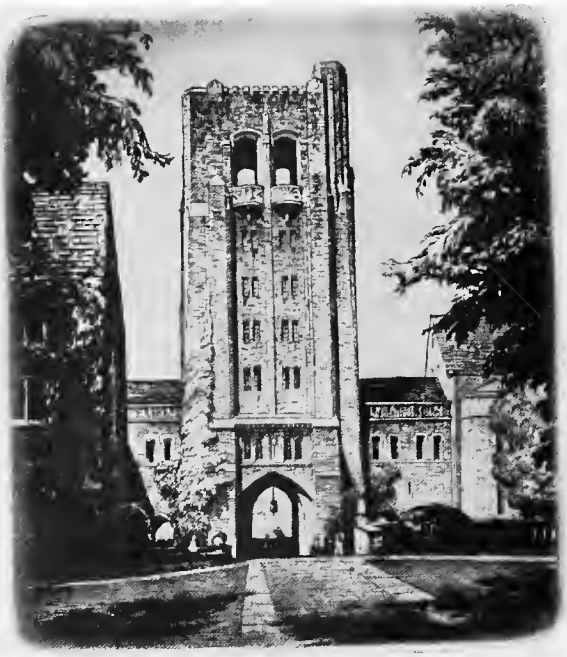

NOTES

ON

COMMON FORMS:

A BOOK OF

MASSACHUSETTS LAW.

BY

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NOTES ON COMMON FORMS.

DEEDS.

Under this head it is proposed to consider only those instruments which are called "deeds" in the more limited sense of the word; that is, conveyances of real estate or of some interest therein. In Massachusetts in early times most, if not all, the modes of conveyance known to the English law seem to have been sometimes made use of, — feoffment, bargain and sale, lease and release, covenant to stand seized, fines, recoveries, &c. Only two of these, however, were common, — namely, the feoffment, and the bargain and sale; the former consisting of a formal livery of seizin of the premises conveyed, accompanied generally, but not necessarily, by the delivery of a writing under seal called a charter of feoffment; and the latter being a contract by which one agreed to convey his land to another for a pecuniary consideration, in consequence of which a use arose to the bargainee, and the Statute of Uses immediately vested the possession. (See Pidge *v.* Tyler, 4 Mass. 541. — Ward *v.* Fuller, 15 Pick. 185, 188. — Thatcher *v.* Omans, 3 Pick. 521, 529, 532.) Most of the early deeds, however, united many of the elements of the charter of feoffment with those of the bargain and sale,

a union which is still maintained in our modern deeds, the words "give, grant," in which have been adopted from the former; while from the latter are derived the words "bargain, sell," and the mention in the habendum clause of the use and behoof of the grantee and his heirs.

It is, however, a well-established rule of law that the technical words which may happen to be adopted in a deed shall not determine its character and effect, if such construction would defeat the lawful intent of the parties, but an instrument shall be construed to belong to any of the recognized species of conveyance, so as best to give effect to such intent. Thus, a deed which in form is strictly a release may be holden to act as a deed of bargain and sale, and a deed in form of bargain and sale may be construed to operate as a covenant to stand seized. Pray *v.* Pierce, 7 Mass. 381. Russell *v.* Coffin, 8 Pick. 143. — Gale *v.* Coburn, 18 Pick. 397. — Jamaica Pond Aq. Co. *v.* Chandler, 9 Allen, 159, 167. — Wallis *v.* Wallis, 4 Mass. 135. See also Thatcher *v.* Omans, 3 Pick. 521. — Wade *v.* Howard, 11 Pick. 289, 295. — Cox *v.* Edwards, 14 Mass. 492.

As early as 1640 it was provided by statute in the Massachusetts Colony that conveyances of real estate, *where the grantor remained in possession*, should, unless acknowledged and recorded, be valid only as against the grantor and his heirs. Mass. Col. Rec. vol. i. p. 306. Soon afterwards, in 1652, with the view of preventing the then common evil of transfers of real estate without deed, it was provided that no conveyance should be valid, unless "by deed in writing under hand and seal," accompanied either by livery of seizin or by the acknowledgment and recording of the deed. Mass. Col. Rec. vol. iii. p. 280. In 1697 what had been implied in the last-cited statute was distinctly enacted; namely, that a deed recorded at length should "be valid to pass" real

estate without livery of seizin. Mass. Prov. Laws, 1697. For the space of nearly a century after this the law remained unaltered, till, in 1784, the importance of livery of seizin was finally destroyed, and the new system of registration firmly and completely established by a statute provision to the effect, that, unless acknowledged and recorded, a deed should not be good except as against the grantor and his heirs. St. 1783, c. 37, s. 4. This left the law substantially as we find it at present; the only changes having been that the Revised Statutes included, in the same exception with the heirs, the devisees of the grantor, and also, (adopting a judicial determination to that effect,) persons having actual notice of the deed. R. S. c. 59, s. 28. — G. S. c. 89, s. 3. See 6 Cush. 167, 168. See a general review of the changes of the law relative to conveyances of real estate in the decisions of Parsons, C. J., in Pidge *v.* Tyler, 4 Mass. 541, and in Marshall *v.* Fiske, 6 Mass. 24. See also Ward *v.* Fuller, 15 Pick. 185, 188, &c. — Cox *v.* Edwards, 14 Mass. 492.

It may be well to mention in this connection that a disseizee, without entry and delivery of the deed on the land, cannot convey any title which will be valid as against the disseizor and those claiming under him. See Dadmun *v.* Lamson, 9 Allen, 85, 88, and cases there cited. See also Somes *v.* Skinner, 3 Pick. 52, 61. But it seems that this rule has no application to grants by the State. Ward *v.* Bartholomew, 6 Pick. 409, 415. As to what is a disseizin sufficient to prevent the true owner of an estate from making a valid conveyance, see Winter *v.* Stevens, 9 Allen, 526, 529.

I. WARRANTY DEED.

Know all men by these presents that I, A. B., of Boston, in the Commonwealth of Massachusetts, in consideration of one thousand dollars to me paid by C. D., of Worcester, in said Commonwealth, the receipt whereof is hereby

acknowledged, do hereby give, grant, bargain, sell and convey unto the said C. D. a certain parcel of land situated on W street in said Boston, and bounded as follows: — Easterly on said W street, thirty feet; — Southerly on land now or late of L. M., fifty feet; — Westerly on land of N. O., thirty feet; — and Northerly on the same, fifty feet and seven inches; — and being the same premises that were conveyed to me by R. S. by deed, dated 7th Dec. 1862, and recorded in Suffolk Registry of Deeds liber 820, folio 147.

To have and to hold the aforegranted premises, with the privileges and appurtenances to the same belonging, to the said C. D. and his heirs and assigns to his and their use and behoof forever.

And I do hereby, for myself and my heirs, executors and administrators, covenant with the said grantee and his heirs and assigns that I am lawfully seized in fee of the granted premises; that they are free from all incumbrances; that I have good right to sell and convey the same as aforesaid; and that I will, and my heirs, executors and administrators shall, warrant and defend the same to the said grantee and his heirs and assigns forever, against the lawful claims and demands of all persons.

And for the consideration aforesaid, I, S. B., wife of the said A. B., do hereby release unto the said grantee and his heirs and assigns all right of and to both dower and homestead in the granted premises.

In witness whereof we, the said A. B. and S. B., have hereunto set our hands and seals this first day of January in the year one thousand eight hundred and sixty-seven.

Signed and sealed in presence of
E. F.
G. H.

A. B. (SEAL.)

S. B. (SEAL.)

NOTES.

"I, A. B., OF BOSTON," &c. The mention of the county in which a party to a deed resides would seem, at least in this State, to be unnecessary and superfluous. The naming of the profession or business of the parties is of but little practical benefit, especially when, as is often the case, such general terms as "gentleman," "trader," "yeoman," or "merchant," are employed.

"IN CONSIDERATION OF" &c. Even if no consideration be *named*, a deed is not on that account invalid, a consideration being implied in the solemnity of the instrument. Boynton *v.* Rees, 8 Pick. 329. See also 2 Kent Com. 464 — Crocker *v.* Gilbert, 9 Cush. 131, 134. Nor it seems is an *actual* want or failure of consideration a good ground, in the absence of fraud, for the avoidance of a deed by the grantor. Bartlett *v.* Bartlett, 4 Allen, 440, 443. Nor will a total want of consideration raise an implied trust in the grantee in favor of the grantor, even though aided by an oral agreement. Titcomb *v.* Morrill, 10 Allen, 15, 17.

But it is provided by statute that, when the whole or any part of the consideration of any conveyance is money or goods won by gaming or betting, or for reimbursing or repaying money knowingly lent or advanced for gaming or betting, or lent and advanced at the time and place of such gaming or betting to a person so gaming or betting, such conveyance shall be void, except as to parties holding in good faith and without notice, — and upon any such conveyance of lands being adjudged void, *the lands are to enure to the use of such person as would be entitled thereto if the grantor were dead.* Gen. St. c. 85, s. 4. (Re-enacting R. S. c. 50, s. 15, and St. 1785, c. 58, s. 1.)

"A conveyance of property made only on a meritorious consideration, as of blood and affection, is not *per se* fraudulent. Whether it be so or not is a question of fact, to be determined on a view of all the circumstances attendant upon the making of the grant or conveyance, especially on the condition of the vendor or grantor as to property, and as to the amount of debts which were due and owing from him at the time he undertook to dispose of his estate, or a portion thereof, by gift, or without adequate consideration." Bigelow, C. J., in Winchester *v.* Carter, 12 Allen, 606, 608. And in

this case it was held that a voluntary conveyance from one to his wife through a third person was not to be considered void as against subsequent creditors, although such conveyance was made with a view to place the property beyond the reach of creditors to whom the grantor might at some subsequent day become indebted, provided he had not at the time of the conveyance any fraudulent intent to contract debts which he did not intend to pay, or had reasonable ground to believe that he should not be able to pay.

The consideration and the acknowledgment of its payment expressed in the deed are held to be recitals merely which afford only *primâ facie* proof of the facts, and are liable to be controlled and rebutted by parol evidence. Paige *v.* Sherman, 6 Gray 511, 513. Consequently it may be proved by parol that the real consideration was *greater* (Miller *v.* Goodwin, 8 Gray 542, — Paige *v.* Sherman, 6 Gray 511, — Preble *v.* Baldwin, 6 Cush. 549, 553.) or *less* (Webb *v.* Peele, 7 Pick. 247) than that named, or altogether *different* from it; (Gale *v.* Coburn, 18 Pick. 397, — Bullard *v.* Briggs, 7 Pick. 533, 537.) or that a part or the whole of the consideration, the receipt of which is acknowledged in the deed, has not in fact been received by the grantor. (Paige *v.* Sherman, 6 Gray 511, — Clapp *v.* Tirrill, 20 Pick. 247, —Wilkinson *v.* Scott, 17 Mass. 249, 257.)

So although it be expressed in the deed that the consideration was paid by the grantee, yet parol evidence that it was in fact paid by a third person is admissible for the purpose of establishing a resulting trust in his favor. Livermore *v.* Aldrich, 5 Cush. 431, 435. — Perkins *v.* Nichols, 11 Allen, 542, 545. And it seems that a resulting trust in favor of a third party may also be established when, although the money paid by the grantee was his own money, it is yet fully and clearly proved by parol that it had been distinctly agreed before the purchase that the money so paid should be considered as a loan

from the grantee to the third person. Kendall *v.* Mann, 11 Allen 15.

"GIVE, GRANT, BARGAIN, SELL AND CONVEY." A warranty during the life of the grantor was, in the absence of express covenants, formerly implied from the words *give* and *grant*. Co. Litt. 384, *a* — Dow *v.* Lewis, 4 Gray, 468, 473 — Earle *v.* De Witt, 6 Allen, 520, 528. But it may be doubted whether such an effect would now be given to those words in this State. It would seem that none of the other words recited above have ever been held to imply any warranty or covenant whatever.

A deed in which all words of grant were omitted, but which was complete in other respects, has been held to be a valid conveyance. Bridge *v.* Wellington, 1 Mass. 219.

"TO THE SAID C. D." It is common to insert the words "and his heirs and assigns" in this place after the name of the grantee, but they are wholly unnecessary. The habendum is the portion of a deed which, properly, should declare the quality of the estate granted, whether for years, for life, in fee, &c., and, if that refers to the "heirs" of the grantee, the deed passes a fee in all the estate described in the premises. Pratt *v.* Sanger, 4 Gray 86. It may be remarked also that the form given above corresponds in this respect with that of the ancient charter of feoffment as given at the end of the Second Book of Blackstone's Commentaries.

"A CERTAIN PARCEL OF LAND," &c. The words "*all my right, title and interest in*" are sometimes inserted before the description of the premises, and it has been held that in such cases all subsequent covenants, which in terms apply, according to the usual form, to the "granted premises," are to be construed as referring not to the parcel of land described by

metes and bounds, but to the right, title and interest, whatever they may be, of the grantor therein. Sweet *v.* Brown, 12 Met. 175. — Allen *v.* Holton, 20 Pick. 458. — Comstock *v.* Smith, 13 Pick. 116, 120. — Sumner *v.* Williams, 8 Mass. 174. See also Commonwealth *v.* Brown, 15 Gray 189, 191. And if the grantor in a deed, in which these words are used, has in addition to a certain *vested* interest a further *contingent* interest, the grant will operate to pass the *vested* interest only, and a warranty will be construed as referring to such *vested* interest alone, and will not extend to the *contingent* interest or operate upon it even by way of estoppel. Blanchard *v.* Brooks, 12 Pick. 47, 65. — Wight *v.* Shaw, 5 Cush. 56, 64. Where however a deed conveyed all "the share and interest" of a party in certain land, it was held to pass both a present estate and an estate in reversion. Sowle *v.* Sowle, 10 Pick. 376. See also Miller *v.* Ewing, 6 Cush. 34, 40, where, though by the terms of the deed the grantors "remise, release, grant, bargain, sell and forever quit claim *certain lands*" *described*, "*together with* all the estate, right, title, interest, use, property, claim and demand whatsoever of us which we now have, or at any time heretofore had, of, in, or to the aforementioned premises," it was held that the grant was only of the right, title and interest of the grantors at the time of the grant and that the covenants in the deed covered such interest only. But where, having used terms purporting to convey an estate described by metes and bounds, the grantor added the words "meaning and intending hereby to convey all my right, title and interest in and to" the said estate, it was held that the covenants applied to the land described and not to the grantor's interest therein. Hubbard *v.* Apthorp, 3 Cush. 419.

According to the preceding decisions the restricting of the grant to the grantor's *right, title and interest* in the described

premises renders any covenant in the usual form which may be contained in the deed wholly ineffectual, and a deed which purports in its general appearance and to the eye of any but the practised conveyancer to be a full warranty deed, may, through the influence of these few obscure words, be in fact a simple release of the interest of the grantor without any effectual covenant whatever.

Indeed the influence of these words seems to reach still farther, for in Adams *v.* Cuddy, 13 Pick. 460, though the final decision of the case did not rest upon this point, but was adverse to the party in whose favor it operated, it was held by Judge Shaw that, where they are thus introduced in a deed, the grantee takes a title subject to all prior unregistered conveyances and incumbrances, even those of which he has no notice. In this case however the deed contained no particular description by metes and bounds of the parcel conveyed, and this fact may have had an influence, though it was not referred to as one of the grounds of the decision; but the principle there laid down has, at least as applicable to deeds not containing descriptions by metes and bounds, been recognized and adopted in the recent cases of Jamaica Pond Aq. Co. *v.* Chandler, 9 Allen 159, 169; Chaffin *v.* Chaffin, 4 Gray 280; and Cook *v.* Farrington, 10 Gray 70.

With regard to the use in this part of a deed of the words "*with the buildings thereon*," it was remarked by Chief Justice Parsons in Crosby *v.* Parker, 4 Mass. 110, 114, that "they are often inserted by unskilful scriveners without any particular meaning, and in fact have no legal operation." Sometimes however by a reference to the particular character of the buildings on the granted premises, as for instance by mentioning "the church" or "the new brick dwelling-house thereon standing," a fact may be recorded in the deed which will be useful in identifying the

premises, or will, at least, be interesting as illustrating their history.

"BOUNDED AS FOLLOWS." It is by no means necessary that the granted premises should be particularly described; thus, where a deed conveyed several parcels described by metes and bounds, and then provided as follows, "meaning and intending hereby to convey all the real estate which I derived under" certain deeds, referred to only by their place of registry, "to all which deeds reference is to be had," it was held that a parcel conveyed by one of the deeds so referred to, but not one of those described by metes and bounds, passed by the deed. Foss *v.* Crisp, 20 Pick. 121. But on the other hand it seems that such a recital, following a particular description by metes and bounds, will not be allowed to exclude from the operation of the deed any parcel included in the particular description. Whiting *v.* Dewey, 15 Pick. 428.

When land is described as bounding *on* or *by* a *highway*, in the absence of such a description as necessarily excludes any portion of the way, the law presumes it to be the intention of the grantor to convey the fee of the land to the centre of the road, provided of course that his own title extends so far. Hohenbeck *v.* Rowley, 8 Allen 473. From the numerous cases in which our Supreme Court has applied the above principle there may, we think, be deduced two practical rules of interpretation, which may however be rendered inoperative in any given case by the addition in the deed of peculiar words or phrases tending to show the intention of the grantor.

1st. If a monument, such as a stake or a wall standing at the side of the way, is mentioned as the point to and from which the bounding-lines of the granted premises run, the whole of the way is excluded. Smith *v.* Slocomb, 9 Gray 36. — Sibley *v.* Holden, 10 Pick. 249.

2d. If however the land be bounded *on* or *by* the *road* or *street* without any reference to such monument, the conveyance is held to extend to the middle of the way, even though measurements of side lines be given of such a length as to reach only to the outer line of the way. Phillips *v.* Bowers, 7 Gray 21, 24. — Newhall *v.* Ireson, 8 Cush. 595. But see Tyler *v.* Hammond, 11 Pick. 193. See also remarks of Chapman J. in Codman *v.* Evans, 5 Allen 308, 310.

Where land was bounded easterly by a "thirty-foot street by a line which is parallel with and one hundred and *ninety* feet distant from B Street," and which thirty-foot street was also described as being one hundred and *sixty* feet westerly from said B Street, it was held that the description did not include any part of said thirty-foot street. Brainard *v.* B. & N. Y. Central R. R. Co., 12 Gray 407.

The same principles extend to lands bounding on *private ways*. Fisher *v.* Smith, 9 Gray 441. — Codman *v.* Evans, 1 Allen 443. See also Phillips *v.* Bowers, 7 Gray 21, 26. — Stearns *v.* Mullen, 4 Gray 151.

In the following cases the intent to exclude the way has been held to be sufficiently shown by peculiar expressions in the deeds. Where the granted premises were bounded "on a certain nine-feet passage-way or open piece of land *lying between* the land herein conveyed and the house of said A." Codman *v.* Evans, 1 Allen 443. Where they were bounded "on an *intended* street," O'Linda *v.* Lothrop, 21 Pick. 292; but in this case the above expression was aided by other facts tending to show an intent to exclude the street. Where they were bounded "by the Worcester Turnpike," the turnpike having been "recently laid out by an exact description, recorded, and well known and understood." Parker *v.* Framingham, 8 Met. 260, 267.

When land is described as bounding *by* or *on* a *river* (Lunt

v. Holland, 14 Mass. 149), *brook* (Newhall *v.* Ireson, 13 Gray 262), *mill-pond* (Phinney *v.* Watts, 9 Gray 269), *the sea* (Green *v.* Chelsea, 24 Pick. 77. — Jackson *v.* B. & W. R. R., 1 Cush. 578. — Saltonstall *v.* Long Wharf, 7 Cush. 200), a *harbor* (Mayhew *v.* Norton, 17 Pick. 357), or *creek* (Harlow *v.* Fisk, 12 Cush. 302), the conveyance is held to extend to the thread of the river or stream, and to low-water mark of the sea or tide water. And this result is not affected by the fact that the side lines are described as running to and from monuments standing on the bank of the river or at high-water mark of the sea (Cold Spring *v.* Tolland, 9 Cush. 492. — Knight *v.* Wilder, 2 Cush. 199, 210. — Ipswich, Pet. 13 Pick. 431), nor by the fact that the quantity of land granted or the length of the side lines as given in the deed would exclude all beyond the bank or high-water mark. (Mayhew *v.* Norton, 17 Pick. 357. — Saltonstall *v.* Long Wharf, 7 Cush. 195.)

