "foreclosure," in the old sense of the word. Only the mortgagee and mortgagor are named as parties in the statutory form of petition, but subsequent attaching creditors of the premises may be joined.[253] In North Carolina the mortgagee still has his three concurrent remedies: An action for the debt; another for the possession of the land; a third in the nature of a suit in equity. This last, however, is not directed to strict foreclosure, but to a judicial sale. The right to the remedy by ejectment is not lost by

[251] In Gilson v. Gilson, 2 Allen, 115, a mortgage equitable in form was held well foreclosed by possession and lapse of time. But where the mortgage contains a power of sale, or a deed of trust a power of management, and these cannot be carried out for any reason, a suit in equity would be proper. Shepard v. Richardson, 145 Mass. 32, 11 N. E. 738. And see Massachusetts, Pub. St. c. 181, § 14. In Vermont it is said a suit in equity lies in all cases. Ross v. Shurtleff, 38 Vt. 177. See, for foreclosure by possession, Riddle v. George, 58 N. H. 25; Howard v. Handy, 35 N. H. 315. Attempts to throw out bills in equity as unnecessary seem not to have succeeded.

[252] Connecticut, Gen. St. §§ 3010–3015.

[253] Vermont, St. §§ 760–762; Id. § 1253.

a preceding attempt to get a judicial sale, which turns out ineffectual.[254]

Wherever the distinction between law and equity is kept well in hand, a court enforcing a mortgage by sale or foreclosure has no power to adjudge the rights of third parties claiming the legal estate by title paramount to the mortgagor and mortgagee. One who claims the fee under a tax title cannot be dislodged incidentally. Nor can a junior mortgagee defeat the priority of the elder by simply making him a party to his bill, as a person "having a claim or interest in the property." [255]

Under the old equity rule the junior incumbrancers could not compel the first mortgagee to foreclose or to ask a sale, their only remedy being to obtain the equity of redemption by foreclosing or selling on their own incumbrance, subject to the first, and then to redeem from it; and this rule is still observed in some states, while in others the courts of equity are unwilling to sell any other but a full and unincumbered title, and will, therefore, when the first mortgage is overdue, sell the land out and out, and refer the first mortgagee to the proceeds of sale for his satisfaction.[256] Where chancery powers of sale over mortgages are most highly developed, sales will be ordered free of taxes, and the purchaser be allowed to pay all taxes and assessments out of his bid. It is to be regretted that this course of conducting foreclosure sales, which tends to bring the best attainable price, and places it in the registry of the court for the benefit of all concerned, does not obtain more widely.[257]

Along with the enforcement by sale or foreclosure, we must consider the agreement usual in long-time mortgages, payable in in-

[254] Kiser v. Combs, 114 N. C. 640, 19 S. E. 664; Bruner v. Threadgill, 88 N. C. 364. See also, section 92, note 19.

[255] Hayward v. Kinney, 84 Mich. 591, 48 N. W. 170; Buzzell v. Still, 63 Vt. 490, 22 Atl. 619 (elder mortgagee). But it has been held, to the contrary, in Nebraska, that in a suit looking to sale or foreclosure every defendant who fails to answer admits that his interest is subordinate to that of plaintiff. Lincoln Nat. Bank v. Virgin, 36 Neb. 735, 55 N. W. 218. And the Codes of Procedure generally provide that a sale under decree carries the title of all parties to the suit.

[256] Seibert v. Minneapolis & St. L. Ry. Co., 52 Minn. 246, 53 N. W. 1151.

[257] E. g. Kentucky, Civ. Code, § 773 (for Jefferson county only).

stallments, or running with interest in yearly or half-yearly gales, that, upon a failure to pay any installment of the principal or interest for a certain number of days after its maturity, the mortgagee may, at his option, treat the whole sum secured as due (or simply that the whole sum shall become due). When the clause is in the note or bond, and such instrument, by reason thereof, falls due, the mortgage, which is conditioned upon failure to pay the note or bond, is forfeited, and becomes enforceable; but such an agreeement is just as valid when inserted in the mortgage only, and not in the notes or bond.[258]

The insertion of the words, "at the election of the mortgagee," is construed in most of the states to require no separate act on his part, other than putting the mortgage in suit for the whole amount, which at his option has become due. Such suit is election enough, just as there need be no demand, other than an action, of a note payable on demand.[259]

Courts of equity have often treated such clauses as a "penalty" to be relieved against; that is, if the mortgagor, after suit brought, brings the overdue installment into court, with interest and with costs up to the time, before the court can render a decree against him, the default is forgiven, and he is relieved from the forfeiture.[260]

[258] Maddox v. Wyman, 92 Cal. 674, 28 Pac. 838; Brown v. McKay, 151 Ill. 315, 37 N. E. 1037. No previous demand necessary, and the right to treat the whole as due not lost by delay. Atkinson v. Walton, 162 Pa. St. 219, 29 Atl. 898. Nay, the clause in a mortgage, or deed with express vendor's lien, hastens the personal obligation on the notes. Park's Ex'r v. Cooke, 3 Bush (Ky.) 168. When the terms of the note and those of the mortgage disagree, those of the note prevail. Indiana & I. Cent. R. Co. v. Sprague, 103 U. S. 756; Hutchinson v. Benedict, 49 Kan. 545, 31 Pac. 147.

[259] Buchanan v. Berkshire Life Ins. Co., 96 Ind. 510 (unless notice of election is stipulated); Hewitt v. Dean, 91 Cal. 5, 27 Pac. 423; Clemens v. Luce, 101 Cal. 432, 35 Pac. 1032. It is otherwise where a trustee in a mortgage is to declare it all due at the request of a majority of the bondholders. Batchelder v. Council Grove Water Co., 131 N. Y. 42, 29 N. E. 801.

[260] See notes to Peachy v. Duke of Somerset, 2 White & T. Lead. Cas. Eq. 2014, for a discussion of this doctrine. Messrs. Hare and Wallace say of it that it prevailed formerly, and quote Mayo v. Judah, 5 Munf. (Va.) 495; Bonafous v. Rybot, 3 Burrows, 1370; and point to a distinction, which they call rather thin, that if the whole debt be made payable at the time of the first installment, with leave to the debtor to postpone on paying this and subsequent

But the courts in New Jersey and Pennsylvania have reprobated the great liberality shown in this behalf, and maintain that relief against the forfeiture should not be given, except upon a good excuse shown, without, however, explaining whether a man's inability to pay, when he has no money to pay with, is an excuse, or not.[261]

It is quite usual to make the mortgage debt fall due if the mortgagor should fail to pay the accruing taxes, or to keep the premises insured, and such an agreement is enforced.[262]

The clause making the whole mortgage enforceable by sale when any one installment of principal or interest has lain over unpaid, for such a number of days as to render its voluntary payment thereafter unlikely, is of great importance to the mortgagee, because a decree to sell for one or more installments that have become due is highly inconvenient, especially when the notes for later installments have fallen into other hands. To sell subject to these would give to the holder of later maturing notes an undeserved advantage. To divide the land is often impracticable, and nearly always likely to cause injustice. In some states (without the above clause), when the installments are all in one hand, and the land is indivisible, it

installments promptly, there would be no forfeiture. See, also, Benedict v. Lynch, 1 Johns. Ch. 370.

[261] Warwick Iron Co. v. Morton, 148 Pa. St. 72, 23 Atl. 1065; Baldwin v. Van Vorst, 10 N. J. Eq. 577 (though in equity time is not of the essence of the contract, the parties can make it so; in a loan of $40,000 for 10 years, the nonpayment of the first interest installment for 30 days should not be relieved against, as the same relief might be asked each time, which would thoroughly change the nature of the loan). In Sloat v. Bean, 47 Iowa, 60, where an unauthorized agent had accepted payment of overdue sums, it was strongly intimated that acceptance by the mortgagee himself does not waive the forfeiture; s. p., Malcolm v. Allen, 49 N. Y. 448. As to the effect when part of the unmatured notes have been assigned, see Sargent v. Howe, 21 Ill. 148. The American edition (1859) of the Leading Cases in Equity speaks of relief in equity against such clauses as rather obsolete (though given in Mayo v. Judah, 5 Munf. [Va.] 495); that such relief could be evaded by making the principal due with the first installment of interest, with further time given should the interest be paid. Some courts of original jurisdiction do yet indulge the mortgagor upon terms of paying up all arrears with interest and costs; but there are few, if any, recent reported cases sustaining the practice.