But when the boundary is by the *bank* of a river (Hatch *v.* Dwight, 17 Mass. 289), by the *shore* of the sea (Storer *v.* Freeman, 6 Mass. 435, but see remarks in Doane *v.* Willcutt, 5 Gray 335), by the *beach* (Niles *v.* Patch, 13 Gray 254 — Tappan *v.* Burnham, 8 Allen 65, 72), or by the *flats* (Saltonstall *v.* Long Wharf, 7 Cush. 195, 200 — Jackson *v.* B. & W. R. R., 1 Cush. 575, 579), the land under the river in the one case, and that between high and low-water marks in the other, is excluded. When the expression "*sea or beach*" or "*sea or flats*" is used, the conveyance is held to extend to low-water mark on the principle that an ambiguous expression in a deed is to be construed most strongly against the grantor. Saltonstall *v.* Long Wharf, 7 Cush. 195 — Doane *v.* Willcutt, 5 Gray 328. In this connection it should also be remarked that in a recent case it has been decided that flats are not included in a description which bounds the land on a salt-water "creek betwixt said land and land of J. L." Chapman *v.* Edmands,

3 Allen 512. See also the cases on this subject collected in the note to Commonwealth *v.* Roxbury, 9 Gray 524.

When land is described as bounding on a street or way, if the grantor be the owner of the adjoining land over which such street or way is described as laid out, he and his heirs and all persons claiming under him are *estopped* from setting up any claim or doing any acts inconsistent with the grantee's use of such street or way. O'Linda *v.* Lothrop, 21 Pick. 292. — Farnsworth *v.* Taylor, 9 Gray 162. — Tufts *v.* Charlestown, 2 Gray 271. — Parker *v.* Smith, 17 Mass. 413. — Emerson *v.* Wiley, 10 Pick. 310. But where at the time of the grant there is a way existing, which does not correspond completely to the description of the bounding way given in the deed, the estoppel may be limited in its effect to the extent of such actually existing way. Clap *v.* McNeil, 4 Mass. 589. — Parker *v.* Smith, 17 Mass. 413, 416. When however the grantor has not any interest in the adjoining land, the mere recital of a street or way as one of the abuttals in the description will not raise any *implied covenant* of the existence of such street or way. Howe *v.* Alger, 4 Allen 206. See also Loring *v.* Otis, 7 Gray 563.

As to the rights of the grantee of land bounded upon a court open only at one end, see Rodgers *v.* Parker, 9 Gray 445.

See also a case where, — one having sold lots on one side of a street, referring in the deeds conveying the lots to a plan on which those lots were shown, and the land on the other side of the street belonging to the grantor was not divided into lots, but was marked in one portion "Ornamental Grounds," and in another, "Play Ground," — it was held that there was no implied covenant on the part of the grantor that such land on the opposite side of the street should continue to be appropriated for the purposes specified on the plan. Light *v.* Goddard, 11 Allen 5.

If land be described as bounding on a "*house*," "*building*," &c., the line will run, not by the face of the wall, but by the edge of the eaves or other extremest part of the building. Carbrey *v.* Willis, 7 Allen 364, 370 — Millett *v.* Fowle, 8 Cush. 150.

The following are some of the more important general rules of construction which are applicable to the interpretation of this portion of a deed: —

"Whenever known monuments are referred to as boundaries, they must govern, although neither courses, nor distances, nor the computed contents, correspond with such boundaries." Per Wilde, J. in Davis *v.* Rainsford, 17 Mass. 207, 210. See also George *v.* Wood, 7 Allen 14. But this rule is not inflexible; a boundary inadvertently inserted may be rejected. See Parks *v.* Loomis, 6 Gray 467, 472.

"When the description includes several particulars, all of which are necessary to ascertain the estate to be conveyed, no estate will pass except such as will agree to every particular of the description." Per Parsons, C. J. in Worthington *v.* Hylyer, 4 Mass. 196, 205.

"But if the description be sufficient to ascertain the estate intended to be conveyed, although the estate will not agree to some of the particulars in the description, yet it shall pass by the conveyance, that the intent of the parties may be effected." Ibid.

Where a plan is referred to for further description, the lines, courses, distances, references to monuments, and other particulars appearing thereon, are to be as much regarded as the true description of the land conveyed as they would be if expressly recited in the deed. Magoun *v.* Lapham, 21 Pick. 135, 137. — Farnsworth *v.* Taylor, 9 Gray 162, 166. — Morgan *v.* Moore, 3 Gray 319. — Parker *v.* Bennet, 11 Allen 388. — Rodgers *v.* Parker, 9 Gray 445, 447. — Richardson *v.* Bigelow, 15 Gray 154. But compare Light *v.* Goddard, 11 Allen 5.

Where a deed contains two inconsistent descriptions of the land conveyed, the more certain and particular description must govern. For example, a description by metes and bounds will be followed rather than a reference to the grantor's title-deeds. Dana *v.* Middlesex Bank, 10 Met. 250, 255. Melvin *v.* Props. Locks & Canals, 5 Met. 15, 27.

But if the particular description be uncertain and impossible, it will be controlled by an intelligible, though general, description. Sawyer *v.* Kendall, 10 Cush. 241, 246.

When the description is clear and unambiguous, parol evidence is not admissible to control its effect by showing the intention of the parties, and the description may be in a legal sense clear and unambiguous, although its construction may involve questions of considerable difficulty. Bond *v.* Fay, 12 Allen 86. — S. C. 8 Allen 212.

"Doubtful words and provisions are to be taken most strongly against the grantor, he being supposed to select the words which are used in the instrument." Adams *v.* Frothingham, 3 Mass. 352, 361. See also 2 Met. 240 — 2 Cush. 331.

"A grant of any principal thing shall be taken to carry with it all which is necessary to the beneficial enjoyment of the thing granted, and which it is in the power of the grantor to convey." Per Shaw C. J. in Johnson *v.* Jordan, 2 Met. 239. — See also 2 Cush. 331.

"Whenever land is occupied and improved by buildings or other structures designed for a particular purpose, which comprehends its practical beneficial use and enjoyment, it is aptly designated and conveyed by a term which describes the purpose to which it is thus appropriated." Bigelow J. in Johnson *v.* Rayner, 6 Gray 107, 110. Thus a grant of *a well* carries the soil covered by and used with it. Same case. And a conveyance of a *wharf and dock* will include the flats

lying in front thereof. Doane *v.* Broad St. Ass. 6 Mass. 332. — Ashby *v.* Eastern R. R. Co. 5 Met. 368. So an exception of *a mill* will exclude from the conveyance the land under the mill and adjacent to it, so far as necessary to its use and commonly used with it. Forbush *v.* Lombard, 13 Met. 109. "The grant of a mill carries with it by necessary implication the right to the use of the watercourse coming to the mill and furnishing power for working it, and also to the canal or raceway which carries the water from the mill, to the full extent of the grantor's right and power so to grant them." Richardson *v.* Bigelow, 15 Gray 154, 156. And where land was conveyed "with all the buildings standing thereon except the *brick factory*," the land on which the factory stood and the water-privilege appurtenant thereto were held not to pass. Allen *v.* Scott, 21 Pick. 25. So where "*the town pound*" was excepted, the exception was held to cover the land on which the pound stood. Wooley *v.* Groton, 2 Cush. 305. But where one conveyed a "*highway twenty feet wide*," it was held that the fee did not pass, but only an easement. Jamaica Pond Aqueduct Co. *v.* Chandler, 9 Allen 159.

"BEING THE SAME PREMISES," &c. For the convenience of those who may afterwards have occasion to examine the title to the estate in the Registry of Deeds, this reference to the deed by which the grantor acquired his title ought always to be made. When releases, assignments of mortgages, &c. have been obtained by a grantor in order to perfect his title, additional reference should be made to the date and place of record of all such instruments.

Incumbrances, such as outstanding mortgages, rights of way, restrictions upon building, &c. &c. are usually referred to immediately before the habendum. It is equally correct not to mention them before referring to them as exceptions

under the covenants, but, because probably of the greater space usually afforded before the habendum by the printed blanks in common use, it has become customary to insert the full statement of them there, merely referring to them under the covenants in general terms. As to the manner in which they should be mentioned there, see below in the notes on the covenants.

By Gen. St. c. 161, s. 59, 60, it is made a criminal offence, punishable by fine and imprisonment, for one to convey real estate, knowing that an incumbrance exists thereon or that it is attached on mesne process, without giving notice thereof to the grantee.

With regard to the mention of easements, privileges, and appurtenances in a deed, the following rules will, we think, be found to be substantially correct.

Any general reference to them, as by conveying the estate "together with all the easements, privileges, and appurtenances to the same belonging," is wholly without effect, inasmuch as whatever would be included in such an expression will pass by the deed as a matter of course without any mention whatever. Brown *v.* Thissell, 6 Cush. 254. But see Ammidown *v.* Bull, 8 Allen 293.

All easements upon land of a *stranger*, such as rights of way, of drainage, of light and air, &c., which have been used and enjoyed by the grantor in connection with the estate granted, will pass by a conveyance of it, although not in any way mentioned or referred to in the deed. Brown *v.* Thissell, 6 Cush. 254, 257. — Underwood *v.* Carney, 1 Cush, 285. — Mendell *v.* Delano, 7 Met. 176. — Kent *v.* Waite, 10 Pick. 138, 141. See also 7 Mass. 6. — 6 Mass. 332.

But any use which a grantor may have previously made of adjoining or neighboring land belonging to *himself*, for the benefit of the premises sold, will not be a sufficient foundation

upon which the grantee can base a claim for an easement not mentioned in his deed, unless a continuance of such use be reasonably necessary to the beneficial enjoyment of the premises conveyed. Leonard *v.* Leonard, 7 Allen 277, 283. — S. C. 2 Allen 543. — Randall *v.* McLaughlin, 10 Allen 366. — Parker *v.* Bennett, 11 Allen 388. — Thayer *v.* Payne, 2 Cush. 327, 331. — Grant *v.* Chase, 17 Mass. 443. And a right of way may be considered thus "reasonably necessary" if another way, though not impracticable, cannot be made without unreasonable labor and expense, taking into consideration the comparative value of the land and the cost of such other way. Pettingill *v.* Porter, 8 Allen 1.

So also no easement upon premises sold can be taken as reserved by the grantor for the benefit of adjoining premises owned by him, unless by express reservation, or unless such easement "is *de facto* annexed and in use at the time of the grant and is necessary to the enjoyment of the estate which the grantor retains. And this necessity cannot be deemed to exist if a similar privilege can be secured by reasonable trouble and expense." Carbrey *v.* Willis, 7 Allen 364. — Randall *v.* McLaughlin, 10 Allen 366. — Johnson *v.* Jordan, 2 Met. 234.

The benefit of any covenants running with the land conveyed will pass to the grantee, though not mentioned or referred to in the deed, but if a covenant does not run with the land, no provision inserted in his deed can give the grantee the benefit of it. (See below, under "*Covenants.*") So also with regard to restrictions upon neighboring estates, the right of a grantee to enforce them for the benefit of his own estate depends upon the original nature and foundation of the restriction, and not upon any words or provisions in the deed under which he claims. But from these considerations it by no means follows that all mention of such covenants and restric-

tions should be omitted in the deed conveying an estate, for such mention is often desirable as a means of preventing the rights of the parties from being neglected and forgotten.

CLAUSES IMPLYING PROMISES BY THE GRANTEE. When in a deed conveying an interest in real estate there is any clause or proviso, in whatever language expressed, showing an intention of the parties that the grantee should do certain things for the benefit of the grantor, and the grantee accepts the deed and the estate granted thereby, the law implies a promise on his part to perform the things thus provided for, and upon such implied promise the grantor may maintain an action against him. Pike *v.* Brown, 7 Cush. 133. — Goodwin *v.* Gilbert, 9 Mass. 510. — Western R. R. Co. *v.* Babcock, 6 Met. 346, 353, 357. And where the promise so implied was to pay money to a third person, it was held that such third person might maintain an action upon it in his own name against the grantee. Felch *v.* Taylor, 13 Pick. 133. *It seems* that such implied promise may even amount to an implied grant or covenant, creating a right in favor of the grantor in land of the grantee, the title of which is in no way derived through the deed containing the proviso. See Dyer *v.* Sanford, 9 Met. 395, 405. [In examining the title to an estate, such implied grants could only be discovered by searching all the deeds in which the owner was *grantee* while his ownership lasted.]

A common illustration of a promise implied from the acceptance of a deed by the grantee, is afforded by the recital, in a deed of an estate sold subject to a mortgage, that the grantee "*is to assume*" or "*assume and pay*" such mortgage. Such words in a deed raise an implied promise on the part of the grantee to pay the mortgage when due, or, if it be already due at the time of passing the deed, to pay it forthwith or within a reasonable time. Braman *v.* Dowse, 12 Cush. 227,

229. And if a question subsequently arises between grantor and grantee whether the implied promise has been performed, the burden of proof is upon the grantee to prove that it has been. Jewett *v.* Draper, 6 Allen 434. As to the measure of damages for breach of this implied promise or covenant, see Brewer *v.* Worthington, 10 Allen 329.

Though the clause relative to the assuming of the mortgage by the grantee be in terms a *condition*, as if it reads "*and this deed is upon condition that the grantee shall assume and pay*" a certain mortgage, it is held that the words, though strictly words of condition, also create an implied promise upon which the grantor has his remedy, and that he is not restricted to his entry for breach of condition. Pike *v.* Brown, 7 Cush. 133.

A good form for the clause creating the obligation of the grantee to assume a mortgage would seem to be as follows: — "Said premises are hereby conveyed subject to a certain mortgage, dated, &c., and recorded &c., and on which the sum of $—— is now due, which mortgage the said grantee is to assume and pay, the said amount forming a part of the above named consideration."

Where however an estate is conveyed by warranty deed simply "*subject to*" a mortgage, the grantee does not thereby become bound to pay off such mortgagee. Strong *v.* Converse, 8 Allen 557.

"To HAVE AND TO HOLD," &c. "The office of the habendum in a deed is to declare and fix the nature and extent of the interest or title conveyed by the premises. It may define, enlarge, or diminish the estate granted." Per Bigelow J. in Pratt *v.* Sanger, 4 Gray 84, 86. See also 8 Mass. 175. — 5 Gray 340.

"WITH ALL THE PRIVILEGES AND APPURTENANCES" &c. These words are usually inserted, but might well be omitted. A habendum, which in terms applies to the "granted premises," though not containing any such words as those in question, includes in its operation everything granted in the earlier portion of the deed and gives the grantee a fee in any easement, &c., there mentioned, as fully as in the parcel of land there described. Pratt *v.* Sanger, 4 Gray 84. See further as to the meaning of the words "privileges and appurtenances," Ammidown *v.* Grocers' Bank, 8 Allen 285, 290 — Ammidown *v.* Ball, 8 Allen 293. Also above page 17.

As a general rule, land will not pass as an "appurtenance" to land, but may pass as such to a "wharf," a "house," &c. Ammidown *v.* Ball, 8 Allen 293. — Ashby *v.* Eastern R. R., 5 Met. 368. — Doane *v.* Broad St. Assn. 6 Mass. 332. — See also 8 Allen 291. — 6 Gray 110.

"AND HIS HEIRS AND ASSIGNS." The general rule of law is that "the word '*heirs*' is essential in a deed of conveyance to create an estate in fee." Buffum *v.* Hutchinson, 1 Allen 58, 60. And a conveyance to an indvidual and his "successors and assigns forever" will pass only a life estate. Sedgwick *v.* Lakin, 10 Allen 430. But this rule is subject to the exception that — "when the conveyance is in trust, and the trusts are of such a nature that they do, or by possibility may, require a legal estate in the trustee beyond that of an estate for his own life," he will take a fee though his *heirs* be not mentioned. Cleveland *v.* Hallett, 6 Cush. 403, 407, and cases there cited. — King *v.* Parker, 9 Cush. 71, 81.

But by an early statute of the Colony (1651), requiring the use of the word "heirs" in granting a fee, it was provided that this rule should not extend "to any land granted or to be granted by the freemen of a *town*." 3 Mass. Col.

Rec. 222. And by a subsequent statute, (1684,) explanatory of the preceding, and reciting that it was "intended for the direction of *private persons* only in their particular deeds and conveyances of land from one to another," it was enacted that all grants of land made *prior to that time* by the *General Court* or by a *town* should be construed to convey a fee simple unless expressly declared otherwise. 5 Mass. Col. Rec. 470.

When the whole fee is granted and an exception is made to the grantor without words of inheritance, a life estate only is excepted. Jamaica Pond Aq. Co. *v.* Chandler, 9 Allen 159, 170.

If the habendum be to the grantee "*and to the heirs of his body*," or words of similar import, an estate tail will be created. Corbin *v.* Healy, 20 Pick. 514. — Steel *v.* Cook, 1 Met. 281. — Davis *v.* Hayden, 9 Mass. 514. — See also 6 Gray 18. And such estate tail, unless barred under Gen. St. c. 89, s. 4, or taken or sold for debts of the tenant in tail under Gen. St. c. 90, s. 36, descends in this Commonwealth, as at common law, to the oldest son, &c. Wight *v.* Thayer, 1 Gray 284. — See also Gen. St. c. 92, s. 1.

The word "assigns" would seem to be unnecessary in this connection (4 Kent Com. 5) unless some effect is still to be allowed to an old statute of the Massachusetts Colony, passed in 1651, which provided that when in deeds "an estate of inheritance is to passe, it shall be expressed in these words or to the like effect, viz. — To have and to hold the sayd house or lands respectively to the partie or grantee, his heirs and assigns forever." Mass. Col. Rec. Vol. 3, p. 222. Compare also Vol. 4 (pt. 1), p. 39.

In a deed to a *corporation* the habendum should be to the corporation "*and its successors and assigns*," but the fee will pass though these words are omitted. 4 Kent Com. 7. It

would seem however that in no case can a deed to a corporation pass an absolute fee, but only an estate subject to an implied condition, for upon the civil death of a corporation, as by expiration of its charter, dissolution, &c., all its real estate remaining unsold reverts back to the original grantor and his heirs. 2 Kent Com. 307.

When the St. 1845, c. 208, was in force, it was important that in a deed to the separate use of a married woman there should be inserted in the habendum the words "to her sole and separate use free from the interference or control of her husband." Gerrish *v.* Mason, 4 Gray 432. — Jewett *v.* Davis, 10 Allen 68. But St. 1855, c. 304, rendered these words unnecessary in a deed to a woman thereafter married, and St. 1857, c. 249, rendered them unnecessary in any case. See Smith *v.* Bird, 3 Allen 34. In Spaulding *v.* Day, 10 Allen 96, 98, however, Judge Hoar seems to intimate that some such expression in a deed to a married woman may still be important, but it is difficult to discover any ground for such an idea. See Gen. St. c. 108, s. 1.

"TO HIS AND THEIR USE AND BEHOOF FOREVER." In the old deed of bargain and sale it was formerly "absolutely necessary that these words should be used." Lily's Pract. Conv. p. 20. But it is probable that they are not of any vital importance in a modern deed.

A conveyance may be made *habendum* from a future time, as *after the death of the grantor*, but it seems that this can only be done where the grantor and grantee are so connected by blood or marriage that a consideration of natural affection may be implied, if not expressed in the deed. Wallis *v.* Wallis, 4 Mass. 135. See also 4 Kent Com. 492, 494. The estate must however be limited to vest within the time allowed by the law against perpetuities.

Where a deed was made to A "as he is trustee for B," habendum "in trust as aforesaid," and there was nothing further in the deed to show the nature of the trust, it was held that the Court might go out of the deed to ascertain the trust more exactly, and it appearing that the only relation of trustee and cestui que trust which subsisted between A and B grew out of the appointment of the former as trustee under a certain will, the necessary inference was held to be that that relation was referred to, and the provisions of the will were deemed to be in legal effect as much a part of the deed as if recited therein. Cleveland *v.* Hallett, 6 Cush. 403.