[262] In Clouston v. Gray, 48 Kan. 31, 28 Pac. 983, such a clause was not enforced, as being "too vague," when it was plain enough to understand; but the general position was conceded.

may be sold for the whole debt; in others (e. g. in Kentucky), such a course is forbidden by statute. To sell for one installment, subject to the later ones in the same hands (the creditor being purchaser), would extinguish both lien and debt, by merger, and thus compel the mortgagee to forego all hope of further recovery, when the land is insufficient in value.[263]

Sometimes, a penalty is inserted in a mortgage, or in the notes which it is made to secure, that upon failure to pay the debt at its maturity, or to pay any of the installments of interest, the debtor shall thereafter pay a higher rate of interest than that originally agreed upon, but still a rate within the limits of the usury laws. The only objection to such an arrangement is the technical one that a court of equity should not be called upon to enforce a penalty. But as this objection can be easily evaded by putting the higher rate into the contract, with a proviso for reducing it in case of prompt payment, the better opinion is that such a clause, though it sounds like a penalty, should be enforced.[264]

It often happens, in the enforcement of a mortgage, deed of trust, or lien, whether by strict foreclosure, judicial sale, or by sale under a power, that an administrator or executor upon whom it has devolved by the death of the former lien holder becomes the owner of the land that was in lien. In such a case the fee vests in him, in trust for the decedent's estate; and he can, by his deed, dispose of the fee, the power to do so being incident to his office.[265]

§ 102. Sundry Statutory Liens.

There are several other liens which may rest on land besides the mortgage, legal or equitable, and besides the vendor's lien, and those

[263] California Code Civ. Proc. § 728; Yoakam v. White, 97 Cal. 286, 32 Pac. 238; Phillips v. Taylor, 96 Ala. 426, 11 South. 323 (the creditor cannot bring his suit after first installment, and collect the rents through a receiver till the last falls due). In Tennessee the sale must be subject to the notes not due, Shields v. Dyer, 86 Tenn. 41, 5 S. W. 439; but see Cleveland v. Booth, 43 Minn. 16, 44 N. W. 670 (holder of coupon may sue, though principal not yet due in other hands).

[264] Pass v. Shine, 113 N. C. 284, 18 S. E. 251; Dean v. Applegarth, 65 Cal. 391, 4 Pac. 375.

[265] Watson v. Railroad Co., 91 Mich. 199, 51 N. W. 990.

which have been named as in some way akin to it; some of which liens are not generally discussed in books on real estate, but on which the lawyer examining a title must have an eye before declaring it "clear, free, and unincumbered." The lien of the judgment, of the execution or attachment, and of the lis pendens will be treated in other chapters at some length.

There is, next in importance, the mechanic's lien, the result of comparatively late legislation, the leading principle whereof is this: that he who, for the owner of the soil or of any interest therein, puts up, improves, or repairs any buildings thereon, or who furnishes to such owner any building material towards such erection, improvement, or repairs, has a lien as "a mechanic or material man," without any express contract for that purpose, written or oral, other than the contract which binds the employer for the price. The laws of the different states run very far apart on all the details, but they nearly all agree on the following points: (1) The lien is waived by accepting a mortgage or collateral security, but not by taking the unsecured note of the employer for the debt; (2) the lien is barred by a comparatively short delay, generally one year from the completion of the work, the furnishing of the material, or after the much shorter time within which a written notice must be put on record; (3) for a limited time, generally during the progress of the work, the lien rests on the doing of the work, or on the delivery and use of the materials alone, while thereafter the claimant must lodge his claim in the office of the register, recorder, or county clerk; (4) such lodging for record, whenever required, makes this lien superior to the rights of subsequent purchasers or incumbrancers. Under these laws, he who buys land, or lends money on it, must sometimes take a view, to see whether erections or buildings are going up; but he must always search the record for mechanic's lien notices.[266] Other

[266] In New York, a uniform mechanics' lien law, superseding all those for several cities and counties, was passed only in 1885 (since amended); in Kentucky, a uniform law came into force for the first time June 12, 1894. In the New York law a notice of the lien must be filed and suit be brought within one year, or an order of court must be obtained to continue the lien. In Kentucky, notice must be filed within 60 days from the time the work is finished (see St. 1894, §§ 2468, 2470), and suit must be brought within 12 months thereafter. In Indiana (see Rev. St. §§ 5293–5303), there is no short limitation, and the lien is lost by neglect to sue in 60 days only when called on by the owner

statutes of comparatively recent date subject railroads to certain liens, which are generally preferred, not only to subsequent, but also to elder mortgages. The value of a railroad is most uncertain. It is almost independent of the cost. When the current expenses are not met by the receipts the road is worth nothing; for the law does not allow one to dismantle it, to sell off the rails or rolling stock, and to turn the depots into hotels. The mortgages cover everything, and as soon as the interest charge exceeds the net receipts the road is bankrupt, and there is nothing to pay on the "floating debt," that is, to those engaged in work on the road in all its manifold employments, to those furnishing supplies for its daily uses, or to those who have given work or materials to its construction. The hardships arising have been so great that the legislatures of several states in the South and West have interfered to protect their own citizens, by giving to them, for wages, for supplies, and for construction, these liens, as far-reaching and paramount as those which the maritime law gives to him who furnishes supplies in a foreign port, or to the salvor. Generally, wages come first, supplies

of the property to proceed). In these and all other states provision is made for filing or recording a notice, which binds subsequent purchasers and incumbrancers. Aside of a mode by which the subcontractors, material men, or workingmen employed by the "builder" can garnish the amount due him from the owner, most state laws enable these men to notify the owner that they will proceed thereafter with their work or their supplies upon his credit. In Kentucky the present statute gives the lien from the time the work or furnishing of material begins, against all purchasers and incumbrancers,—a great change in the builder's favor, it having been decided under the old law that the progress of the unfinished building is no notice of the lien debt. Generally speaking, only the employer's interest is liable. Some states provide that, where a person having an insufficient interest in the land procures the erection of buildings, these may be sold with the right of removal, if they can be removed without injury to the freehold. Generally, there is an equal distribution of proceeds among the lienholders, and an arrangement for consolidating the claims of all in one suit. The lien is of no avail, unless it be put on record, against purchasers or incumbrancers; but, generally speaking, it is good against judgment or attaching creditors. Under many statutes, there is no lien where the builder or material man takes any other security, such as the suretyship of a third person, or a pledge of collaterals, or a mortgage on the lot or building. Machinery which is part of the freehold is subject to mechanic's lien. The above remarks indicate the lines along which the practitioner should search the statutes and decisions of his own state.

next, lastly construction; but in some states all these claims are put upon the same footing.[267] Some states have extended this policy of giving priority to wages, under the name of a lien, superior to all incumbrances, to other establishments, say to all mining or

[267] The Indiana act (now printed as sections 5303a, 5303b of the Revised Statutes) was enacted in 1885. This latter act gives a lien to all persons who work in construction and to those who furnish material towards it; and this whether the work be done or material furnished under contract with the company or for any lessee or contractor; and the latter need not give the usual notice which subcontractors or workmen have to give under the mechanics' lien law, in order to bind the owner. This act is but an amendment to the mechanics' lien law, applying it to railroads, and neither undertakes to override prior mortgages nor does it provide for running wages or supplies. The Kentucky act of 1876, now forming section 2487 et seq. of the statutes, does all this, and was fully carried into effect by the United States circuit court, in a proceeding which was brought up to the circuit court of appeals, in Columbia Finance & Trust Co. v. Kentucky Union Ry. Co., 9 C. C. A. 264, 60 Fed. 794. So, in Tennessee a railroad company can give no mortgage having priority over executions for timber furnished, or for work and labor, or for damages to person, etc. Frazier v. Railroad Co., 88 Tenn. 140, 12 S. W. 537. In Alabama (Civ. Code, § 3077) laborers and employés except the officers of the railroad company, have a general lien for their work and labor on all the property within the state. Nothing is said as to its priority over mortgages. Under the Virginia Code, §§ 2485, 2486, first enacted in 1879, all employés, including clerks and depot agents, and all persons furnishing supplies to any railroad or canal company, have a prior lien on its real or personal property, upon filing claims within six months after they become due. Texas (Rev. St. arts. 3312, 3313) gives the lien to those who have performed work "with tools, teams, or otherwise," including the use of tools or teams. The Missouri Revised Statutes are very full. See §§ 6741–6758, dating back to 1873. The first and second sections give to those working in, or furnishing materials for, construction a lien superior to all other incumbrances; the lien claimed, to be filed and actions be pursued within 90 days thereafter. This lien extends to horse railroads. St. Louis Bolt & Iron Co. v. Donahoe, 3 Mo. App. 559. Work done without the state gives a lien on the part of the road that lies within. Knapp v. St. Louis, K. C. & N. Ry. Co., 74 Mo. 374, where it is said that the Missouri act of 1873 goes beyond the legislation of any other state to that time. The ordinary mechanics' lien law is extended to the construction of railroads by the statutes of Rhode Island, Nevada, Colorado, and the Dakotas; to railway bridges and trestles by a New York act of 1870; to bridges generally (including railroad bridges) in Ohio, Indiana, Wisconsin, Nebraska, Delaware, Maryland, Mississippi, and most of the Pacific and far Western states and territories.