Conditions. For a discussion of the question what conditions are valid and what void as contrary to the policy of the law, see the decision of Parker C. J. in Gray *v.* Blanchard, 8 Pick. 284, where a condition, that *no windows should be placed in a certain wall of a certain house or of any house to be erected on the granted premises within thirty years*, was held to be valid.

Where real estate was devised to a town "*for the purpose of building a school-house. Provided said school-house is built by said town within one hundred rods of the place where the meeting-house now stands;*" — it was held that this was a condition subsequent, and that there being no particular time mentioned for the performance of the condition, it must be performed within a reasonable time, and the school-house not having been built within twenty years after the testator's death, the condition was held to be broken. Hayden *v.* Stoughton, 5 Pick. 528.

A grant to a town of land, which had been used as a burying place, "*for a burying place forever,*" made in consideration of love and affection "and divers other valuable considerations," was held not to be a grant upon condition. And

Bigelow C. J. in delivering the opinion of the Court says — "We believe there is no authoritative sanction for the doctrine that a deed is to be construed as a grant upon a condition subsequent solely for the reason that it contains a clause declaring the purpose for which it is intended the granted premises shall be used, where such purpose will not enure specially to the benefit of the grantor and his assigns, but is in its nature general and public, and when there are no other words indicating an intent that the grant is to be void if the declared purpose is not fulfilled." Rawson *v.* Uxbridge, 7 Allen 125.

But where a grant was made *habendum*, so long as it should be used for a particular purpose, and no longer, and *with a provision for re-entry* upon failure so to use it, it was held that an estate upon condition was created. Attorney General *v.* Merrimack Manuf. Co., 14 Gray 586, 592, 611, 612.

Where a devise was made on condition that *the devisee should pay a certain legacy*, it was held that a demand of payment of the legacy must be made before forfeiture could be enforced, the legatee being out of the State at the time of the testator's death and until the time of bringing the action. Bradstreet *v.* Clark, 21 Pick. 389.

See a similar decision where the condition was created by a clause in the deed that '*whenever the grantee, his heirs or assigns, should neglect or refuse to support a certain fence, then the deed should be void.*' Merrifield *v.* Cobleigh, 4 Cush. 178.

See also to the effect that a condition is to be construed strictly. Hadley *v.* Hadley Manuf. Co., 4 Gray 140, 145. Compare also Giles *v.* Bost. F. & W. Soc. 10 Allen 355.

For cases of grants upon condition that the grantee shall assume and pay, and save the grantor harmless from, a mortgage which the grantor has previously put upon the estate, see Stone *v.* Ellis, 9 Cush. 95. — Sanborn *v.* Woodman, 5 Cush. 36. — Pike *v.* Brown, 7 Cush. 133.

For a case of a conveyance upon condition that the grantee should support the grantor during his lifetime, see Hubbard *v.* Hubbard, 12 Allen 586.

For a case where the word "provided" was held not to create a condition, see Chapin *v.* Harris, 8 Allen 594.

As to the extent to which relief may be obtained in equity from a forfeiture for breach of a condition to pay money, see Hancock *v.* Carlton, 6 Gray 39. — Sanborn *v.* Woodman, 5 Cush. 36. — Atkins *v.* Chilson, 11 Met. 112. — Stone *v.* Ellis, 9 Cush. 95, 103.

Upon breach of condition the estate will revert to the grantor and his heirs, although the deed may be silent as to the disposition to be made of the estate after such breach. 4 Kent. Com. 123. — Gray *v.* Blanchard, 8 Pick. 284, 291. At common law an *entry* by the grantor or his heirs was necessary to revest the estate after breach of condition, (4 Kent. Com. 122, 127,) but in this State by statute (Gen. St. c. 134, s. 2, 7.) an actual entry is rendered unnecessary, and a writ of entry to enforce the forfeiture may be brought without any such prior actual entry. Austin *v.* Cambridgeport Parish, 21 Pick. 215, 224. — Stearns *v.* Harris, 8 Allen 597, 598. — Compare 1 Am. Law Rev. 265, 270.

Nor is it possible, in a deed creating an estate upon condition subsequent, to limit the estate over upon breach of condition to any persons other than the grantor and his heirs, except in a case where the condition, if broken at all, *must be broken* within the time allowed by the law against perpetuities, that is, within the term of a life or lives in being at the date of the deed and twenty-one years afterwards, as a term in gross, or, in case of a child en ventre sa mere, twenty-one years and the period of gestation, in which case a limitation over to a third person might take effect as a shifting use. See Brattle Square Church *v.* Grant, 3 Gray 142. — 4 Kent

Com. 126, 199, 293. — Welsh *v.* Foster, 12 Mass. 93, 97. See an article in the Am. Law Rev. vol. 1, p. 265, in which it is claimed that it is still an open question in Massachusetts whether *all* estates on condition are not subject to the rule against perpetuities.

At common law it was considered that the grantor of an estate on condition had nothing left in him but a possibility or right of reverter, which did not constitute an actual estate, and could not be assigned or devised by him or by his heirs. 4 Kent Com. 10, note, 122. — 3 Gray 150. But it has been held in this Commonwealth that under our statutes this right or interest may be *devised.* Austin *v.* Cambridgeport Parish, 21 Pick. 215. — Brigham *v.* Shattuck, 10 Pick. 306. — Hayden *v.* Stoughton, 5 Pick. 528. — Brattle Square Church *v.* Grant, 3 Gray 142, 159, 161. Gen. St. c. 92, s. 1. See also 2 Pick. 621, note. — 1 Am. Law Rev. 265, 269. It has been decided also that an assignment in insolvency of the property of one who has created an estate upon condition subsequent, made after breach of the condition, will pass to the assignee the right to enforce the forfeiture. Stearns *v.* Harris, 8 Allen 597. Quære, whether the right of reverter would not pass under a sale by an administrator, executor, &c. for payment of debts, &c. See Gen. St. c. 102, s. 11, 24, 26, 33.

It has been decided however that the old common law rule regarding *grants* of the right of reverter still holds in Massachusetts, and that such grants will not only be ineffectual to pass such right, but will also have the effect wholly to discharge the estate from the condition. Rice *v.* Boston & Worcester R. R. Co. 12 Allen, 141.

As to the kind of entry requisite to be made in order to enforce the forfeiture of an estate for breach of condition, see Stone *v.* Ellis, 9 Cush. 95, 101.

Restrictions on the manner of using the estate granted. In whatever mode such restrictions may be expressed, whether in the technical form of a condition, covenant, reservation, exception, or otherwise, and though in terms personal and not purporting to bind the land or the assignees of the land, — if it appears by a fair interpretation of the words of the deed that it was the intent of the parties to create such restrictions in favor of other land owned either by the grantor or by another, they will be binding not only upon the parties to such deed, but will also be enforced in equity against all subsequent owners of the premises thus subjected to the restrictions, and in favor of any subsequent owner of the premises intended to be benefited by the same. Parker *v.* Nightingale, 6 Allen 341. — Whitney *v.* Union R. R. Co. 11 Gray 359. — Badger *v.* Boardman, 16 Gray .

In the above case of Parker *v.* Nightingale it was said by Bigelow C. J. that, where such restriction is in form a condition, the heirs of the original grantor who created the condition, if they have retained no other interest in any estate intended to be affected by it, hold the right or interest, which vests in them on breach of such condition, only as a dry trust in which they have no beneficial use or enjoyment, the entire usufruct being in those holding the estates for the use and benefit of which the condition was intended. 6 Allen 348.

In the same case it was also suggested (p. 349) that " circumstances may exist which might warrant a refusal to grant equitable relief even where it was made to appear that there had been a failure to use and occupy premises in accordance with the terms of the deed by which they were conveyed. If for instance it were shown that one or two owners of estates were insisting on the observance of restrictions and limitations contrary to the interest and wishes of a large number of proprietors having similar rights and interests, by

which great pecuniary loss would be inflicted on them, or a great public improvement be prevented, a court of equity might well hesitate to use its powers to enforce a specific performance or restrain a breach of the restriction."

The exact form of the restrictions in the above-cited cases was as follows:

In Parker *v.* Nightingale the conveyance was upon *condition* "that no other building shall be erected or built on the lot hereby granted, except one of brick or stone, not less than three stories in height, and for a dwelling house only." The owner of the estate converted the building into a restaurant or eating house, which use of the premises the Court decided should be stopped by injunction.

In Badger *v.* Boardman, the following clause was inserted in the deed — "Subject to the following restriction, that no outbuilding or shed shall ever be erected westerly of the main building of a greater height than those now standing thereon."

In Whitney *v.* Union Railway Co. the estate was conveyed subject to these restrictions: "That if the said grantee, his heirs or assigns, shall suffer any building to stand or be erected within ten feet of Lambert Avenue, or shall use or follow, or suffer any person to use or follow, upon any part thereof, the business of a taverner, or any mechanical or manufacturing, or any nauseous or offensive business whatever, then the said grantors, or any person or persons at any time hereafter, who at the time then being shall be a proprietor of any lot of land represented upon said plan east of lot No. 27 and north of Lambert Avenue, shall have the right, after sixty days' notice thereof, to enter upon the premises with his, her or their servants, and forcibly, if necessary, to remove therefrom any building or buildings erected or used contrary to the above restrictions, and to abate all nuisances, without being

liable to any damages therefor, except such as may be wantonly and unnecessarily done."

THE COVENANTS. "To constitute a covenant it is not necessary that the word covenant or any other particular word or words should be made use of, for any words in a deed, in what part soever found, from which the intent of the parties to enter into an engagement can be collected, are sufficient for that purpose." Per Wilde J. in Newcomb *v.* Presbrey, 8 Met. 406, 410.

As to the covenant of title implied in the words "give" and "grant," see page 7.

As to implied covenants regarding the existence of streets &c. mentioned in the deed, see page 13.

As to the effect of an express covenant in excluding implied ones, see Earle *v.* Dewitt, 6 Allen 520, 528.

Where two tenants in common convey by a deed containing a covenant against incumbrances in the usual form, they will both be liable for an incumbrance created by one alone. Comings *v.* Little, 24 Pick. 266.

As to the joint or several liability of parties who join in a covenant, see Donahoe *v.* Emery, 9 Met. 63, 67.

The covenants are not to be regarded as forming a substantial part of the consideration of a deed, and if no title passes by a deed, there is a total failure of the consideration notwithstanding the covenants. Basford *v.* Pearson, 9 Allen 387, 389.

"FOR MYSELF AND MY HEIRS" &c. The legal effect of the covenants would be the same, if all reference to the heirs, executors and administrators of the grantor were omitted. In this State their liability depends wholly upon statute provision, and when by the terms of the statute they are bound

at all, they are liable whether named in the covenant or not. Hall *v.* Bumstead, 20 Pick. 2, 3. — Howes *v.* Bigelow, 13 Mass. 384. — Royce *v.* Burrell, 12 Mass. 395. — Gen. St. c. 101, ss. 31–37. But see remarks of Wilde J. in Morse *v.* Aldrich, 19 Pick. 449, 453.

At *common law* however it was important to mention the heirs of the covenantor, for the real estate of their ancestor was not liable in their hands upon his covenants, unless an intent to charge the heirs was distinctly indicated in the deed. 2 Jarman on Wills, 509. — Fitzh. Nat. Brevium, 312. — Hays *v.* Jackson, 6 Mass. 151.

"GRANTEE AND HIS HEIRS AND ASSIGNS." As to the meaning of the words "grantor," "grantee," &c. in a deed, see 5 Cush. 365. Compare also Gen. St. c. 3, s. 7 cl. 5. — 5 Mass. 471.

All mention of the heirs and assigns of the grantee might also be omitted in the covenants without altering their legal effect. The covenants of seizin, of right to convey, and against incumbrances are broken, if at all, at the moment of the execution of the deed, and cannot in any event pass to the heirs or assigns of the grantee. Whitney *v.* Dinsmore, 6 Cush. 124. — Clark *v.* Swift, 3 Met. 390 and cases there cited. But *quœre* as to the effect of Gen. St. c. 89, s. 17, which seems to provide for an action, on the covenant against incumbrances, by an *heir* or *assignee* of the covenantee, contrary to the well established rule of the common law. The covenant of warranty, on the other hand, runs with the land conveyed, and any heir or assignee of the grantee, to whom the estate may afterwards come, is entitled, whether the heirs and assigns of the grantee be or be not mentioned in the covenant, to maintain an action upon it. Sprague *v.* Baker, 17 Mass. 586, 590. — Thayer *v.* Clemence, 22 Pick. 490. — 1 Smith's

Lead. Cas. (H. & W.'s. Notes) 177. — Morse *v.* Aldrich, 19 Pick. 449. And a mortgagee of the grantee will be entitled as his assignee to bring an action upon this covenant. Tufts *v.* Adams, 8 Pick. 547.

If the above views are correct, a much more simple and at the same time equally effectual form for the usual covenants in a warranty deed would be as follows, — "And I do hereby covenant with the said grantee that I am lawfully seized in fee of the granted premises, — that they are free from all incumbrances, — that I have good right to sell and convey the same as aforesaid, — and that I will warrant and defend the same against the lawful claims and demands of all persons forever."

All incumbrances, defects of title, &c. should be mentioned as exceptions under all the covenants of which they would constitute a breach, — otherwise the grantor will be held to have covenanted against them under that covenant from which they are not excepted. Estabrook *v.* Smith, 6 Gray 572.

Though in a warranty deed the premises be described as the same conveyed to the grantor by a certain other deed, the date and place of record of which are given, and which specifies a certain incumbrance to which the estate is subject, the grantor will be liable for such incumbrance, unless it be specially excepted under the covenants of the deed given by him. Harlow *v.* Thomas, 15 Pick. 66.

Parol evidence cannot in any case be resorted to to show that the grantee actually knew of the existence of an incumbrance which is not excepted under the covenants. Spurr *v.* Andrew, 6 Allen 420 — Harlow *v.* Thomas, 15 Pick. 66 — Batchelder *v.* Sturgis, 3 Cush. 201. — Townsend *v.* Weld, 8 Mass. 146. — See also 6 Gray 579. — But see Spring *v.* Tongue, 9 Mass. 28.

The force and effect of the several covenants usually inserted in deeds, as determined by the Supreme Court of Massachusetts, would seem to be as follows:

COVENANTS OF SEIZIN AND RIGHT TO CONVEY. These covenants are often said to be synonymous, because the same fact, namely, the actual seizin of the grantor, irrespective of his having a good, indefeasible title, will support them both. They do not however stand altogether upon the same footing, for it is said that if one having an estate for years should convey, covenanting that he was seized in fee and had good right to convey, the former covenant would be broken, while the latter would not. Slater *v.* Rawson, 6 Met. 439, 445 — Raymond *v.* Raymond, 10 Cush. 134, 140 — Marston *v.* Hobbs, 2 Mass. 433, 437.

The seizin will be sufficient to satisfy these covenants if, at the time of executing the deed, the grantor has the actual and exclusive possession of the premises, claiming the same as his own, and although there may be an outstanding title in a third person, who is the true owner, and whom his acts have not been of so marked a character as to disseize. Follett *v.* Grant, 5 Allen 174 — Slater *v.* Rawson, 6 Met. 439 — Twambly *v.* Henley, 4 Mass. 441 — Bearce *v.* Jackson, 4 Mass. 408. — Marston *v.* Hobbs, 2 Mass. 433, 439.

But if there be no such actual seizin of the whole estate covered by the covenants, they will be broken. Cornell *v.* Jackson, 3 Cush. 506.

If there be no such land in existence as the deed purports to convey, both these covenants will be broken. Bacon *v.* Lincoln, 4 Cush. 210.

It seems that where an executor, being seized of land by force of the statutes, conveys it in a manner contrary to statute provision, neither of these covenants will be broken. Baldwin *v.* Timmins, 3 Gray 302.

These covenants, if broken at all, are broken immediately upon the execution of the deed containing them. Bickford *v.* Page, 2 Mass. 455, 460.

If a deed and mortgage back, both containing like covenants of seizin and right to convey, be given simultaneously, the covenants in the mortgage will not be allowed to operate as a rebutter to a demand for breach of those in the deed. Sumner *v.* Barnard, 12 Met. 459.

The *measure of damages* for breach of these covenants is the amount of the consideration paid, with interest from the time of payment. Marston *v.* Hobbs, 2 Mass. 433. — Bickford *v.* Page, 2 Mass. 455.

But if the consideration cannot be ascertained, the value of the land at the date of the deed, with interest, will be the measure of damages. Byrnes *v.* Rich, 5 Gray 518, — Smith *v.* Strong, 14 Pick. 128.

When the want of seizin and right to convey extends only to a portion of the estate conveyed, the measure of damages will be such proportion of the consideration or original value as the *value* of such portion of the estate bore to that of the whole estate. Cornell *v.* Jackson, 3 Cush. 506 — Byrnes *v.* Rich, 5 Gray 518, 519. — See also Leland *v.* Stone, 10 Mass. 459, 463. — Spurr *v.* Andrew, 6 Allen 422.

The interest which may be recovered is not limited to that which accrued within six years before action brought, — but on the other hand, if the covenantee has derived profits from the land for which by reason of the lapse of time he is no longer responsible, it seems that such profits are to be deducted in estimating the amount of damages. Whiting *v.* Dewey, 15 Pick. 428, 435.

The fact that the covenantee before action brought has conveyed the premises to a third person without any covenants will not prevent his recovering full damages. Cornell *v.* Jackson, 3 Cush. 506.

When the covenantor afterwards gains a valid title to the premises, and such title enures to his covenantee by way of estoppel, such fact will operate to reduce the damages. Cornell *v.* Jackson, 3 Cush. 506. But see Blanchard *v.* Ellis 1 Gray 195.

The fact that the covenantee has been obliged to pay, on a covenant of warranty made by him on a subsequent sale of the estate, a sum larger than the consideration paid by him with interest, will not affect the amount of damages which he is entitled to recover. Nichols *v.* Walter, 8 Mass. 243.

The measure of damages will be the same, although the land be situated in another state, in which, if the suit upon the covenant had been brought there, greater damages would have been allowed. Nichols *v.* Walter, 8 Mass. 243, — Smith *v.* Strong, 14 Pick. 128.

COVENANT AGAINST INCUMBRANCES. This covenant is broken if a third person at the time of the conveyance had a right to or interest in the land granted, which diminished the value of the absolute interest in the same, while it was consistent with the passing of the fee by the deed. See Spurr *v.* Andrew, 6 Allen 420 — Prescott *v.* Trueman, 4 Mass. 627, 629.

Thus the existence of a paramount title which may wholly defeat that of the grantee, though he has not been actually evicted, has been held to amount to a breach of this covenant. Prescott *v.* Trueman, 4 Mass. 627 — Barrett *v.* Porter, 14 Mass. 143. — Blanchard *v.* Ellis, 1 Gray 195.

So also the existence of a mortgage upon the granted premises. Wyman *v.* Ballard, 12 Mass. 303 — Tufts *v.* Adams, 8 Pick. 547.

Or, of a public town way (Kellogg *v.* Ingersoll, 2 Mass. 97) or private right of way over the same. (Harlow *v.* Thomas, 15 Pick. 66 — Wetherbee *v.* Bennett, 2 Allen 428.)

Or, the right of a third person to cut and remove standing trees therefrom. Spurr *v.* Andrew, 6 Allen 420.

Or, an inchoate right of dower therein. Shearer *v.* Ranger, 22 Pick. 447.

Or, an equity of redemption from the levy on execution under which the covenantor held. Norton *v.* Babcock, 2 Met. 510.

Or, a judgment in favor of a third person which constituted a lien upon the premises. Jenkins *v.* Hopkins, 8 Pick. 346.

But where an estate was held upon the condition that a dwelling-house should be erected thereon within a given time, and the time had not expired nor had the house been erected, it was held that this covenant was not broken. Estabrook *v.* Smith, 6 Gray 572.

Nor, where a third person claimed an interest in the premises by virtue of an oral agreement with the covenantor, which agreement gave him no legal right as against the covenantee. Fitch *v.* Seymour, 9 Met. 462.