manufacturing plants, thus rendering a mortgage upon such property a somewhat precarious security.[268]

Not so large in amount, but more general, in fact universal, is another incumbrance,—that of the taxes assessed on land, either for state purposes, or on behalf of the county, city, town, or other smaller district. These taxes are always liens. They are generally to be looked for in some other office than that of the register or recorder of deeds; at least, during the first year after the assessment. What renders this branch of the examination more delicate is that the assessor may have neglected to put a tract of land on the list or tax roll for the year, and yet, under the law of the state, the tract may remain liable for the tax when the error is afterwards corrected.[269] But even before the tax is by law collectible its lien may rest upon the tract in question. Thus, in Kentucky all property is assessed according to its value and ownership on the 15th of September of each year. But the assessor is occupied for several months in his work, which is next submitted to the supervisors of the precinct, and to the county judge for modifications, and next to the state equalization board, so that the amount due on and by reason of each tract is not known till next spring or summer, and the bills are not made out till then. Now, if any one buys land on or after September 16th, he has the right to call on his vendor to pay the tax for the fiscal year, which expires on the 14th or 15th of September of the following year. The vendor is personally bound for the tax; but the buyer must secure himself otherwise against the lien, if he is not satisfied with this personal liability.[270] On the other hand, in the year following the

[268] Such a law was passed in Kentucky in 1876, repealed as to most of its parts in 1878, but re-enacted, probably by an oversight, in 1894. See St. 1894, § 2487, etc. There is a remarkable law in Arkansas (Digest, §§ 4425–4452), and part of it in Georgia, which gives to laborers a lien on all the product of their labor, including a farm which they may have cleared or even tilled.

[269] The power of the legislature to order the reassessment of land badly assessed in a previous year, and to make this tax a lien as against an intermediate purchaser, is affirmed in Tallman v. City of Janesville, 17 Wis. 71. See Cooley, Const. Lim. (6th Ed.) 470.

[270] In New York, on the other hand, there is no such fixed time at which the tax for the year becomes a lien; but it is on the day, which may vary between rather wide limits, on which the assessment is confirmed. Washington

assessment, the lien of the tax has taken another shape. The land has been put up for sale, either upon ministerial, or summary judicial proceedings, and has been either "forfeited" to the commonwealth for want of bidders, or been bid in either by the state, city, or town, as the case may be, or by some private buyer. As such forfeiture or sale is always subject to a redemption, the time for which varies from state to state, and often within the same state, for different cities with regard to the municipal tax, the certificate of sale or entry of forfeiture only raises a new lien, more trenchant and dangerous, than that of the unpaid tax bill before the sale. The title examiner will not only look for these forfeitures or tax sales, but may also, by looking into the proceedings, satisfy himself whether they are valid, and thus likely soon to ripen into a paramount title, flowing immediately from the sovereign.[271] In cities the most onerous taxes are those known as "special assessments," which are laid on the abutting owners, for the grading, paving, and curbing of streets and sidewalks, sometimes also for the building of sewers, or digging of wells or fire cisterns. In some states these assessments are collected by the municipality, like other taxes, in others the apportionment warrants are made payable to the contractor in payment of the work, and are then collected by him from refractory owners by a suit in chancery or action in the nature thereof. The apportionment of the cost is naturally to be found, not with the register or recorder, who is a county officer, but, like the municipal tax bills, at some office of the city or town.

Heights M. E. Church v. Mayor, etc., of New York, 20 Hun, 297. But as the tax lien, when it attaches, overreaches all sales and incumbrances, this is really not so much a question of title as of personal responsibility.