Nor, where, in a sale of a pew, it was liable for prior expenses of building the church, the assessment of the tax not being made till after the sale. Spring *v.* Tongue, 9 Mass. 28.

Nor will unlawful and tortious acts of third persons constitute an incumbrance, and in an action on this covenant the burden is on the plaintiff to prove that the alleged incumbrance was a lawful one. Lathrop *v.* Grosvenor, 10 Gray 52.

See also on the question as to what constitutes an incumbrance. Chapel *v.* Bull, 17 Mass. 213 — Jarvis *v.* Buttrick, 1 Met. 480 — Prescott *v.* Williams, 5 Met. 429.

As to the *measure of damages* for a breach of this covenant it has been held that —

Where the incumbrance is a paramount title which entirely defeats that of the covenantee, so that he never obtains possession of the estate, he will be entitled to recover back the

consideration paid with interest. Jenkins *v.* Hopkins, 8 Pick. 346 — Chapel *v.* Bull, 17 Mass. 213 — Blanchard *v.* Ellis, 1 Gray 195. For this purpose "the consideration expressed in the deed is *primâ facie* the true one, but liable to be controverted by evidence." Per Thomas, J. in same case, p. 203.

But if the covenantee is evicted by such paramount title after having been in possession of the estate, the value of the premises at the time of eviction, and including the value of any improvements made, will be the rule. Norton *v.* Babcock, 2 Met. 510, 519. — Barrett *v.* Porter, 14 Mass. 143. See also Chapel *v.* Bull, 17 Mass. 213, 221.

Where the party evicting the covenantee has been required under the provisions of the statutes (Gen. St. c. 134, s. 18 &c.) to allow him a certain amount for improvements, &c., such sum is to be deducted from the amount which the covenantee would otherwise be entitled to recover of his covenantor. Norton *v.* Babcock, 2 Met. 510.

If the covenantee has been wholly evicted by title paramount, the covenantor cannot afterwards purchase such title and compel the covenantee to take it against his will, either in satisfaction of the covenant against incumbrances or in mitigation of the damages for breach of it. Blanchard *v.* Ellis, 1 Gray 195, 199.

If the incumbrance be an attachment, mortgage, or lien, which has neither interfered with the beneficial enjoyment of the estate nor been extinguished, only *nominal* damages can be recovered. Prescott *v.* Trueman, 4 Mass. 627 — See also Harlow *v.* Thomas, 15 Pick. 66, 69.

In the case of an outstanding mortgage, the covenantee, even though he has been actually evicted by possession taken for foreclosure, can still recover only nominal damages in an action on this covenant, unless he has paid off such mortgage. Tufts *v.* Adams, 8 Pick. 547. — Wyman *v.* Ballard, 12 Mass.

303. See also decision of Parsons, C. J., in Prescott *v.* Trueman, 4 Mass. 627, 630. In the above case of Wyman *v.* Ballard the deed to the covenantee contained also a covenant of warranty, and the covenantee having sold the estate before the entry to foreclose, it was held that, although the foreclosure had become absolute by the lapse of three years, the covenantee should recover, in an action on the covenant against incumbrances, only nominal damages, the reason given being that, were he to recover full damages, his grantee being entitled as assignee of the covenant of warranty to recover under that for the eviction which he had suffered, the covenantor would thus be compelled to pay twice for the same thing.

Where the covenantee has fairly extinguished the incumbrance, he will be entitled to recover the expenses necessarily incurred in so doing, but only to an amount not exceeding the value of the estate with improvements. Prescott *v.* Trueman, 4 Mass. 627, 631 — Norton *v.* Babcock, 2 Met. 510, 519. — Wyman *v.* Brigden, 4 Mass. 150. And in determining such expenses, sums paid after action brought are not to be excluded. Brooks *v.* Moody, 20 Pick. 474.

But see Gen. St. c. 89, s. 17, which provides that, in cases where the incumbrance appears of record, the covenantor shall be liable "for all damages sustained in removing the same."

Where the incumbrance is of a permanent nature, like a right of way, and such as the covenantee cannot remove, it has been said that he should recover a "just compensation for the actual injury resulting from its continuance." Harlow *v.* Thomas, 15 Pick. 66, 69. — Batchelder *v.* Sturgis, 3 Cush. 201, 206. But in the later case of Wetherbee *v.* Bennett, 2 Allen 428, the Court, while recognizing the above rule, held that such compensation might be determined by the difference in the market value of the estate occasioned by the incumbrance,

although the covenantee had never been disturbed in the enjoyment of his estate by any user of the right of way which constituted the incumbrance, and though the right had been extinguished without expense to him.

COVENANT OF WARRANTY. This covenant will not attach so that an action can be brought upon it, unless the grantor at the time of his conveyance be seized of the premises conveyed. Slater *v.* Rawson, 1 Met. 450. As to what seizin is necessary in order that the covenant may attach, see Slater *v.* Rawson, 6 Met. 439.

In order to constitute a breach of this covenant it is necessary that there should be, not only a want or defect of title, but an actual eviction or ouster, or what in law is deemed equivalent thereto. Gilman *v.* Haven, 11 Cush. 330 — Emerson *v.* Proprietors &c., 1 Mass. 464 — Marston *v.* Hobbs, 2 Mass. 433, 437 — Bearce *v.* Jackson, 4 Mass. 408 — Twambly *v.* Henley, 4 Mass. 441. — Chapel *v.* Hall, 17 Mass. 213, 220.

It will be deemed equivalent to eviction, if the covenantee consents to dispossession by one having a paramount title. But in such case the burden will be upon the covenantee to show that the title to which he yields is good, whereas in case of an eviction by force of a judgment at law, with notice of the suit to the warrantor, the judgment itself, unless obtained by fraud, will be plenary evidence of the validity of such title. Hamilton *v.* Cutts, 4 Mass. 349, 352. As to the mode of vouching in a covenantor, and the extent to which he will be bound by a judgment in the suit, although he does not appear and defend it, see Chamberlain *v.* Preble, 11 Allen, 370.

So where, being threatened with eviction under a paramount title, the covenantee purchases such title. Estabrook *v.* Smith, 6 Gray 572 — Sprague *v.* Baker, 17 Mass. 586.

So where, though there is no threat of eviction, the equity

of redemption, under which the covenantee claims, is sold by the sheriff by virtue of an attachment made before the conveyance to the covenantee, and he purchases at such sale. Whitney *v.* Dinsmore, 6 Cush. 124.

So of a formal entry in the presence of two witnessess to foreclose an outstanding mortgage. White *v.* Whitney, 3 Met. 81. But see Bartlett *v.* Tarbell, 12 Allen 123, 127.

So of a mere entry to cut wood upon the premises by an agent of one having a paramount title. And it need not be shown that, before action brought, the covenantee notified the covenantor of the entry &c. Burrage *v.* Smith, 16 Pick. 56.

But if a covenantee executes a mortgage back to his covenantor, and afterwards gives him possession to foreclose such mortgage and becomes his tenant, an eviction will not constitute a breach of the covenant, as not being against the possession of the covenantee, but against that of his grantor and mortgagee. Gilman *v.* Haven, 11 Cush. 330.

As to what constitutes a breach of a limited covenant of warranty against persons claiming by, through, or under the covenantor, see West *v.* Spaulding, 11 Met. 556 — Raymond *v.* Raymond, 10 Cush. 134.

The *measure of damages* for breach of this covenant is the value of the land with the improvements at the time of eviction and interest from such time. Gore *v.* Brazier 3 Mass. 523. — Bigelow *v.* Jones, 4 Mass. 512. But see Sumner *v.* Williams, 8 Mass. 162, 221. It would seem that from the amount thus determined must be deducted such amount, if any, as the party evicting the covenantee may have been required under the provisions of the statutes (Gen. St. c. 134, s. 18 &c.) to allow him for improvements &c. See Norton *v.* Babcock, 2 Met. 510.

In a case where the covenantee after eviction extinguished the paramount title, it was held that he was entitled to recover

all sums paid by him for that purpose, whether paid before or after action brought, charges for his own time employed therein, and incidental expenses for horses and carriages, board and lodging, &c., but not sums paid to counsel for advice and services. Leffingwell *v.* Elliott, 10 Pick. 203.

But where the title which causes eviction is under a mortgage, the measure of damages will be limited to the amount due on such mortgage, or the amount paid to redeem the same with interest, together with the costs of defending any suit which may have been brought against the covenantee thereon. Tufts *v.* Adams, 8 Pick. 547.—White *v.* Whitney, 3 Met. 81, 89. — Estabrook *v.* Smith, 6 Gray 572, 579. — Thayer *v.* Clemence, 22 Pick. 490. — See also Donahoe *v.* Emery, 9 Met. 63.

If the covenantee has, before the happening of the breach, mortgaged the premises, it seems that the amount due on such mortgage is to be deducted from the amount which he would otherwise be entitled to recover. Tufts *v.* Adams, 8 Pick. 547, 549.

OTHER COVENANTS SOMETIMES INSERTED. As to the covenant for quiet enjoyment, see Donahoe *v.* Emery, 9 Met. 63. — Ellis *v.* Welch, 6 Mass. 246. — Shelton *v.* Codman, 3 Cush. 318.

The insertion after the *habendum* of the words, — "so that neither the said grantor nor his heirs, nor any other person or persons claiming from or under him or them, or in the name or stead of him or them, shall or will, by any way or means, have, claim, or demand any right or title to the aforesaid premises or any part thereof forever," constitutes a covenant real running with the land. Trull *v.* Eastman, 3 Met. 121. Gibbs *v.* Thayer, 6 Cush. 30, 32. — Newcomb *v.* Presbrey, 8 Met. 406, 410. See also Wight *v.* Shaw, 5 Cush. 56, — Miller *v.* Ewing, 6 Cush. 34, 40.

ESTOPPEL AND REBUTTER. A covenant of warranty will so operate by way of estoppel or rebutter in cases where the warrantor at the time of making the deed has no good title, but afterwards acquires one, that such title, when acquired by him, will enure to the benefit of his grantee or his heirs or assigns. White *v.* Patten, 24 Pick. 324. See also 2 Smith Lead. Cas. H. & W. Notes, p. 609, 620. — 5 Gray 334.

It appears to be questionable how far the above rule as to the estoppel of a warrantor is applicable to *his heirs*. *It seems* that the heirs will not be estopped in case their ancestor was disseized at the time he gave his warranty. Bates *v.* Norcross, 17 Pick. 14, 19. Compare Slater *v.* Rawson, 1 Met. 450. — 6 Met. 439. *Perhaps* heirs will not be estopped unless they have received from their warranting ancestor assets of a value at least equal to that of the estate to be affected by the estoppel. Bates *v.* Norcross, 17 Pick. 14, 21. — See also 2 Smith Lead. Cases, H. & W. Notes, p. 642. — 5 Gray 334. — 13 Pick. 119. *Possibly* the estoppel of heirs will take effect only when a *sole heir* of the warrantor acquires the paramount title. See 17 Pick. 22, 17. But where an heir had given bond under the statute to pay all his ancestor's debts and legacies, a title which came to such heir before his ancestor's death was held to enure by way of estoppel or rebutter to his ancestor's grantees, without regard to the amount of assets received by such heir, and although, at the time when the question of title was raised between such heir and such grantees, an action on the covenant of warranty was barred by the statute of limitations. Cole *v.* Raymond, 9 Gray 217. (Compare statement of facts in Holden *v.* Fletcher, 6 Cush. 235.)

The husband of a woman, who would be estopped as heir of the warrantor, has been held to be equally estopped to set up a title in himself. Bates *v.* Norcross, 17 Pick. 14, 21. But

quære as to effect of Gen. St. c. 108, s. 8, 5, and St. 1855, c. 304, s. 2, 7.

Though a married woman is not liable to an action on the covenants in a deed of her estate executed by her during coverture jointly with her husband, she will nevertheless be estopped by such covenants in like manner as other persons. Nash *v.* Spofford, 10 Met. 192. — See also Fowler *v.* Shearer, 7 Mass. 14, 21. — Colcord *v.* Swan, 7 Mass. 291. — Doane *v.* Willcutt, 5 Gray 328, 332. But see a strong intimation of a contrary doctrine in Wight *v.* Shaw, 5 Cush. 56, 66. See also Gen. St. c. 108, s. 2. — Rev. St. c. 59, s. 2.

But a woman will not, by joining with her husband in release of dower, be estopped from claiming an estate in her own right in the premises so released. Raymond *v.* Holden, 2 Cush. 264, 270. Nor will any deed of the estate of a married woman, which is signed by her but not executed in accordance with the requirements of the statutes regarding such deeds, even though containing full covenants of warranty, operate in any way as an estoppel on her or her heirs. Lowell *v.* Daniels, 2 Gray 161 — Bruce *v.* Wood, 1 Met. 542. See also Bemis *v.* Call, 10 Allen 512, 517.

Where a guardian, in a deed executed by him as such, covenanted that he was "lawfully authorised and empowered to make sale of the granted premises," it was held that he was thereby estopped from setting up any claim to such premises previously acquired by him in his own right. Heard *v.* Hall, 16 Pick. 457. And it would seem that the result would be the same where the executor, guardian, &c., purports to convey the property of another by virtue of a power or license, even though the deed contains no covenant whatsoever. See Poor *v.* Robinson, 10 Mass. 131.

In all cases of estoppel or rebutter the paramount title acquired by the covenantor will pass to the covenantee from the

moment when it comes to the covenantor, and will be valid not only against him and those claiming under him, but also *against strangers.* Somes *v.* Skinner, 3 Pick. 52.

But where the covenantee has been wholly evicted from the premises by a title paramount, such title, if afterwards acquired by the covenantor, will not enure to the covenantee *unless at his election.* Blanchard *v.* Ellis, 1 Gray 195, 199.

No estoppel or rebutter can operate to prevent the setting up of a title *acquired by disseizin subsequently to the deed creating the estoppel.* Stearns *v.* Hendersass, 9 Cush. 497. — Parker *v.* Props. Locks & Canals, 3 Met. 91.

Nor will full covenants of warranty estop a grantor from claiming a *way of necessity* over the land granted. Brigham *v.* Smith, 4 Gray 297.

The giving of a deed by a party disseized will not estop him from bringing an action against the disseizor. Wolcot *v.* Knight, 6 Mass. 418.

It seems that a deed made to a company incorporated but not organized, and thus not valid when made, will enure by way of estoppel to the use of the corporation when organized. Dyer *v.* Rich, 1 Met. 180, 190.

Where the grantor warrants *only against himself and those claiming under him*, it would seem that he will not be estopped from setting up a paramount title afterwards acquired by him. Doane *v.* Willcutt, 5 Gray 328, 333. — Comstock *v.* Smith, 13 Pick. 116, 120. — See also Raymond *v.* Raymond, 10 Cush. 134, 140. — Miller *v.* Ewing, 6 Cush. 34, 40. — Wight *v.* Shaw, 5 Cush. 56, 64. But where a grantor quitclaimed all the "right, title or interest which he had or might have in or unto the estate of his father, whether the same might fall to him by will or heirship" and warranted that he and his heirs &c. should not "have, claim, or demand any right or title" in the granted premises forever, it was held

that such grantor was estopped from claiming an estate afterwards devised to him by his father. Trull *v.* Eastman, 3 Met. 121, 124.

And where such a limited warranty was contained in a deed which was fraudulent and void as against the grantor's creditors, and the grantor's assignee in insolvency afterwards conveyed to him the estate described in the former deed, he was held to be estopped from setting up such title against his former grantee. Gibbs *v.* Thayer, 6 Cush. 30.

By a simple conveyance of land *without warranty*, the grantor will be estopped to deny that he had any title at the time of such conveyance, but a mere title by disseizin will be sufficient to avoid the effect of such estoppel. Comstock *v.* Smith, 13 Pick. 116, 120. — Heard *v.* Hall, 16 Pick. 460.

As to the extent to which, by accepting a deed, a grantee may be estopped to deny his grantor's title, see Flagg *v.* Mann, 14 Pick. 467, 481. — Wedge *v.* Moore, 6 Cush. 8. The acceptance of a devise will estop the devisee from denying the testator's title. Smith *v.* Smith, 14 Gray 532.

As to the effect of *recitals* in a deed as estopping the parties to it, see ante p. 13, — also Parker *v.* Parker, 17 Mass. 370, 375. — Commonwealth *v.* André, 3 Pick. 224. — Holt *v.* Sargent, 15 Gray 97.

When a person conveys by warranty deed a *portion* of a parcel of land, the *whole* of which is subject to a mortgage, the portion remaining in the grantor will, as against him, his heirs and devisees, and purchasers from him with notice, be first chargeable with the mortgage debt. And the mortgagee also, if he have actual or constructive notice of such conveyance by the mortgagor, is also bound to regard the equity of the grantee in such conveyance. But the mere recording of such conveyance will not amount to constructive notice to such mortgagee. George *v.* Wood, 9 Allen 80 and

cases there cited. — See also same case, 11 Allen 41. Also Pike *v.* Goodnow, 12 Allen 472.

RELEASE OF DOWER AND HOMESTEAD. The common form of inserting the release of dower and homestead in the *in testimonium* clause, though decided to be valid, (Stearns *v.* Swift, 8 Pick. 532) is very clumsy and hardly admits of being expressed in grammatical language. The form given above corresponds to that formerly in use, as given in Curtis's Conveyancer and in the earlier editions of Oliver, and seems to be in every way preferable to the other. The language used is framed with a view to meet exactly the requirements of the statutes prescribing the mode of releasing dower and homestead. Gen. St. c. 90, s. 8, — c. 104, ss. 7, 8. (See Greenough *v.* Turner, 11 Gray 332.) As to the statement of the consideration for the release, its sufficiency is established by the well-known rule of law which recognizes as valid any consideration which is either a benefit to the party promising or some trouble or prejudice to the party to whom the promise is made. 2 Kent Com. 465.

By the provisions of the Gen. St. (c. 90, s. 8) "a married woman may bar her right of dower in any estate conveyed by her husband, *or by operation of law*, by joining in the deed conveying the same, and therein releasing her right to dower; or by releasing the same by a subsequent deed *executed separately*, or jointly with her husband." The provisions of the Rev. St. (c. 60, s. 7) differ from the above in not containing the words in italics and in adding the words "*with him*" after "*by joining.*"

Prior to the Gen. St. a "subsequent deed executed separately" did not bar dower. Page *v.* Page, 6 Cush. 196.

As to the law relative to release of dower prior to the Rev. St. see decision of Parsons, C. J. in Fowler *v.* Shearer,

7 Mass. 14, 20. See also Page *v.* Page, 6 Cush. 197 — Stearns *v.* Swift, 8 Pick. 532.

To be valid for the purpose of releasing dower, a deed must contain words importing such release. Thus a deed in which the only mention of the wife's name was in the *in testimonium* clause, which read — "In witness whereof I, the said A. B., and S. B., my wife, have hereunto set our hands," &c., was held insufficient to bar dower. Lufkin *v.* Curtis, 13 Mass. 223. The same was held of a deed in which the wife joined in the following form — "In witness whereof I, the said A. B., with S., my wife, in token of her assent thereto, have hereunto set our hands" &c. Leavitt *v.* Lamprey, 13 Pick. 382. See also Catlin *v.* Ware, 9 Mass. 218 — Melvin *v.* Props. Locks & Canals, 16 Pick. 137. But in Learned *v.* Cutler, 18 Pick. 9 it was held that it was not necessary that dower should be released *eo nomine*, but that any other words showing an intention on the wife's part to relinquish her dower would be sufficient. And it was said that if she joined with her husband in the sale and conveyed the land jointly with him, this generally would be a sufficient indication of her intention to exclude herself from any claim of dower. This case however was decided upon the statutes existing prior to the Rev. St., and which did not contain the words "and therein releasing her claim to dower," which are found in the latter.

As to the proper form for a subsequent deed releasing dower and executed jointly by husband and wife, see Stearns *v.* Swift, 8 Pick. 532, 536.

A writing signed by a married woman, but not sealed nor acknowledged, will not in any way work an alienation of her dower. Giles *v.* Morse, 4 Gray 600.