[271] In a note on tax titles we shall recur to the many difficulties by which the validity of "local assessments" is beset. But the proceedings are generally better watched than those for general taxes, as individual interest is at stake. The constitutional power to charge the abutting property for the "opening, making, improving, or repairing of streets, the draining of swamps, and the like local works" as Judge Cooley puts it in his Constitutional Limitations (Ed. 1890) p. 612, is everywhere acknowledged. Among the like local works are wells, fire cisterns, sewers, and sea walls. In fact, the assessment of benefits began under the English acts for "commissioners of sewers," who also looked to sea walls, as early as the reign of Henry VIII. There are, however, unconstitutional modes of apportioning the cost of the work; such as making every

Lastly, there is a lien differing greatly from all the others, an offspring of the milder views of the nineteenth century,—that which the "occupying claimant" has for his lasting improvements. Under the harsh doctrine of the common law, whatever buildings are placed or improvements are made on land without the owner's consent become part of the freehold, without any right of compensation to him at whose cost they were placed or made, though he expended his work and his means while in possession of the land, under the belief, entertained in good faith, of being the rightful owner. Under the wretched land systems of the old states, especially of Virginia and North Carolina, men often expended their labor and savings for many years, on land which had been granted to them by the commonwealth, but which had before been granted to others; the cost of improvement exceeding many times the original price of entering the land. The many defective tax titles under which land was settled and improved in several Western states, especially in Illinois, where no trouble could arise from a conflict between older and younger patents, also cried for relief for the evicted. The efforts of courts and legislatures to relieve the unlucky possessor of land who had improved it in good faith were at first directed only towards setting off the increase of value resulting therefrom, against the rents and profits for which the defendant in ejectment is liable, but were even here met with the objection that to do so was an unauthorized and unconstitutional interference with vested rights of property. Still louder was the outcry raised by the holders of elder grants, and of other slumbering titles, when the Western legislatures (those of Ohio, Kentucky, and Tennessee) enacted their statutes, which have since spread over most of the states, and are known as the "Occupying Claimant Laws." [272] But

lot pay the cost of the part of the street on which it fronts. City of Lexington v. McQuillan's Heirs, 9 Dana, 513. But the clauses, found in most state constitutions, which require taxes to be assessed upon and in proportion to the true value, have been invoked in vain against local assessments apportioned upon lineal feet or upon the areas of the abutting lots. City of Peoria v. Kidder, 26 Ill. 351, and other cases elsewhere.

[272] In Green v. Biddle, 8 Wheat. 2, the supreme court of the United States declared the Kentucky law on the subject unconstitutional, as violating the compact with Virginia guaranteeing the property rights arising from Virginia land grants.

the United States courts have for more than 20 years given that same relief to the unsuccessful claimant which they at first considered unconstitutional.[273] Intended at first only to protect the junior grantee, holding land under the broad seal of the commonwealth, they were soon extended to those who held land bought at tax sales, also under the auspices of the commonwealth, and were at last extended, either by the lawmaker or by analogies which the courts drew from them, to all cases in which the defeated defendant in ejectment had taken possession and made his improvements in the honest belief of being the rightful owner. The best and most usual way of enforcing a lien for the balance due to the evicted occupier for his lasting improvements (deducting net rents and waste, if any) is to enjoin the judgment in ejectment till he is paid, or in states where law and equity may be combined in the same action, by withholding the writ of possession, till the amount found to be due to the defendant, under his equitable defense of lasting improvements made in good faith, shall have been paid or secured.[274]

§ 103. Apportionment.

It often happens that the owner of incumbered property, generally of land covered by a vendor's lien or a mortgage for pur-

[273] By act of congress of June 1, 1874 (18 Stat. 50), the United States courts must give the same relief to occupying claimants as these could, under the laws of the state containing the land, receive in the state court.

[274] The writer has in his "Kentucky Jurisprudence" sketched the two systems working side by side in his state,—one statutory, the other called "common law" by bench and bar, though it is thoroughly at war with the common-law maxim that everything annexed to the freehold belongs to the owner. "The statute applies only in favor of him who is evicted because his title derived from the commonwealth is younger at the fountain head than that of his adversary. The rule in equity applies to other cases. The remedy under the statute is an inquest before a justice, returnable into the circuit court which has adjudged the land. The remedy in equity was formerly invoked by injunction," etc. The statutory remedy has fallen into disuse, along with actions upon elder patents. Under Rev. St. Ind. §§ 1074–1085, the "occupying claimant," if he has "color of title," i. e. if he "can show a connected title, in law or equity, derived from the records of any public office, or holds the same by purchase or descent from any person claiming title derived as aforesaid, or by deed duly recorded," is entitled to the value of his "lasting improve-