When the husband is under guardianship, the wife may release her dower by joining in the deed with the guardian. Gen. St. c. 90, s. 8, — c. 108, s. 11.

When a married woman is insane, a guardian may be appointed, and her rights of dower and homestead released by him. See Gen. St. c. 108, s. 19–25.

No release of dower will be required where the seizin of the grantor has been only instantaneous, for in such case the grantor's wife will acquire no title to dower. 4 Kent Com. 39. Thus where a deed and a mortgage back to the grantor are executed at the same time and as parts of one transaction, no release of dower will be needed in the mortgage. Holbrook *v.* Finney, 4 Mass. 566. And the same rule holds although such mortgage be given to a third person. King *v.* Stetson, 11 Allen 407 — Clark *v.* Munroe, 14 Mass. 351.

Nor is any release of *homestead* required in such cases. New England Jewelry Co. *v.* Merriam, 2 Allen 390. In this case it was decided that, although the date of the deed was earlier than that of the mortgage, this fact would not affect the the result, provided the two instruments were actually executed simultaneously.

Nor in a conveyance of an estate which the grantor holds only as trustee and without any beneficial interest in himself. See 4 Kent Com. 42, 43.

Nor in a conveyance of wild lands. Gen. St. c. 90, s. 12.

Nor when a jointure or pecuniary provision in lieu of dower has been settled on the wife before marriage in accordance with Gen. St. c. 90, ss. 9 & 10.

"In witness whereof," &c. It is not necessary that the *in testimonium* clause should contain words indicating that the parties have affixed their seals. It is sufficient if it should otherwise appear to have been done, and where seals are in fact affixed to an instrument the legal presumption is that they were placed there as the seals of the parties. Mill Dam Foundry *v.* Hovey, 21 Pick. 417, 428. — Bradford *v.* Randall, 5 Pick. 496.

"THIS FIRST DAY OF," &c. In the absence of evidence to the contrary, the presumption is that a deed was executed on the day on which it bears date, and the fact that it was not acknowledged until a later day does not affect this presumption. Smith *v.* Porter, 10 Gray 66.

Evidence is admissible to show that a deed was delivered at a time subsequent to that of its date. Fairbanks *v.* Metcalf, 8 Mass. 230, 240.

"So insignificant is the mere date of a deed that the delivery may be averred and proved to be either before or after the date; and if an absurd or impossible date, or no date at all, be found, the grantee may prove the time of execution, if important to be proved, by witnesses." Per Parker, C. J. in Harrison *v.* Trustees of Phillips Academy, 12 Mass. 456, 463.

SIGNATURE. In this Commonwealth sealing, without signing, is not a sufficient execution of a conveyance of land. Gen. St. c. 89, s. 2. — Hutchins *v.* Byrnes, 9 Gray 367, 369.

A signature *by initials* only has been held to be good in the case of a writing not under seal, whether equally good in a deed, *quære.* See Sanborn *v.* Flagler, 9 Allen 474, 478.

Where one named as a party in a deed signs his name in the proper place for the name of a witness, evidence is admissible to show that he intended to sign as a party and not as a witness. Richardson *v.* Boynton, 12 Allen 138.

SEAL. "Anciently a seal was defined to be an impression on wax; but it has long been held that a seal by a wafer or other tenacious substance, upon which an impression is or may be made, is a valid seal." Per Wilde, J. in Tasker *v.* Bartlett, 5 Cush. 359, 364. The seal in this case was made of gummed paper with an impression upon it and affixed to the deed by moistening the gum, without the addition of any

wafer or wax, and it was held to be a good seal. See also Bradford *v* Randall, 5 Pick. 496, 497.

It seems that for the seal of an *individual* it is necessary that there should be affixed to the deed a wafer, wax, gummed paper or some other tenacious substance capable of receiving the impression of a seal upon it, and that a mere impression on the paper of the deed or a scrawl will not be sufficient. See Bates *v.* New York Central R. R. Co., 10 Allen 251, 254. — Commonwealth *v.* Griffith, 2 Pick. 11, 18. But *quære* whether the rule laid down in the case of Hendee *v.* Pinkerton cited below, though in terms confined to the seals of corporations only, should not properly apply equally to those of individuals.

For the seal of a court, public office, or *corporation* it is provided by statute that an impression of the official seal, made upon the paper to which it is affixed, shall be sufficient. Gen. St. c. 3. s. 7, cl. 15. And in a case arising upon a deed made prior to the existence of any such statute provision as the above relating to the seals of corporations, it was decided that a distinct, visible, and permanent impression of a corporate seal upon and into the substance of the paper on which a conveyance was written, without the addition of any wafer or other substance, constituted a valid seal of a corporation. Hendee *v.* Pinkerton, Jan. Term, 1867 (not yet reported). But it has been held to be no sufficient seal, where a fac simile of the seal was printed upon the instrument at the same time and by the same agency as the blank form printed thereon, to be afterwards filled up and signed by the officers of the corporation. Bates *v.* N. Y. Central R. R., 10 Allen 251.

Several persons may seal by one seal, but in such case it is proper, though not absolutely necessary, that the *in testimonium* clause should read thus — "have hereunto set our hands and our common seal." Tasker *v.* Bartlett, 5 Cush. 359, 364. Mill Dam Foundry *v.* Hovey, 21 Pick. 428.

If a party subscribes his name and affixes his seal to a deed purporting to be the deed of another, and in the body of which he is not mentioned or referred to, it would seem that he is not in any way bound or affected by such deed. See Catlin *v.* Ware, 9 Mass. 218 — Melvin *v.* Props. Locks & Canals, 16 Pick. 137.

"SIGNED AND SEALED IN PRESENCE OF." It is customary to write this — "Signed, sealed, and *delivered*" &c., but as a statement that the deed has been *delivered* in the presence of the attesting witnesses is generally not in accordance with the facts, it would seem advisable, as a general rule, to omit this word.

"A deed is valid without attesting witnesses. At the same time it is proper to add that as the attestation of witnesses affords such an easy and effectual mode of proof as may enable a grantee to supply the want of an acknowledgment and obtain the registration of his deed, where acknowledgment is wanting," (See Gen. St. c. 89, ss. 20 – 27) "and adds greatly to the credit of a deed, every conveyancer of common prudence, and every grantee in the exercise of due care, will perceive the propriety of having a deed duly attested by witnesses." Per Shaw C. J. in Dole *v.* Thurlow, 12 Met. 157, 166. — Thacher *v.* Phinney, 7 Allen 149. See also Brigham *v.* Palmer, 3 Allen 450 for a statement of the theory of the law regarding attesting witnesses.

It may be remarked however that an attesting witness is often the cause of trouble, inasmuch as the law requires that upon proving the deed he should be called, or his absence accounted for, even though the person whose signature is attested, is himself present and competent to testify; (Brigham *v.* Palmer, 3 Allen 450 — 1 Gr. Ev. sect. 569) and it would seem on the whole to be undesirable to have the signature

to a deed attested when, as is so often the case, the witnesses are less well known and less likely to be easily found than the party whose signature they attest, or when that signature is one which is well known in the community and which can be readily identified and sworn to by numerous individuals. An attesting witness is, however, of importance upon a promissory note under our statute of limitations. Gen. St. c. 155, s. 4.

Noting of Alterations &c. It is important to note in the attestation clause all material alterations or interlineations which may have been made in the body of the instrument, for if made by the grantee after the execution and delivery of the deed, they render it void, and the fact that they are so noted affords a presumption that they were duly made before execution. If however the alterations are *immaterial*, — that is, such as do not change the legal tenor and effect of the instrument, — it is not necessary that they should be noted, for whenever made, whether before or after the execution of the instrument, they will not affect its validity. 1 Gr. Ev. sect. 564 — 2 Pars. Cont. 224 — Wilde *v.* Armsby, 6 Cush. 314 — Ely *v.* Ely, 6 Gray 439 — Fay *v.* Smith, 1 Allen 477 — Ives *v.* Farmer's Bank, 2 Allen 236. — Basford *v.* Pearson, 9 Allen 387. — Adams *v.* Frye, 3 Met. 103. — Brown *v.* Pinkham, 18 Pick. 172.— Smith *v.* Crooker, 5 Mass. 538, 540. It is equally unnecessary to note alterations when, as is often the case, the instrument shows on its face that they were made before execution.

But no alteration in a deed, made after the estate conveyed has vested in the grantee, can divest or invalidate his title, it "may deprive him of his remedies upon the covenants but not of his right to hold the property." Chessman *v.* Whittemore, 23 Pick. 231. — Kendall *v.* Kendall, 12 Allen 91. — Hatch *v.*

Hatch, 9 Mass. 307. — Hunt *v.* Adams, 6 Mass. 519. — Smith *v.* Crooker, 5 Mass. 538.

As to the effect of the material alteration of a deed by the grantor or by a stranger, as by tearing off the seal, whether by accident or design, see Powers *v.* Ware, 2 Pick. 451, 457.

If blanks are filled in after a deed has been signed and sealed by the grantor, the deed will not be valid unless such alterations are made by the grantor himself or in his presence and by his direction, or by his attorney created by a power under seal, or unless the filling of the blanks is not material to the validity of the instrument, and does not alter its legal tenor and effect. Burns *v.* Lynde, 6 Allen, 305. — Basford *v.* Pearson, 9 Allen 387. — Warring *v.* Williams, 8 Pick. 326. — Smith *v.* Crooker, 5 Mass. 538. — Hunt *v.* Adams, 6 Mass. 519.

Internal Revenue Stamps. The United States Revenue Laws require that upon every "deed, instrument, or writing, whereby any lands, tenements, or other realty sold shall be granted, assigned, transferred, or otherwise conveyed to, or vested in, the purchaser or purchasers, or any other person or persons by his, her, or their direction" there shall be affixed stamps to the amount of fifty cents for every five hundred dollars, or fractional part thereof, of the "consideration or value" of such conveyance. Inter. Rev. Law (as passed 30 June 1864 and amended by Acts of 3 March 1865, 13 July 1866, and 2 March 1867,) s. 151 and Schedule B.

How Cancelled. Upon all stamps so affixed "the person using or affixing the same shall write the initials of his name and the date upon which the same shall be attached or used, so that the same may not be used again." Ibid. s. 156.

Every document "made or purporting to be made in any foreign country to be used in the United States, shall pay the same tax as is required by law on similar instruments or

documents when made or issued in the United States; and the *party to whom the same is issued*, or by whom it is to be used, shall before using the same, affix thereon the stamp or stamps indicating the tax required." Ibid. s. 163.

Exemptions. "All official instruments, documents, and papers issued by the officers of the United States government, or by the officers of any State, county, town, or other municipal corporation, shall be, and hereby are, exempt from taxation: Provided: That it is the intent hereby to exempt from liability to taxation such State, county, town, or other municipal corporation, in the exercise only of functions strictly belonging to them in their ordinary governmental and municipal capacity." Ibid. s. 154. Under this section it is claimed that deeds conveying lands belonging to a city or town do not require to be stamped.

No stamp is required "on any certificate of the record of a deed or other instrument in writing, or of the acknowledgment or proof thereof by attesting witnesses." Ibid. s. 160.

Stamping by collector in cases of doubt. Whenever it is doubtful whether any stamp is required upon an instrument, or where the amount of the stamp required is doubtful, such instrument may, before it is issued or used, be presented to the collector, who shall thereupon stamp it as exempt from stamp duty, or shall affix the stamp he deems to be proper, and such instrument shall then "be received in evidence in all courts of law or equity, notwithstanding any objection made to the same by reason of it being unstamped, or of it being insufficiently stamped." Ibid. s. 162.

Effect of failure to stamp. "Any person or persons who shall make, sign, or issue, or who shall cause to be made, signed, or issued, any instrument, document, or paper of any kind or description whatsoever" "without the same being duly stamped, or having thereon an adhesive stamp for denot-

ing the tax chargeable thereon, and cancelled in the manner required by law, *with intent to evade the provisions* of this act, shall, for every such offence, forfeit the sum of fifty dollars, and such instrument, document, or paper," "not being stamped according to law, *shall be deemed invalid and of no effect: Provided:* That the title of a purchaser of land by deed duly stamped shall not be defeated or affected by the want of a proper stamp on any deed conveying said land by any person from, through, or under whom his grantor claims or holds titles." Ibid. s. 158.

Whether a failure properly to stamp an instrument, *if not intentional*, will invalidate it, quære. See Desmond *v.* Norris, 10 Allen 250 — Hugus *v.* Strickler, 19 Iowa 413.

"No deed, instrument, document, writing, or paper, required by law to be stamped, which has been signed or issued without being duly stamped, or with a deficient stamp, nor any copy thereof, shall be recorded, or admitted, or used as evidence in any court until a legal stamp or stamps, denoting the amount of tax, shall have been affixed thereto, as prescribed by law." Inter. Rev. Law s. 163.

"It shall not be lawful to *record* any instrument, document, or paper required by law to be stamped, unless a stamp or stamps of the proper amount have been affixed, and cancelled in the manner required by law; and the record of any such instrument, upon which the proper stamp or stamps aforesaid shall not have been affixed and cancelled as aforesaid, shall be utterly void, and shall not be used in evidence." Ibid. s. 152.

Remedy in case of failure to affix proper stamps. Where an instrument has been made or issued without being duly stamped, "any party having an interest therein" may, upon application to "the collector of the revenue of the proper district" and the payment of a penalty, have such instrument,

or if it be lost, a copy thereof, stamped by such collector, "and the same shall thereupon be deemed and held to be as valid, to all intents and purposes, as if stamped when made or issued." And it is further provided that if such application is made "*within twelve calendar months* after the making or issuing" of such instrument, the collector may in certain cases remit the penalty. And the instrument or copy may then be recorded anew, and such instrument, or copy, or record "may be used in all courts and places in the same manner and with the like effect as if the instrument had been originally stamped." "But no right acquired in good faith before the stamping of such instrument or copy thereof, and the recording thereof as herein provided, if such record be required by law, shall in any manner be affected by such stamping as aforesaid." Ibid. s. 158.

II. — QUIT-CLAIM DEED.

Know all men by these presents that I, A. B., of &c., in consideration of ten thousand dollars to me paid by C. D., of &c. the receipt whereof is hereby acknowledged, do hereby remise, release and forever quit-claim unto the said C. D. a certain parcel of land &c.

To have and to hold the above-released premises, with the privileges and appurtenances to the same belonging, to the said C. D. and his heirs and assigns to his and their use and behoof forever.

And I do hereby, for myself and my heirs, executors and administrators, covenant with the said C. D., and his heirs and assigns, that the released premises are free from all incumbrances made or suffered by me, and that I will, and my heirs, executors and administrators shall, warrant and defend the same to the said C. D. and his heirs and assigns against the lawful claims and demands of all persons claiming by, through, or under me, but against none other.

And for the consideration aforesaid I, S. B., wife of the said A. B., do hereby release unto the said C. D. and his heirs and assigns all right of and to both dower and homestead in the said premises.

In witness whereof we, the said A. B. and S. B., have &c.

NOTES.

"REMISE, RELEASE AND FOREVER QUIT-CLAIM." According to the old and technical rule of the common law, a deed in this form would be ineffectual to pass any right to one who was not already seized or in possession of the estate. But our Supreme Court, acting upon the principle, before referred to in the general remarks upon Deeds, that although an instrument be not, technically, adapted to execute the intent of the parties, it shall be held to operate in some other way in order to effect such intent, have held that a deed in the above form should be effectual, although the releasee be not in possession. Pray *v.* Pierce, 7 Mass. 381 — Russell *v.* Coffin, 8 Pick. 143. This decision was incorporated into the Revised Statutes, which provide that — "A deed of quit-claim and release of the form in common use in this State shall be sufficient to pass all the estate which the grantor could lawfully convey by a deed of bargain and sale." Rev. St. c. 59, s. 5. The same provision is repeated in Gen. St. c. 89, s. 8.

One who takes a quit-claim deed of all the grantor's right, title and interest in an estate, with a covenant of warranty against all persons claiming under the grantor, cannot recover back the purchase money upon a total failure of the grantor's title, although at the time of the sale both parties supposed the title to be perfect. And it would seem that the same rule would hold in the case of a simple quit-claim deed without the words, "right, title and interest" and without any covenant whatever. Earle *v.* DeWitt, 6 Allen 520. But the purchase money may be recovered back if the title fails for want of authority in the grantor to act in the capacity in which he professes to act, — as for instance if he assumes to act as assignee in insolvency without due appointment, (Earle *v.* Bickford, 6 Allen 549) as attorney without authority, (Shearer

v. Fowler, 7 Mass. 31) or as guardian under a license to sell without having given the bond or taken the oath required by law. (Williams *v.* Reed, 5 Pick. 480.)

In the printed blanks in common use a space is generally left before the word "remise" for the insertion of some other word by the pen, but it is not easy to see what word would be of any particular avail in this place.

Covenants. The remarks before made relative to the covenants in a warranty deed apply equally to those of the deed now under consideration. It may be mentioned that, when there are more than one grantor, for the word "*me*" in the covenants should be inserted "*us or either of us.*"

3. — MORTGAGE DEEDS.

The mortgages in general use may be divided into two classes, — common mortgages, and power of sale mortgages.

I. — COMMON MORTGAGE.

This differs from a warranty deed only in the insertion before the *in testimonium* clause of two clauses substantially as follows: —

Provided nevertheless that if the said grantor, or his heirs, executors, administrators, or assigns, shall pay unto the said grantee, or his executors, administrators, or assigns, the sum of one thousand dollars in three years from this date, with interest semi-annually at the rate of six per cent. per annum, and until such payment shall pay all taxes and assessments on the granted premises; shall keep the buildings thereon insured against fire in a sum not less than one thousand dollars for the benefit of the said grantee and his executors, administrators and assigns, at such Insurance Office as he or they shall approve; and shall not make or suffer any strip or waste of the granted premises, — then this deed, as also a note of even date herewith, signed by the said A. B., whereby he promises to pay to the said grantee or order the said sum and interest at the times aforesaid, shall both be void.

But it is agreed that, until default in the performance of the condition of this deed, the grantor and his heirs and assigns may hold and enjoy the granted premises and receive the rents and profits thereof.

NOTES.

"GRANTOR, OR HIS HEIRS, EXECUTORS, ADMINISTRATORS, OR ASSIGNS." Many mortgages are made without inserting the word "assigns" in this connection, but it would seem that this word is equally as important as the ones preceding it, for the mortgagor is quite as likely to assign and convey away his interest in the estate, as to die and leave it to his heirs.

"THE SUM OF" &c. If the amount be payable by instalments the deed should read somewhat as follows, — "the sum of three thousand dollars in three several instalments, namely, — one thousand dollars in one year, — one thousand dollars in two years, — and one thousand dollars in three years from this date, — with interest" &c.

Three days' grace are to be allowed in computing the time for the payment of the principal sum due on a mortgage note, or of any instalment thereof payable at a day certain, so also of any interest falling due at the same time with the principal or any instalment of the principal. Whether grace is to be allowed upon all interest made payable at a fixed time, *quære.* Coffin *v.* Loring, 5 Allen 153.

"SHALL KEEP THE BUILDINGS THEREON INSURED" &c. As to the rights of the parties in policies of insurance procured pursuant to this stipulation, see Graves *v.* Hampden Ins. Co., 10 Allen 281. See also Felton *v.* Brooks, 4 Cush. 203. — Merrifield *v.* Baker, 9 Allen 29.

"ANY STRIP OR WASTE" &c. The clause relative to waste

by the mortgagee is not often inserted, and does not seem to be of much importance.

"As also a note" &c. It is not necessary that a note, or other collateral personal security for the debt, should be given with the mortgage. Rice *v.* Rice, 4 Pick. 349.

"Then this deed" &c. In a case where this provision, that upon fulfilment of the condition the deed should be void, was omitted, it was held that the deed should still be considered a mortgage. Steel *v.* Steel, 4 Allen 417.

"But it is agreed" &c. This clause is generally introduced by the words — "*And provided also,*" but the word *provided* is technically and properly used only for introducing a condition. It was therefore correctly employed in commencing the preceding paragraph, which is the true *condition* of the mortgage. This clause however is by no means another condition, as would seem to be implied by the use of the words — "and provided also," but is a mutual agreement between the mortgagor and mortgagee.

This agreement that the grantee may retain possession &c. is rendered necessary by the principle that, unless there be an agreement to the contrary, a mortgagee has a right to immediate possession, and may eject the mortgagor before breach of the condition. Lackey *v.* Holbrook, 11 Met. 458 — Gen. St. c. 140, s. 9. Such agreement however, though not expressly set forth, may in some cases appear by necessary *implication* from the terms of the condition of the mortgage. Wales *v.* Mellen, 1 Gray 512.

In the blank forms in general use this clause only stipulates that "until default" &c. "the grantee shall have no right to enter and take possession," — but it would seem that, even

though without any right of *entry*, a mortgagee would still be entitled to recover of a lessee, holding under a lease prior to the mortgage, all rent accruing after execution of the mortgage. The form given above has been framed with a view to cover this case also. See Russell *v.* Allen, 2 Allen 42.

For a case where it was provided that the mortgagor, until condition broken, might make *leases* of the mortgaged premises, see Haven *v.* Adams, 4 Allen 80.

STAMP. Upon every mortgage a fifty cent stamp is required for every five hundred dollars, or fractional part thereof, of the amount for which such mortgage is given as security. Inter. Rev. Law, Schedule B. "Mortgage."

II. — POWER OF SALE MORTGAGE.

This differs from the common mortgage only in the addition of provisions authorizing a sale of the premises in case of failure by the mortgagor to perform the condition. The forms in general use vary greatly, but after a careful examination of all those most approved, we offer the following which, though quite brief in comparison with many, will, we think, be found to include all that it is desirable to provide for.

But upon any default in the payment of the money above-mentioned or of the interest thereon, the said grantee, his executors, administrators, or assigns, may sell the granted premises, with all improvements that may be thereon, at public auction in said Boston, first publishing a notice of the time and place of sale once each week for three successive weeks in one or more newspapers published in Boston aforesaid, and in his or their own name or names, or as the attorney of the said grantor, may convey the same by proper deed or deeds to the purchaser or purchasers absolutely and in fee simple; and such sale shall forever bar the grantor and all persons claiming under him from all right and interest in the granted premises, whether at law or in

equity. And out of the money arising from such sale the said grantee or his representatives shall be entitled to retain all sums then secured by this deed, whether then or thereafter payable, including all costs, charges, and expenses incurred or sustained by reason of any failure or default on the part of the said grantor or his representatives to perform and fulfil the condition of this deed or any covenant or agreement herein contained, rendering the surplus, if any, together with an account of all such costs, charges and expenses to the said grantor or his heirs or assigns.

And it is agreed that the said grantee, his executors, administrators or assigns, or any person or persons in his or their behalf, may purchase at any sale made as aforesaid, and that no other purchaser shall be answerable for the application of the purchase money; and that, until default in the performance of the condition of this deed, the grantor and his heirs and assigns may hold and enjoy the granted premises and receive the rents and profits thereof.

NOTES.

"The sale of a mortgaged estate, being made in pursuance of a valid power given by the owner, vests in the purchaser an estate in fee, free from the original condition and from any right of redemption." Kinsley *v.* Ames, 2 Met. 29, 30. But see a *quære* whether there can be a valid power of sale mortgage of the real estate of a married woman, in Roarty *v.* Mitchell, 7 Gray 243.

Under a power in the form given above a valid sale may be had after the death of the mortgagor. Varnum *v.* Meserve, 8 Allen 158.

The validity of the sale will not be affected by the fact that the mortgagee has previously made an entry to foreclose the mortgage, and has received rents and profits to an amount insufficient to discharge the mortgage debt, nor, as against a *bonâ fide* purchaser without notice, by the fact that a tender of the amount due on the mortgage has been previously made by the mortgagor to the mortgagee, such tender not having been followed by any bill to redeem. Montague *v.* Dawes, 12 Allen 397.

The fact, that a prior assignment of the mortgage was not recorded till after the sale, will not affect the validity of the sale, if no one was misled thereby. Montague *v.* Dawes, 12 Allen 397, 400.

It is provided by statute that no sale or transfer by the mortgagor shall impair or annul any right or power of attorney given in the mortgage to the mortgagee to sell or transfer the mortgaged property as attorney or agent of the mortgagor. Gen. St. c. 140, s. 39.

It is also provided by statute that if, at the time of executing a power of sale mortgage, the mortgagor had no wife, or if his wife joined in the deed and released her dower, a sale under the power will bar all claim of dower in the estate. Gen. St. c. 140, s. 44.

"BUT UPON ANY DEFAULT" &c. Another form, often more desirable than that given above, is as follows:—"*But upon any default in the performance of the foregoing condition, the said grantee,*" &c.

"MAY SELL" &c. Until recently most power of sale mortgages provided that the mortgagee might *enter* and sell, but since the case of Roarty *v.* Mitchell, 7 Gray 243, in which it was held that, under a deed in that form, a sale would not be valid, if made without a previous entry, or at least a demand for entry, it has been customary to omit all reference to such prior entry.

"IN SAID BOSTON." In many mortgages the sale is required to be "on the premises" or "on or near the premises." The first of these expressions is bad, because a mortgagor in possession might easily prevent such a sale, and the second, though better, seems to be objectionable from the difficulty

that might arise in naming the place of sale in the published notice. If such notice named the place of sale only as "on or near the premises," or as "near the premises," it might be objected to as too indefinite, — while if it stated it as "on the premises," the mortgagee would be as liable to have the sale prevented, as if his deed had expressly required the sale to be made there.

"FIRST PUBLISHING A NOTICE" &c. The manner of publishing notice must of course vary greatly according to the wishes of parties in each case. The notice specified in the form given above is about such as is usually required.

"AND OUT OF THE MONEY" &c. The provisions regarding the disposal of the proceeds of the sale, the rendering of an account, &c., are often so inserted as to make the validity of the sale depend upon their due fulfilment and execution; but such a form is obviously objectionable.

A mortgagee making a sale under a power may give the purchaser credit for a portion of the purchase money, but he must in such case account to the mortgagor for the whole amount of the purchase money *as cash.* Bailey *v.* Ætna Ins. Co. 10 Allen 286.

"INCLUDING ALL COSTS, CHARGES, AND EXPENSES." These words will cover a reasonable sum paid for legal advice respecting the sale, and a reasonable compensation for the mortgagee's time and trouble in making it. Varnum *v.* Meserve, 8 Allen 158. (In this case $30.00 was allowed for legal advice and making the deed and $20.00 for the mortgagee's time and trouble.) A compensation to the mortgagee is however often specially provided for by inserting before the words — "rendering the surplus," a clause to the following effect — "to-

gether with a commission of — per cent on the gross amount of said sale, to be allowed to the grantee or his representatives as a compensation for his or their trouble and services."

"To the said grantor or his heirs or assigns." As to the party to whom the surplus is to be paid in the case of the death of the mortgagor, see Varnum *v.* Meserve, 8 Allen 158. If the equity of redemption be sold by the mortgagor, the mortgagee must account for the surplus to the grantee of the equity. Buttrick *v.* Wentworth, 6 Allen 79.

"And it is agreed." It may be well after these words to insert an additional provision as follows — "that on any sale made as aforesaid the grantor or his heirs or assigns will upon request execute and deliver such further deeds or instruments as may be necessary or proper to confirm such sale and to vest the title to the premises sold in the purchaser thereof."

As to the validity and effect of the provision that the mortgagee or his assigns &c. may purchase at the sale, see Montague *v.* Dawes, 12 Allen 397, 399.

As to the form of the papers to be executed upon making a sale under the power see at a subsequent page.

Stamp. Upon a power of sale mortgage the leading conveyancers of Boston place, in addition to the stamps required for it regarded as *mortgage* simply, an additional $1.00 stamp for the *power of attorney* which it contains.

GENERAL POINTS RELATIVE TO MORTGAGES.

An agreement to give "a mortgage" is complied with by giving one in the common form without a power of sale. Capron *v.* Attleborough Bank, 11 Gray 492.

The validity of a mortgage of land situated in this State is to be decided by our laws, although it was executed in another State in which the parties resided. Goddard *v.* Sawyer, 9 Allen 78.

A conveyance to secure a debt, made not to the creditor but to a third person in trust, will not constitute a mortgage. Munro *v.* Merchants' Bank, 11 Allen 216, 223.

MORTGAGES TO SECURE FUTURE ADVANCES &c. A valid mortgage may be given to secure future advances or liabilities. Goddard *v.* Sawyer, 9 Allen 78. — Hills *v.* Farrington, 6 Allen 80. — Barnard *v.* Moore, 8 Allen 273. — Commercial Bank *v.* Cunningham, 24 Pick. 270. See also 3 Cush. 306, 309 — 3 Met. 268 — 10 Pick. 199. — 1 Pick. 389, 398. When this is effected by making the mortgage in terms to secure a note for a round sum, the actual advances or liabilities, or whatever indebtedness may in fact, by the stipulations made by the parties, be covered by the mortgage, may be shown by parol. Hills *v.* Farrington, 6 Allen 80. — Commercial Bank *v.* Cunningham, 24 Pick. 270.

But where the mortgagor's interest in the mortgaged property has been attached and the mortgagee has been summoned as trustee of the mortgagor, such attachment will have priority over any indebtedness subsequently arising from the mortgagor to the mortgagee. Barnard *v.* Moore, 8 Allen 273. And it would seem that any attachment or duly recorded conveyance of the mortgagor's interest would have a like priority over subsequent advances, &c. See Boswell *v.* Goodwin, 31 Conn. 81.

Though a mortgage be not made in terms to cover future advances, yet where sums are actually advanced with the understanding that the mortgage shall stand as security for them, upon a bill to redeem by the mortgagor the Court, on

the principle that he who asks equity must do equity, will not aid the mortgagor by suffering him to redeem without allowing for such advances to the amount of the full face of the mortgage. Stone *v.* Lane, 10 Allen, 74.

MORTGAGES TO SECURE SUPPORT, &c. As to these see the cases collected in Bennett & Heard's Digest, vol. 2, p. 283.

MORTGAGE NOTE.

Secured by Mortgage.

$1000.00. BOSTON, 1st January, 1867.

For value received I promise to pay to C. D. or order the sum of one thousand dollars in three years from this date, with interest semi-annually at the rate of six per cent. per annum.

A. B.

In presence of
M. N.

If there be more than one promisor the note should read — "we jointly and severally promise."

When interest is reserved at a rate higher than six per cent, it will be well to add to the note words to this effect, "during said term and for such further time as the said principal sum or any part thereof shall remain unpaid;" otherwise, in case the note should not be paid when due, the mortgagor might claim that after maturity only six per cent could be recovered, the express agreement for the higher rate extending only to that date. See St. 1867, c. 56.

As mortgage notes are often allowed to run for many years after maturity, it is important that they should be signed in the presence of an attesting witness, as thereby they are brought within those provisions of the Statute of Limitations which allow an action to be brought within twenty years after the cause of action accrues. Gen. St. c. 155, s. 4.

It is not customary to stamp a mortgage note, it being pro-

vided in the statute that "whenever any bond or note shall be secured by a mortgage, but one stamp shall be required to be placed on such papers; Provided: That the stamp duty placed thereon shall be the highest rate required for said instruments or either of them." Inter. Rev. Law, s. 160.

GUARANTY OF MORTGAGE NOTE.

BOSTON, 1st January, 1867. For value received and in consideration of the loan for which the above note is given, which loan is this day made at our request, we hereby jointly and severally guarantee to C. D. above-named, his executors, administrators or assigns, the payment of the above note and interest and in default of payment by the promisor, we hereby promise to pay the same on demand, waiving demand on the promisor and notice.

For a case relating to a guaranty of a mortgage note, see Crocker *v.* Gilbert, 9 Cush. 131.

ASSIGNMENT OF MORTGAGE.

Know all men that I, C. D., of &c., the mortgagee named in a certain mortgage deed given by A. B. to secure the payment of one thousand dollars, dated 1st January 1865, and recorded in Suffolk Registry, liber 901, folio 74, in consideration of one thousand dollars to me paid by E. F., of &c., the receipt whereof is hereby acknowledged, do hereby assign, transfer and set over to the said E. F. the said mortgage deed, the note and claim thereby secured, and all my right, title, and interest in the estate thereby conveyed.

To have and to hold the same to the said E. F. and his heirs and assigns to his and their use and behoof forever.

In witness whereof I, the said C. D., have hereunto set &c.

NOTES.

If the assignment be endorsed upon the mortgage, it should read — "that I, C. D. of &c., the within named mortgagee, in consideration of" &c., — "assign, transfer and set over to the said E. F. the within mortgage deed" &c.

If the assignment be by an *assignee* of the mortgage, it should read "that I, E. F. of &c., the assignee of a certain mortgage given by A. B. to C. D. to secure" &c., or "the assignee of the within mortgage."

"ASSIGN, TRANSFER AND SET OVER." "The proper technical words of an assignment are 'assign, transfer and set over.' But the words 'give, grant, bargain and sell,' or any other words, which show the intent of the parties to make a complete transfer, will amount to an assignment." 4 Cruise Dig. 88.

As to the form and effect of assignments of mortgages in general, see Gould *v.* Newman, 6 Mass. 239. — Hills *v.* Eliot, 12 Mass. 26, 30. — Warden *v.* Adams. 15 Mass. 233, 236.

A warranty deed (Ruggles *v.* Barton, 13 Gray, 506), a quitclaim deed (Hunt *v.* Hunt, 14 Pick. 374), or even a mortgage (Murdock *v.* Chapman, 9 Gray 156), given by a mortgagee will operate as an assignment of his mortgage. See also Welch *v.* Priest, 8 Allen 165.

An assignment of a mortgage made by an executor or administrator at any time before the equity of redemption is foreclosed is good, though made without license of court, &c. Gen. St. c. 96, s. 12, 13, — c. 98, s. 5. — Burt *v.* Ricker, 6 Allen 77. But prior to the passage of St. 1849, c. 47 such license was necessary to the validity of any assignment of a mortgage by an executor or administrator. *Ex parte* Blair, 13 Met. 126. By St. 1851, c. 288, however, all such assignments made subsequent to the Revised Statutes and prior to the Statute of 1849 were declared to be valid, though made without license.

One of two *executors* may make a valid assignment of a mortgage. George *v.* Baker, 3 Allen 324, 326.

But one of several *trustees* cannot make a valid assignment. Austin *v.* Shaw, 10 Allen 552.

It would *seem* that where a mortgage is made to two jointly to secure a note payable to them jointly, an assignment executed by one in the name of both, accompanied by an indorsement of the note similarly executed, will effect a good legal assignment of the mortgage. See Bruce *v.* Bonney, 12 Gray 107, 110, 111.

Where a mortgage is made to two, and one of them dies, it would seem that, in case the mortgage was given to secure a *joint* note or debt, the survivor alone may assign the mortgage, but in case the mortgage was given to secure *separate* debts or obligations, the representatives of the deceased mortgagee must join. See Gen. St. c. 89, s. 13, 14. — Gilson *v.* Gilson, 2 Allen 115, 117. — Savary *v.* Clements, 8 Gray 154. — Burnett, *v.* Pratt, 22 Pick. 556.

A foreign executor or administrator cannot make a valid assignment of a mortgage of land situated in this State. Cutter *v.* Davenport, 1 Pick. 81. — Hutchins *v.* State Bank, 12 Met. 421, 424.

An assignment by a trustee is presumed to be valid, unless a restriction upon his power of alienation be shown. Manahan *v.* Varnum, 11 Gray 405.

An assignment of a mortgage made to one, whose duty it is to pay and cancel it, will be construed as a release or discharge. Brown *v.* Lapman, 3 Cush. 554. — Strong *v.* Converse, 8 Allen 559. — Butler *v.* Seward, 10 Allen 466. — Bemis *v.* Call, 10 Allen 512, 516.

But an assignment of a mortgage to the owner of the equity of redemption, not being the original mortgagor, but a subsequent purchaser of the equity, whose manifest interest is to hold the two different titles distinct, to protect him against some other interest which would otherwise intervene, will not be held to operate as a discharge or merger of the mortgage. And this rule holds even where the transfer of the mortgage

is effected by the giving of a quit-claim deed instead of an assignment in the usual form. Savage *v.* Hall, 12 Gray 363. — Pitts *v.* Aldrich, 11 Allen 39.

And where a grantee, whose deed was fradulent and void as against the grantor's creditors, took from a prior mortgagee of the same premises a quit-claim deed of all his interest therein, such deed, though expressly stating that the mortgage was thereby "cancelled and discharged," was held to constitute not a discharge but an assignment. Crosby *v.* Taylor, 15 Gray 64.

For a case in which an instrument somewhat ambiguous in form, though evidently intended to act as a discharge, was held to have that effect, though such effect proved to be wholly contrary to the interests of the party to whom the instrument was given, see Wade *v.* Howard, 11 Pick. 289. — Same case, 6 Pick. 492.

A mortgagee, who is disseized, cannot make a valid assignment. Dadman *v.* Lamson, 9 Allen 85.

A written assignment *not under seal* will not pass the title to the assignee. Adams *v.* Parker, 12 Gray 53.

For a case of a qualified assignment, see Phelps *v.* Townley, 10 Allen 554.

STAMP. "Upon every assignment or transfer of a mortgage the same stamp tax upon the amount remaining unpaid thereon" is required, as is "imposed upon a mortgage for the same amount." Inter. Rev. Law, Schedule B. under "Mortgage."

EXTENSION OF MORTGAGE.

Know all men that we, L. M., the assignee of a certain mortgage from A. B. to C. D., dated 1 Jan. 1867 and recorded in Suffolk Registry liber 901, folio 74, — and N. O., the present owner of the equity of redemption of the estate described in said mortgage, do hereby mutually agree to extend the time of payment of the said mortgage and of the note secured thereby until

the first day of January in the year eighteen hundred and seventy, anything in the condition of said mortgage to the contrary notwithstanding, — the interest being payable semi-annually as heretofore. And until said 1st January 1870 the payment of the principal of said mortgage and note is not to be demanded of said N. O. or his representatives or tendered to the said L. M. or his representatives.

Witness our hands and seals this 1st January 1868.

In presence of L. M.
S. T. N. O.

STAMP. An extension of a mortgage would seem to come within the provision of the statute which requires that upon any "renewal or continuance of any agreement, contract, or charter, by letter or otherwise, a stamp duty shall be required and paid equal to that imposed on the original instrument." Inter. Rev. Law, Schedule B., under "Mortgage."

DISCHARGE OF MORTGAGE.

Know all men that I, C. D. of &c., the mortgagee named in a certain mortgage, dated &c. and recorded &c. do hereby acknowledge that I have received from A. B., the mortgagor named in said mortgage, full payment and satisfaction of the same; and in consideration thereof I do hereby cancel and discharge said mortgage, and release and quit-claim unto the said A. B. and his heirs and assigns forever the premises therein described.

Witness my hand and seal this 1st January 1868.

The form of a discharge of a mortgage, when to be endorsed upon the mortgage itself, or to be executed by an assignee, should be varied in a manner similar to that suggested above for an assignment.

With regard to a discharge written on the margin of the record of the original mortgage, see Gen. St. c. 89, s. 30, 31. Compare 12 Gray 111.

It seems that a foreign executor may give a valid discharge of a mortgage of land situated in this State. Hutchins *v.* State Bank, 12 Met. 421, 425.

It seems that where a mortgage is given to two or more to secure a *joint* note or debt, a discharge by one of the mortgagees will be sufficient, — otherwise if it were given to secure *separate* debts. See Goodwin *v.* Richardson, 11 Mass. 469, 472, 473. — Bruce *v.* Bonney, 12 Gray, 107, 111.

After the death of one of two persons named as grantees in a mortgage given to secure a joint debt, the survivor can without doubt discharge the mortgage. See cases cited above under Assignment of Mortgage, p. 70.

By the strict performance of the condition of a mortgage it will become *ipso facto* discharged, and no written release will be needed except as evidence of the facts. And where the condition is for the payment of money at a time certain, its payment *at* or *before* the day will of itself discharge the mortgage. Holman *v.* Bailey, 3 Met. 55, 58. — Merrill *v.* Chase, 3 Allen 339. — Doody *v.* Pierce, 9 Allen, 141, 142.