chase money, sells a part thereof to another, retaining the rest, or sells the whole of it in parcels at different times to several purchasers. How is the lien to be apportioned, supposing that the parties buying have not, in the conveyances which they received, assumed their shares of the common incumbrance?[275] The purchaser, having paid the full price for his lot, should, irrespective of any covenants of title in his deed, not be compelled to pay the debt of his seller, or help to lift the burden from the latter's property. Hence, as long as the owner of land incumbered by himself, or acquired with an incumbrance upon it, retains any part thereof, it is equitable that this part should be exhausted before any parcel which he has sold, and which is held by others, should be sold, or before the owner of such parcel should be called upon to redeem it. To this extent, the courts of all the states are agreed.[276] But when the part retained by the original owner is insufficient to discharge the burden, or when he has disposed of all his interest, an equity has been worked out among the purchasers of parcels, that they must bear the burden in the inverse order of their purchases. For when A., the common owner of three lots, conveys lot No. 3 to B., it is equitable that the incumbrances should be borne by lots Nos. 1 and 2. Of this advantage B. must not be deprived by a sale of lot No. 2 to C., nor C. of his remaining advantage by the sale of lot No. 1 to D.; hence, when necessary, D.'s lot will be sold first, then C.'s lot or so much thereof as is needed, and only in the last emergency B. can be called upon to stand any part of the loss.[277] The Kentucky

ments." The language of statutes in other states is generally very much like this.

[275] The apportionment of an incumbrance among the owners of parts of a lot is a branch of the learning on "Marshaling Assets," and as such is treated in the notes to Aldrich v. Cooper (from 8 Ves. 382) in 2 White & T. Lead. Cas. Eq. 228. As the incumbrance is most frequently a mortgage for purchase money, or vendor's lien, the parties are often spoken of as "subpurchasers."

[276] McLaurie v. Thomas, 39 Ill. 291.

[277] Clowes v. Dickinson, 5 Johns. Ch. 242, and Gill v. Lyon, 1 Johns. Ch. 447 (both cases of judgment or execution lien), are the leading American cases on the point. Also, Iglehart v. Crane, 42 Ill. 261 (which is followed as to Illinois in Orvis v. Powell, 98 U. S. 176); Stuyvesant v. Hall, 2 Barb. Ch. 151; s. p., McMillan v. McCormick, 117 Ill. 83, 7 N. E. 132; Graceys v. Myer's Adm'r, 15 W. Va. 194; Milligan's Appeal, 104 Pa. St. 503 (inverse order settled rule); a mortgagee from the common owner of the first parcel is within

doctrine is that when all the land has gone into the hands of purchasers for value, they must bear any loss by the incumbrance pro rata, according to the value of each lot at the time of "foreclosure." [278]

The same rule of equality among purchasers has been enounced in Iowa without argument or review of authorities.[279] The lienor having knowledge or notice by the record of the relations between the owners of the several lots covered by his lien, cannot justly release those lots therefrom on which the burden should in equity and good conscience ultimately fall, without losing his recourse to that extent against the owners of those lots which ought to be relieved out of those which he has released; for the part owners and their lots stand to each other somewhat in the position of principal and surety, among whom the former cannot be released without discharging the latter.[280]

But there is a broad and natural exception to the rule by which the purchasers must bear the burden. If any one of them has assumed a part of the common incumbrance, this assumption being a part of the price which he pays for his lot, he cannot complain if the amount assumed by him is charged on his lot, and his

it, Krause v. Pope, 78 Tex. 478, 14 S. W. 616. The purchaser of one part can redeem the whole mortgage, and then claim by subrogation against the owners of the other parts. Pine Bluff, M. & N. Ry. Co. v. James, 54 Ark. 81, 15 S. W. 15.

[278] Morrison v. Beckwith, 4 B. Mon. (Ky.) 76 (following Hughes v. Graves, 1 Litt. [Ky.] 319, a case of a mortgage on several slaves); Dickey v. Thompson, 8 B. Mon. (Ky.) 312 (distinguishing or rather overruling Winfrey v. Williams, 5 B. Mon. [Ky.] 428); as to time for valuation, see Exchange & Deposit Bank v. Stone, 80 Ky. 113, 120. But an assignee, for the benefit of creditors, of the last remaining parcel, does not share equally. The burden is laid on him first. Corn v. Sims, 3 Metc. (Ky.) 391.

[279] Griffith v. Lovell, 26 Iowa, 226.