But *it seems* that upon payment *after* the day the title will not revest in the mortgagor without further proceedings. See Howe *v.* Lewis, 14 Pick. 329, 331. — Holman *v.* Bailey, 3 Met. 55, 57. — Maynard *v.* Hunt, 5 Pick. 240, 243. — Wade *v.* Howard, 11 Pick. 289. — Parsons *v.* Welles, 17 Mass. 419. The title remaining in the mortgagee will not however be such as to enable him to maintain a writ of entry against the mortgagor. Slayton *v.* McIntyre, 11 Gray 271. But on the other hand the mortgagor cannot maintain trespass *quare clausum* against the mortgagee. Howe *v.* Lewis, 14 Pick. 329.

It has been held that an unaccepted tender of the amount due upon a mortgage did not operate as a discharge thereof, but it does not appear whether the tender in this case was made *before* or *after* breach of condition. Currier *v.* Gale, 9 Allen 522, 524.

The fact that a mortgage note has been cancelled and a new one given in its place will not operate of itself to discharge

the mortgage, unless such was the intention of the parties. Pomroy *v.* Rice, 16 Pick. 22. — Walkins *v.* Hill, 8 Pick. 522. — Davis *v.* Maynard, 9 Mass. 242.

But though no mere change in the *form* of the indebtedness is allowed to operate as a discharge, (see Bryant *v.* Pollard, 10 Allen 8,) yet, after actual payment of the debt, the mortgage cannot be *revived* by an oral agreement to keep it in force to secure a distinct and independent debt. Joslyn *v.* Wyman, 5 Allen 62.

For cases in which an *assignment* will operate as a *discharge* of a mortgage see under Assignment of Mortgage, p. 70.

Where a mortgage has been given by a woman to secure the note of another person, the subsequent marriage of the mortgagor to the mortgagee will not operate as a discharge of such mortgage. Bemis *v.* Call, 10 Allen 512.

Where a mortgagor has been in uninterrupted possession of the mortgaged premises for twenty years, the law will presume that the mortgage has been paid and discharged, unless there is evidence of part payment of principal or interest within that time, or other positive and unequivocal evidence to the contrary. Cheever *v.* Perley, 11 Allen 584. — Inches *v.* Leonard, 12 Mass. 379. — Howland *v.* Shurtleff, 2 Met. 26. — Bacon *v.* McIntire, 8 Met. 87. — See also 10 Cush. 76.

In this connection it may be noted that endorsements of payments made on a note in the handwriting of the holder do not of themselves, as against the maker, furnish any competent evidence of such payments. Davidson *v.* Delano, 11 Allen 523.

Stamp. Discharges of mortgages are considered not to require any stamp, receipts given "for the satisfaction of any mortgage" being expressly excepted from the rule requiring a two cent stamp upon receipts. Inter. Rev. Law., Schedule B., under "Receipts."

PARTIAL RELEASE OF MORTGAGED PREMISES.

Know all men that I, C. D., of &c., the mortgagee named in a certain mortgage, dated &c., and recorded &c., in consideration of the sum of one thousand dollars to me paid by A. B., the mortgagor named in said mortgage, the receipt whereof is hereby acknowledged, do hereby remise, release and forever quit-claim unto the said A. B. a certain parcel of land situated, &c. being a portion of the premises conveyed by said mortgage deed, and bounded as follows: —

To have and to hold the same to the said A. B. and his heirs and assigns to his and their own use and behoof forever.

But this release shall in no possible event or contingency be deemed or held to affect or impair the right of the said C. D. to hold all the remainder of the parcel of land conveyed in said mortgage deed, and not hereby released, as security for the sum still remaining due upon said mortgage, which sum this day amounts to two thousand dollars with interest on the same from the first day of January last.

Witness my hand and seal this &c.

Where a mortgagee releases a *portion* of the mortgaged premises, if, since the giving of the mortgage, they have been divided by the mortgagor, and are held by different parties, he may lose a portion of his security though the remainder of the parcel fully equals in value the amount of his mortgage. See Allen *v.* Clark, 17 Pick. 47 — George *v.* Wood, 9 Allen 80.

ACKNOWLEDGMENT BY MORTGAGOR OF ENTRY TO FORECLOSE.

I, A. B., the within-named mortgagor, [or — I, N. O., the person claiming under the within-named mortgagor,] hereby acknowledge and certify that C. D., the within-named mortgagee, [or — E. F., the assignee of the within mortgage,] has [by R. S. his agent thereto duly authorized] this day made an open, peaceable and unopposed entry upon the premises described in the within mortgage for breach of the condition therein contained.

Dated this seventh day of January 1868.

The above certificate must be *written on the original mortgage deed*, and, within thirty days after the entry, recorded in the proper Registry of Deeds with notes of reference as required by Statute, — otherwise the entry will not be effectual for the purpose of foreclosure. It does not appear to be necessary that this certificate should be acknowledged. Gen. St. c. 140, s. 2.

The party signing such certificate is estopped to deny its truth. Oakham *v.* Rutland, 4 Cush. 172. — Bennett *v.* Conant, 10 Cush. 163.

If it be intended that the party signing the certificate shall remain in possession of the premises, it may be well to add at the end of the certificate the words — "And I now hold the said premises as the tenant of the said C. D." It would seem however that this would be implied as matter of law even though not stated in terms. See Bennett *v.* Conant, 10 Cush. 163, 166. — Lennon *v.* Porter, 5 Gray 318, 320.

STAMP. The above requires a five-cent stamp as a "certificate." Inter. Rev. Law, Schedule B.

CERTIFICATE OF TWO WITNESSES TO PROVE ENTRY TO FORECLOSE.

We hereby certify that we were this day present and saw C. D., the mortgagee named in a certain mortgage deed given by A. B. dated &c., and recorded &c., [or, E. F. the assignee of a certain mortgage given by A. B. to C. D., dated &c., and recorded &c.,] make an open, peaceable and unopposed entry on the premises described in the said mortgage for the purpose by him declared of foreclosing said mortgage for breach of the condition thereof.

Dated this seventh day of January 1868.

P. R.

S. T.

COMMONWEALTH OF MASSACHUSETTS.

SUFFOLK ss. BOSTON, 7th January 1868. Then personally appeared the above-named P. R. and S. T. and made oath that the above certificate by them subscribed is true, before me,

X. Y., *Justice of the Peace.*

It is not necessary, as with the certificate of acknowledgment of entry by the mortgagor, that the above certificate should be written on the original mortgage deed, (Bartlett *v.* Johnson, 9 Allen 530, 535), but it is essential to its validity that it should be sworn to before a justice of the peace and within thirty days after the entry recorded in the proper Registry with due notes of reference. Gen. St. c. 140, s. 2.

If the entry be made by an agent of the mortgagee, the certificate should read — "and saw C. D., the mortgagee, &c., by his agent L. M. thereto duly authorized by a power of attorney, dated &c. and recorded &c., make an open" &c.

Though the statute requires the entry to be "*open*," it has been held that it will be equally valid if made *at night* and *in secret*. Ellis *v.* Drake, 8 Allen 161.

A certificate of entry duly made and recorded is not conclusive evidence that there has been any breach of the condition of the mortgage. Pettee *v.* Case, 11 Gray 478.

As to an entry on one parcel in the name of several included in the same mortgage, see Lennon *v.* Porter, 5 Cush. 318.

No lapse of time or length of possession by a mortgagee will give him an absolute title to the mortgaged premises, unless he makes a formal entry to foreclose and records a proper certificate thereof, or obtains judgment for possession in an action brought to foreclose the mortgage. See Goodwin *v.* Richardson, 11 Mass. 469, 474.

Stamps. The certificate of the witnesses and that of the Justice of the Peace each require a five-cent stamp, unless the two together are to be considered as constituting an "affidavit," and therefore wholly exempt under s. 9 of the Act of March 2, 1867, which provides that "all affidavits shall be exempt from stamp duty."

It may sometimes be desirable for the mortgagee to avail

himself of both modes of proving an entry, — the certificate of witnesses, and the acknowledgment of the mortgagor. This may easily be effected by appending to a certificate by witnesses in the usual form a further certificate as follows: — "I, C. D., the within-named mortgagor, hereby acknowledge and certify that an entry to foreclose the within mortgage has been made this day as set forth in the foregoing certificate. C. D." It will of course be necessary in such cases to write both certificates upon the original mortgage.

SURRENDER OF POSSESSION BY MORTGAGEE.

Know all men that I, C. D., of &c., the mortgagee named in a certain mortgage, dated &c., and recorded &c., in consideration of the payment to me this day by A. B., the mortgagor named in said deed, of the interest to this date upon the principal sum secured by said mortgage and of the further sum of one dollar, the receipt of all which is hereby acknowledged, do hereby surrender to the said A. B. and his heirs and assigns the possession of the real estate described in said mortgage, which possession was taken by me on the 1st January 1867 for breach of the condition of said mortgage, and evidence of which is recorded in said Registry, liber ——, fol. —. But it is expressly understood and agreed that nothing herein contained shall in any way, except as above specifically provided, affect or impair my rights or interest under the said mortgage, the whole amount of the principal sum secured by which is still due and unpaid.

Witness my hand and seal this 1st July 1867.

STAMP. The above will require a five-cent stamp as an "agreement or contract." Inter. Rev. Law, Schedule B.

SALE UNDER POWER OF SALE MORTGAGE.

The papers needed in carrying out such sale must, of course, vary greatly in terms according to the different provisions of the original power. The following deed, notice, and

affidavit have been framed with a view to meet the provisions of the form given on p. 61, but they can easily be altered so as to adapt them to the requirements of each special case.

Whereas A. B. did by his mortgage deed, dated &c., and recorded &c., convey the premises hereinafter described to one C. D., which said mortgage has by deed of assignment, dated &c., and recorded &c., been assigned to E. F. hereinafter named; — and whereas in and by said mortgage deed the grantee therein named, his executors, administrators, or assigns were authorized and empowered, upon any default in the payment of the principal sum secured by said mortgage or of the interest thereon, to sell the said premises, with all improvements that might be thereon, at public auction in Boston, first publishing a notice as therein required, and in his or their own name or names, or as the attorney of the said grantor, to convey the same by proper deed or deeds to the purchaser or purchasers absolutely and in fee-simple; — and whereas there has been such default, and notice has been published, and a sale has been made, as more particularly appears in and by the affidavit hereto subjoined; —

Now therefore know all men that we, A. B., of &c., by E. F., his attorney duly authorized as aforesaid, and E. F., of &c., by virtue and in execution of the power contained in said mortgage deed as aforesaid and of every other power and authority me hereto enabling, do, in consideration of the sum of eleven hundred dollars to us paid by G. H., of &c., the receipt whereof &c., hereby give grant, bargain, sell and convey unto the said G. H. a certain parcel of land &c. * * * * being the same parcel described in the aforesaid mortgage deed.

To have and to hold the same to the said G. H. and his heirs and assigns to his and their own use and behoof forever.

In witness whereof we, the said A. B. and E. F., have hereunto set our hands and seals this &c.

Signed and sealed in presence of
M. N.
O. P.

A. B. SEAL.
by E. F.
E. F. SEAL.

COMMONWEALTH OF MASSACHUSETTS.

Suffolk *ss.* Boston, 7th May 1868. Then personally appeared the above-named E. F. and acknowledged the foregoing instrument to be the free act and deed of himself and of the said A. B. before me

X. Y. *Justice of the Peace.*

AFFIDAVIT.

I, E. F., of &c., the assignee of a certain mortgage deed given by A. B. to C. D., dated &c., and recorded &c., on oath depose and say that default was made in the payment of the principal sum mentioned in the condition of said mortgage deed and of the interest thereon, the said principal and six months interest having become payable on the fourth day of January last and not having been then or at any time paid or tendered to any person authorized to receive the same; and that, pursuant to the provisions of said mortgage deed, I published on the second, ninth, and sixteenth days of April now last past in the Boston Post, a newspaper published in Boston aforesaid, a notice of which the following is a true copy.

MORTGAGEE'S SALE.

By virtue of a power of sale contained in a certain mortgage deed given by A. B. to C. D., dated &c., and recorded &c., will be sold at public auction upon the premises [or, at the office of N. A. T. & Co. No. —, —— Street, Boston,] on Wednesday the twentieth day of April 1868 at eleven o'clock in the forenoon all and singular the premises conveyed by said mortgage deed, namely, — a certain parcel of land &c. &c.

E. F. *Assignee of said Mortgage.*

And I further depose and say that pursuant to said notice and at the time and place in said notice appointed, the said default still continuing, I sold the premises conveyed by said mortgage deed at public auction by N. A. T., a duly licensed auctioneer, to G. H., of &c., for the sum of eleven hundred dollars, which amount was bid by the said G. H., and was the highest bid made therefor at said auction, and I have this day in pursuance of said power contained in said mortgage delivered to said G. H. the foregoing deed of said mortgaged premises.

Witness my hand this eleventh day of May A. D. 1868.

E. F.

COMMONWEALTH OF MASSACHUSETTS.

Suffolk *ss.* Boston, 11th May 1868. Then personally appeared the above-named E. F. and made oath that the foregoing affidavit by him subscribed is true, before me.

X. Y. *Justice of the Peace.*

NOTES.

The statute (Gen. St. c. 140, s. 42) requires that the above affidavit should be filed in the Registry of Deeds within thirty days after the sale, and it is further provided (Gen. St. c. 140, s. 43) that, if in due form, the affidavit or a duly certified office copy of the record thereof, shall be admitted as evidence that the power of sale was duly executed.

It is difficult to determine exactly what facts the statute intends that the affidavit should cover, — whether, for instance, it can afford evidence of the default in the payment of principal or interest, — but as it would appear from section 43 that it cannot be used as evidence at all, unless it includes *all* the facts, whatever they may be, which the statute intended should be included, the only safe way in framing such an affidavit is to set forth all facts which, like the default in the payment of interest or principal, though they are not strictly the "acts in the premises" of the party making the sale, yet are important elements in making it "appear" "that he has sold the property in the manner required by the power." It is to be noticed also that the statute requires that the affidavit should set forth the facts "*fully and particularly.*" Where the mortgage requires an entry on the premises before the sale, the fact of such entry should of course be set forth in the affidavit. See Roarty *v.* Mitchell, 7 Gray 243. But it has been decided that the affidavit need not state the rendering of an account or the disposition that has been made of the purchase money. Childs *v.* Dolan, 5 Allen 319.

It would seem indeed to be a serious question whether a failure to record a proper certificate will not have the effect, not merely to deprive the parties of the most convenient evidence of the regularity of the proceedings in reference to the sale, but also to render the sale itself wholly null and void. The words of the statute are (Gen. St. c. 140, s. 42) that the mortgagee &c. "*shall* within thirty days" &c. "file a copy of the notice," &c.

It will be found not only to be a matter of convenience, but to add to the authenticity of the instrument, to use for the copy of the notice in the affidavit a printed slip, cut from the paper in which it was published, and pasted in its proper place upon the affidavit.

In stating in the deed or affidavit the date on which the principal or interest became payable, it should be remembered that three days of grace are to be allowed in fixing the time of payment of the principal and of all instalments of principal, — also of interest falling due at the same time with instalments of principal, and perhaps of *all* interest, whether so falling due or not. Coffin *v.* Loring, 5 Allen 153. And in reckoning the days of grace it is of course important to notice whether the third day falls on a Sunday or legal holiday.

It seems that a sale at public auction under a power of sale will not be valid unless made by a licensed auctioneer. Hosmer *v.* Sargent, 8 Allen 97, 99 — Gen. St. c. 50, s. 9.

The mortgagee may, in the exercise of a reasonable discretion, *adjourn the sale* from time to time, and it is not necessary that this should be done through the agency of a licensed auctioneer nor that any new notice of the sale should be given. Hosmer *v.* Sargent, 8 Allen 97. (This case relates to a mortgage of *personal* property, but it would seem that the above rule must be equally applicable to mortgages of *real* estate.)

To the deed and affidavit as given above is sometimes add-

ed for greater certainty an assignment of the mortgage, but as according to the cases cited above at page 69, the deed must itself act as an assignment of the mortgage, such additional assignment would seem to be superfluous.

It is necessary that the sale should purport to be a sale of the *estate* and not of the *equity of redemption.* Fowle *v.* Merrill, 10 Allen 350.

Instead of a simple sale pursuant to the power, a mortgagee may obtain a decree of Court for a sale in the manner provided by Gen. St. c. 140, s. 38, 40, 41.

It seems that a mortgagor will have no remedy where the acts of the mortgagee in execution of the power of sale, although strictly in accordance with the terms of the deed, are performed in a secret manner with the view and effect of preventing the fact of the sale from coming to the knowledge of the mortgagor. Randall *v.* Hazleton, 12 Allen 412, 415, 418.

Stamp. The deed must, of course, like other deeds, be stamped according to the value of the estate conveyed,—the affidavit, under Act of March 2nd. 1867, s. 9, is exempt from stamp duty.

CONVEYANCES TO USES.

Though the old English statute of 27 Henry VIII., known as the Statute of Uses, is theoretically an important element in accounting for the validity of the deeds in common use, it is seldom of any direct practical importance to the conveyancer in this country. There are cases however where, in framing deeds to accomplish certain special purposes, the aid of this ancient statute may sometimes be directly availed of

even in this State and at the present day. Thus where one or more persons, owning the fee or an interest in the fee of an estate, wish so to convey that the estate may thereafter be held by themselves in a different manner from that in which it had before been held, or wish to admit others to an interest with them in the estate, this statute affords the means of effecting the object by a single instrument. So also where a husband desires to make a conveyance to his wife, or a wife to her husband, this may be accomplished by a single conveyance to uses instead of by two deeds as it is generally done.

A few such deeds have been the subject of decisions by our Supreme Court. For instance, husband and wife, being seized in fee in her right, conveyed the estate to C. D. to the use of themselves, their heirs and assigns, and the heirs and assigns of the longest liver of them; and it was held that C. D. stood seized to the use limited in the deed, and that the Statute executed the use, thereby making the husband and wife complete owners of the estate as joint tenants. Thatcher *v.* Omans, 3 Pick. 521. Thus the difficulty of making the same parties both grantor and grantee in the same deed was avoided, and the third party, C. D., after affording a mere receptacle into which the estate might pass *out* of the grantors, delivered it back instantaneously by virtue of the Statute, without its having been for the smallest fraction of time in any way subject to his disposal or liable to be affected by his acts. Similar cases may be found in Johnson *v.* Johnson, 7 Allen 196 — Bullard *v.* Goffe, 20 Pick. 252. The old Statute of Uses may also be availed of where it is desired to create a freehold to commence *in futuro*, to cause an estate to shift from one person to another by matter *ex post facto*, or to accomplish other objects often of importance in England, but which, by reason of the different habits and customs of the people, are seldom sought after here. In

Morgan *v.* Moore, 3 Gray 319, an estate had been conveyed to A. in fee, in trust for certain purposes during the life of B., and upon the death of B. to the use of C. and his heirs, and it was held that upon B's. death the Statute of Uses immediately executed the use limited in the deed, and the fee thereupon became vested in C. without any conveyance to him from A. See also Davis *v.* Hayden, 9 Mass. 514, where an estate had been conveyed to A. and his heirs *in trust* for B. during her life, then *to the use* of her husband during his life, and then *to the use* of the joint heirs of their bodies.