[280] See a full discussion in Groesbeck v. Mattison, 43 Minn. 547, 46 N. W. 135; Stuyvesant v. Hall, 2 Barb. Ch. 151; contra, where remaining lots will only have to bear their proportions, Kendall v. Woodruff, 87 N. Y. 1; Patty v. Pease, 8 Paige, 277. But the mortgagee loses no rights by having the property sold as a whole, though a sale by parcels might have saved the privileged parcel, Long v. Kaiser, 81 Mich. 518, 46 N. W. 19; nor when the part owner is equitably bound, as shown below, Bacon v. Van Schoonhaven, 87 N. Y. 446.

equities only begin after he has paid what he has thus assumed. Until then the land so bought is the primary fund for satisfying the common incumbrance.[281]

When the conveyances are made at the same time, and the subpurchasers, being on the same footing, must contribute equally (or, in Kentucky and Iowa, where the marshaling among them in inverse order is not known), the distribution of the burden is made by estimating the value of the lots at the time of foreclosure or of the decree of sale, not at the time of the purchases.[282]

Even stronger ground for relief than that of the elder purchaser against the younger is that of a "third person" (usually it is the wife of the debtor). When the debtor's property and that of such third person are under lien for the same debt, the former must be exhausted before resort is had to the latter; and some cases go so far that the wife who joins in a mortgage of the husband's land to bar homestead right or inchoate dower may insist that liens on his other property be first enforced.[283]

When a purchaser has assumed the burden and made himself the principal debtor, the mortgagee has no right to release the lot upon which the burden ought to rest ultimately; and though he has acted in good faith, he cannot afterwards enforce the rest of his demand against the land remaining to the mortgagor, without giving a credit equal to the value of the lot released from the charge.[284] The

281 Wilkins v. Gordon, 11 Leigh (Va.) 547 (and see notes to Aldrich v. Cooper, 2 White & T. Lead. Cas. Eq. 270); George v. Andrews, 60 Md. 26; Canfield v. Shear, 49 Mich. 313, 13 N. W. 605 (though no personal liability assumed); Michigan State Ins. Co. v. Soule, 51 Mich. 312, 16 N. W. 662; Brown v. McKay, 151 Ill. 315, 37 N. E. 1037; Brown v. South Boston Sav. Bank, 148 Mass. 300, 19 N. E. 382 (measure of assumption shown by limit on warranty). In fact, whatever is still due from the subpurchaser to the former owner of the whole tract, if not assigned away, would be subjected first as his property.

282 Boyce v. Stanton, 15 Lea, 346; Cheesebrough v. Millard, 1 Johns. Ch. 409, and supra, notes 278, 279.

283 Earl of Huntingdon v. Countess of Huntingdon, 2 Brod. P. C. 1, 2 White & T. Lead. Cas. Eq. 1922, and notes; Grand Rapids Sav. Bank v. Denison, 92 Mich. 418, 52 N. W. 733; Niemcewicz v. Gahn, 3 Paige, 614; Deans v. Pate, 114 N. C. 194, 19 S. E. 146. As to the homestead, see Evans v. Halleck, 83 Mo. 376; as to inchoate dower, Gore v. Townsend, 105 N. C. 228, 11 S. E. 160; contra, Fichtner v. Fichtner's Assignee, 88 Ky. 355, 11 S. W. 85.

284 Worcester Mechanics' Bank v. Thayer, 136 Mass. 459.

same principle which applies to lots sold out of larger tracts applies also to undivided halves, or other shares, sold at different times out of the entirety; that is, in the absence of assumptions by the vendees, the common burden falls first on the share sold last.[285]

Where one of the joint owners of land gives a mortgage or puts any other lien upon his undivided share, and partition is had thereafter, the mortgage or lien attaches to the purpart in severalty that is allotted to the mortgagor. This seems to be the prevailing opinion, but the law has been held otherwise where partition was made by selling the whole land for distribution.[286]

[285] Jennings v. Moon, 135 Ind. 168, 34 N. E. 996.

[286] Kennedy v. Boyken, 35 S. C. 61, 14 S. E. 809 (and see infra on "Partition," in chapter on "Judgments"); Drew v. Carroll, 154 Mass. 181, 28 N. E. 148 (attachment transferred to purpart). See, contra, Espalla v. Touart, 96 Ala. 137, 11 South. 219 (where, however, the mortgagee estopped himself by claiming the proceeds of a sale).