Where a use is limited upon a use, it is held that the Statute executes only the first use, while the second is void at law and only to be enforced in equity as a trust. Hence if in a deed of bargain and sale, which operates in all cases by way of raising a use which the Statute executes, a use be limited to a party other than the grantee, it will be a use upon a use and as such not executed by the Statute. A conveyance in the form of a deed of bargain and sale should therefore never be adopted where the intention is to take advantage of the effect of the Statute of Uses in the manner we have been considering. It has however been decided that, even though the words "bargain and sell" be contained in a conveyance to uses, the Court will, in order to effectuate the intent of the parties and for the purpose of allowing the use limited to be executed by the Statute, construe the deed, not as a deed of bargain and sale, but as a feoffment. See Thatcher *v.* Omans, 3 Pick. 521, 530. — Stearns *v.* Palmer, 10 Met. 32, 35. — Brooks *v.* Jones, 11 Met. 191, 192. But though the words "bargain and sell" will not work any positive evil, it is of course preferable to employ only words proper to a feoffment, for instance, — "give, grant, enfeoff, and convey." The Gen. Sts. (c. 89, s. 8) provide that a deed of quit-claim and release shall be "sufficient to pass all the estate which a

grantor could lawfully convey by a deed of bargain and sale." This provision does not however require that such deed shall operate *in the same manner* as a deed of bargain and sale, and as a release does not in English law derive its effect from the Statute of Uses, but is a conveyance at common law, a deed using the words commonly inserted in a quit-claim deed — "remise, release and forever quit-claim" — would seem to be perfectly proper as a conveyance to uses. See also Johnson *v.* Johnson, 7 Allen 199, where the deed before the Court was apparently a quit-claim deed.

The following forms will serve as examples of these conveyances to uses.

CONVEYANCE BY THREE OLD TRUSTEES TO TWO CONTINUING AND ONE NEW TRUSTEE.

To all men to whom these presents shall come A. B., C. D., and E. F., all of Boston, Massachusetts, send greeting.

Whereas by a certain deed, dated &c., and recorded &c., X. Y. conveyed to the said B., D., and F. a certain parcel of land hereinafter described in trust for the purposes set forth in said deed; — and whereas it is provided in said deed that, in the event of the resignation of either of said trustees and of the appointment of a new trustee in accordance with the provisions of said trust deed, the remaining trustees and any trustee who shall so resign shall execute such deeds, conveyances and assignments as may be needful or proper in the circumstances; — and whereas the said E. F. has resigned the said trust and G. H. of said Boston has been duly appointed by &c. as trustee in the place of him, the said E. F.

Now therefore know ye that, in consideration of the premises and of one dollar to us paid by the said G. H., we the said A. B., C. D., and E. F., trustees as aforesaid, do hereby remise, release and forever quit-claim unto the said G. H. all that parcel of land situated on Washington Street in said Boston and bounded as follows: —

To have and to hold the above-released premises to him, the said G. H., and his heirs, to the use of the said A. B., C. D., and G. H., and the survivors and survivor of them and the heirs of such survivor and their and his assigns,

but nevertheless in trust for the purposes set forth in the above-mentioned deed from X. Y. to the said B., D., and F.

And I, the said E. F., for myself and my heirs, executors and administrators, do covenant with the said A. B., C. D., and G. H. and their survivors, heirs and assigns that the above-released premises are free from all incumbrances knowingly or willingly made or suffered by me.

In witness whereof we, the said A. B., C. D., and E. F., trustees as aforesaid, have hereunto set our hands and seals this first day of &c.

If the habendum merely expressed the estate to be given to the use of A. B., C. D., and G. H. "and their heirs and assigns" without mention of "survivors," they would still hold as joint tenants under G. S. c. 89, s. 13, 14.

In connection with the above form it may be remarked that, where a new trustee is appointed by the Probate or Supreme Court under Gen. St. c. 100, s. 9, the estate will vest in such new trustee by operation of law and without any conveyance, though the Court may order such conveyance as may be "proper or convenient." Gen. St. c. 100, s. 9, 10.

CONVEYANCE BY HUSBAND TO WIFE.

Know all men by these presents that I, A. B. of &c. (the husband) in consideration of one dollar to me paid by C. D. of &c. (a third party) and for other good and valuable considerations me hereto moving, do hereby remise, release and forever quit-claim unto the said C. D. a certain parcel of land &c.

To have and to hold the same, with all the privileges and appurtenances to the same belonging, to the said C. D. and his heirs to the use of my wife, S. B., and her heirs and assigns forever.

In witness whereof I, the said A. B., have hereto set my hand and seal this &c.

DEED OF ADMINISTRATOR OR EXECUTOR.

To all men to whom these presents shall come A. B., of Boston, Massachusetts, Administrator of the estate of G. M., late of said Boston, deceased, sends greeting.

Whereas by virtue of a license granted to the said Administrator on the second day of March current by the Probate Court for the County of Suffolk, the estate of the said deceased hereinafter described was on the twentieth day of said March sold at public auction to C. D. of said Boston for the sum of ten thousand dollars, which amount was bid by the said C. D. and was the highest bid made therefor at said auction.

Now therefore know ye that I, the said A. B., Administrator as aforesaid, in consideration of the said sum of ten thousand dollars paid by the said C. D., the receipt whereof is hereby acknowledged, do by virtue of the aforesaid license hereby give, grant, bargain, sell, and convey unto the said C. D., a certain parcel of land situated on Court Street in said Boston and bounded as follows: —

To have and to hold the granted premises to him the said C. D. and his heirs and assigns to his and their use and behoof forever.

And I do hereby, for myself and my heirs, executors and administrators, covenant with the said C. D. and his heirs and assigns that I am the duly appointed and legal Administrator of the estate of the said G. M.; — that the license aforesaid was granted by a Court of competent jurisdiction; — that I gave a bond to account for and dispose of the proceeds of said sale according to law, which bond was approved by the Judge of said Probate Court; [or, that no bond was required of me upon the granting of said license] — that the notice of the time and place of said sale was given according to the order of said Court; — and that the said premises were sold accordingly and in good faith at public auction to the said C. D. as aforesaid.

In witness whereof I, the said A. B., Administrator as aforesaid, have hereunto set my hand and seal this thirtieth day of March in the year one thousand eight hundred and sixty-six.

If the deed is by an executor it should read "A. B. of &c., Executor of the will of G. M." &c.

The covenants in the above deed are framed with a view to adapt them to the provisions of St. 1864, c. 137. See also

Gen. St. c. 102, s. 1–23, 48. These covenants are not of much importance, for the matters to which they relate are such that the purchaser may easily satisfy himself regarding them by an examination in the Registry of Probate, and ought in fact always to have such examination made.

It seems that though the covenants be *expressly* made by the grantor "*in his capacity of administrator*," he will be personally liable upon them, while the estate of the deceased will not be bound. Sumner *v.* Williams, 8 Mass. 162. See also 9 Met. 63, — 15 Pick. 428.

As to the extent to which one might be estopped from setting up any claim to an estate sold by him as executor &c. see p. 43.

Where the deed, in the body of it, purports to be executed by a person as administrator of the estate of another, the addition of the word "administrator" to the signature is wholly unnecessary. Chadbourn *v.* Chadbourn, 9 Allen 173.

Where in the deed, as also in the order of Court containing the license, and in the condition of the bond, the grantor was described as an "administratrix," when in fact she was an "executrix," such misnomer was held not to invalidate the sale. Cooper *v.* Robinson, 2 Cush. 184, 190.

A misrecital of the time when the license was granted will not render the deed invalid, provided it contains also a recital of other facts which show that the sale was made under the true license. Thomas *v.* Le Baron, 8 Met. 355, 361.

St. 1864, c. 137 purports to point out and enumerate all the matters essential to the validity of sales of real estate by executors &c., but, in the case of executors and administrators selling for the payment of debts, it is questionable whether such sale may not be rendered void by a matter not there referred to, — namely by reason of the license not having been granted until after the expiration of the two years limited by

statute for bringing actions against executors or administrators, and when there was no debt in existence against which that statute was not an effectual and conclusive bar. Heath *v.* Wells, 5 Pick. 140, 145 and Thompson *v.* Brown, 16 Mass. 172 are decisions to this effect, but these cases arose prior to the existence of any statute provision similar to St. 1864, c. 137. But in the recent case of Lamson *v.* Schutt, 4 Allen 359, though the point is not needed for the decision of the case, it was distinctly laid down that a sale under such circumstances would be wholly void and would pass no title to the purchaser. In Cooper *v.* Robinson, 2 Cush. 184, 190 however, it was said that such sale would be good, but in this case also this was only a dictum, since it does not appear but that the license authorizing the sale in question was legally and properly granted.

It is to be noted that a license may in many cases be properly granted even after the expiration of the two years. See Palmer *v.* Palmer, 13 Gray 326. — Cooper *v.* Robinson, 2 Cush. 184. — Hudson *v.* Hulbert, 15 Pick. 423. — Richmond, Petitioner, 2 Pick. 567. — Allen, Petitioner, 15 Mass. 58.

DEED OF GUARDIAN.

To all men to whom these presents shall come A. B., of Boston, Massachusetts, Guardian of L. M., a minor and child of G. M., late of said Boston, deceased, sends greeting.

Whereas by virtue of a license granted to the said Guardian on the fifth day of January last by the Probate Court for the County of Suffolk, the interest of the said Ward in the real estate hereinafter described was on the thirtieth day of said January sold at public auction to C. D. of said Boston for the sum of ten thousand dollars, which amount was bid by the said C. D. and was the highest bid made therefor at said auction.

Now therefore know ye that I, the said A. B., Guardian as aforesaid, in consideration of the said sum of ten thousand dollars paid by the said C. D., the receipt whereof is hereby acknowledged, do by virtue of the aforesaid license hereby give, grant, bargain, sell and convey unto the said C. D. all the right, title and interest of the said L. M. in and to a certain parcel of land situated on Court Street in said Boston and bounded as follows: —

To have and to hold the granted premises to him the said C. D., and his heirs and assigns, to his and their use and behoof forever.

And I do hereby, for myself and my heirs, executors, and administrators, covenant with the said grantee and his heirs and assigns that I am the duly appointed and legal Guardian of the said L. M.; — that the license aforesaid was granted by a court of competent jurisdiction; — that I gave a bond to account for and dispose of the proceeds of said sale according to law, which bond was approved by the Judge of said Probate Court [*or*, that no bond was required of me upon the granting of said license]; — that the notice of the time and place of said sale was given according to the order of said Court; — and that the said premises were sold accordingly and in good faith at public auction to the said C. D. as aforesaid.

In witness whereof I, the said A. B., Guardian as aforesaid, have hereunto set my hand and seal this first day of February in the year one thousand eight hundred and sixty-six.

The covenants in the above deed are framed with a view to adapt them to the requirements of St. 1864, c. 137. — See also Gen. St. c. 102, s. 6, 24, 25, 28, 34–36, 41, 48. The remarks made on p. 89 relative to the omission of the covenants in an administrator's deed are equally applicable here.

It seems that though the covenants be *expressly* made by the grantor "*in his capacity as guardian*" he will be *personally* liable upon them, while the estate of his ward will not be bound. Donahoe *v.* Emery, 9 Met. 63. — Whiting *v.* Dewey, 15 Pick. 428.

As to the form of the notice of time and place of sale, see Wyman *v.* Hooper, 2 Gray 141.

As to guardian's deeds see further Sowle *v.* Sowle, 10 Pick. 376.

DEED OF SHERIFF UNDER GEN. ST. c. 103, s. 40.

To all men to whom these presents shall come A. B., of Boston in the County of Suffolk and Commonwealth of Massachusetts, a Deputy Sheriff for said County, sends greeting.

Whereas the said A. B., as Deputy Sheriff as aforesaid, did on the first day of &c. by virtue of an execution issued upon a judgment recovered by V. W. against X. Y. on the tenth day of &c. in the Superior Court for said County of Suffolk, seize and take all the right which the said X. Y. had on the third day of &c., being the time when the same was attached on mesne process, of redeeming the mortgaged premises hereinafter described; — and whereas afterwards, having duly given the notices and caused to be published the advertisements required by law, the said A. B. did, on the twentieth day of &c. and in accordance with said notices and advertisements, sell the said right of redemption at public auction to C. D., of said Boston, for the sum of one thousand dollars, which amount was bid by the said C. D. and was the highest bid made therefor at said auction.

Now therefore know ye that I, the said A. B., as Deputy Sheriff as aforesaid, in consideration of the aforesaid sum of one thousand dollars to me paid by the said C. D., the receipt whereof is hereby acknowledged, do hereby give, grant, bargain, sell, and convey unto the said C. D. all the right, which the said X. Y. had at the aforesaid time of attachment, of redeeming the parcel of land situated on State Street in said Boston and bounded as follows: —

To have and to hold the granted premises to the said C. D. and his heirs and assigns to his and their use and behoof forever, subject nevertheless to the right of the said X. Y. and his representatives to redeem the same according to law.

And I, the said A. B., for myself and my heirs, executors, and administrators, do covenant with the said C. D. and his heirs and assigns that in making the aforesaid attachment, seizure, and sale, and in everything the same concerning, I have complied with all the rules and requirements of the law in such cases made and provided.

In witness whereof I, the said A. B., Deputy Sheriff as aforesaid, have hereto &c.

In a sheriff's deed, (or in any deed which is the mere execution of a power given by the Statutes) there is no implied covenant in the word "give." Dow *v.* Lewis, 4 Gray 468.

A sheriff could not probably be required to insert any express covenant in a deed given by him. But as to the force and effect of such covenant, if inserted, see Wade *v.* Merwin, 11 Pick. 280.

A sheriff's deed will convey no title unless the description of the premises is accurately stated and corresponds with the description in the return upon the execution. Whiting *v.* Hadley, 3 Allen 357.

A sheriff's deed will convey no title as against a subsequent purchaser or attaching creditor without notice, unless recorded within three months after the sale. Gen. St. c. 103, s. 40 — De Witt *v.* Harvey, 4 Gray 486, 490. — Houghton *v.* Bartholomew, 10 Met. 138.

DEED OF EXECUTOR OR TRUSTEE UNDER POWER IN WILL.

Know all men by these presents that whereas E. J., late of Boston, Massachusetts, in and by his last will authorized and empowered A. B. of &c., his executor therein named, in case his personal estate should prove insufficient for the payment of his just debts and legacies, to sell and convey such portion of his real estate as might be needed for that purpose, as will more fully appear by reference to said will, and whereas on the 3d November 1865 the said will was duly proved and allowed by the Probate Court for the County of Suffolk and letters testamentary thereon were duly issued to the said A. B., and whereas the personal estate of said deceased has proved wholly insufficient for the payment of his just debts and legacies and it has become necessary to sell and convey the real estate hereinafter described for said purpose; —

Now therefore I, the said A. B., executor as aforesaid, do by virtue and in execution of the power to me given in and by said will, and of every other power and authority me hereto enabling, and in consideration of ten thousand

dollars to me paid by C. D., of &c., the receipt &c., hereby give, grant, bargain, sell and convey unto the said C. D., a certain parcel &c.

To have and to hold &c.

In witness whereof I, the said A. B., executor as aforesaid, have &c.

The above form must be varied to meet the special provisions of the will in each case; — for instance, if the will requires a sale at public auction, such sale should be set forth with sufficient particularity to show that the requirements of the will have been complied with.

"As a general rule trustees, not for a charity or public trust, must join in holding or conveying trust property for the preservation of the trust, and separate conveyances by each of his aliquot part or separate share will be void." Per Shaw C. J. in Chapin *v.* Universalist Society in Chicopee, 8 Gray 580, 583.

A deed of a trustee, purporting to convey only all the right, title, and interest of the *cestui que trust*, will not transfer the legal title. Titcomb *v.* Currier, 4 Cush. 591.

It seems that a deed from a trustee will convey the *legal title*, although no power to sell be given to the trustee in the instrument creating the trust, and no license to sell has been obtained from any competent tribunal. Goodrich *v.* Proctor, 1 Gray 567, 569. — Parker *v.* Converse, 5 Gray 336, 340. — Baldwin *v.* Timmins, 3 Gray 302.

DEED OF ESTATE OF MARRIED WOMAN.

By Gen St. c. 108, s. 2. (substantially reënacting Rev. St. c. 59, s. 2,) it is provided that — "A husband and wife may, by their joint deed, convey the real estate of the wife, which is not her separate property, in like manner as she might do

by her separate deed if she were unmarried; but the wife shall not be bound by any covenant contained in such joint deed."

This statute provision was merely declaratory of the law as fixed by judicial decisions. (See 10 Allen 70.) In Fowler *v.* Shearer, 7 Mass. 14, 21, Chief Justice Parsons says that at common law the deed of a married woman is not merely voidable but void, but that in this State by an immemorial usage, *founded in necessity*, a deed of conveyance executed by husband and wife, acknowledged and recorded, will pass the wife's lands, not only as to the husband, but as to her and her heirs; — that this usage has never extended to make her liable to an action on the covenants in the deed further than they may operate by way of estoppel, nor to authorize her to convey any interest she has in lands without her husband's joining in the deed. There is however another theory which founds the validity of a deed conveying the real estate of a married woman, not on usage and necessity, but on the Prov. St. Mass. 9 Will. 3, s. 1, which gave authority to transfer by deed any estate which a person could alien at common law by any mode of conveyance whatsoever, and inasmuch as at common law the lands of a married woman could be aliened by her suffering a fine and recovery with her husband, it is claimed that this statute rendered it competent for her to effect the same object by executing jointly with her husband a deed conveying the estate. See Bartlett *v.* Bartlett, 4 Allen 440, 442. — Thatcher *v.* Omans, 3 Pick. 521, 525.

As to real estate which is the *separate property* of a married woman under the laws of this State, it is provided by Gen. St. c. 108, s. 3, that it may be conveyed by her by a deed in which her husband joins, or with his assent in writing, or in certain cases with the consent of one of the judges of the Supreme Judicial, the Superior, or the Probate Court, and

upon the covenants contained in such deed she will be liable. See Basford *v.* Pearson, 7 Allen 504. As to what will constitute a sufficient "assent in writing" of the husband, see Hills *v.* Bearse, 9 Allen 403.

The separate real estate of married women includes that held by them under ante-nuptial contracts, or conveyed or devised to their sole and separate use under St. 1845, c. 208, — also that which women married in this Commonwealth after June 3d, 1855 owned at the time of their marriage, or which they have since received by descent, devise, or the gift of any person except their husbands, (St. 1855, c. 304) — also that which came in either of these ways after June 27th, 1857 to any women then married in this Commonwealth, (St. 1857, c. 249) and all that has come since May 31st, 1860 or that may hereafter come by descent, devise, gift, or *grant* to any married woman whatever. (Gen. St. c. 108, s. 1. See also note of Commissioners on Revision of Gen. St. upon this section.)

A married woman who "comes from another State or country without her husband, he never having lived with her in this State" "may make and execute deeds and other instruments in her own name." Gen. St. c. 108, s. 29.

"A wife whose husband has absented himself from the State, abandoning and not sufficiently maintaining her, or whose husband has been sentenced to confinement in the State prison, may upon her petition be authorized by the Supreme Judicial Court" to sell and convey her real estate. Gen. St. c. 108, s. 31.

The separate deed of a married woman, except so far as authorized by the Statute provisions cited above, is not merely voidable, but absolutely void. Concord Bank *v.* Bellis, 10 Cush. 276. And it will not, even though it be a warranty deed and fraudulently dated as of a time prior to her marriage, and signed by the name she then bore, estop her or her heirs

from claiming the land from the grantee or from a purchaser from him without notice. Lowell *v.* Daniels, 2 Gray 161. (On this subject see further ante p. 43.)

Nor will a married woman's sole deed of her separate estate afford any ground upon which, after the husband's death, equity will decree the execution by her of a new deed. Townsley *v.* Chapin, 12 Allen 476.

But under St. 1845, c. 208 a married woman might by her sole deed convey, subject only to her husband's tenancy by the courtesy, real estate which had been conveyed to her to her sole and separate use according to the provisions of that Statute. Beal *v.* Warren, 2 Gray 447, 457. See also Smith *v.* Bird, 3 Allen 34. Such separate conveyance was however by St. 1855, c. 304 forbidden to all women thereafter married, and by St. 1857, c. 249 to all married women without exception.

A deed signed by both husband and wife, but in which the wife's name nowhere occurs except in the signature, and the body of which contains no allusion to her or her right, will not pass her title. Melvin *v.* Props. Locks & Canals, 16 Pick. 137. Nor a deed which was wholly in the name of the husband until the in testimonium clause, which read "In witness whereof I, the said A. B., and I, S. B., wife of A., in token that I relinquish all my right in said bargained premises, have hereunto set our hands" &c. Bruce *v.* Wood, 1 Met. 542. See also Raymond *v.* Holden, 2 Cush. 264, 270.

But the fact that in the in testimonium clause the wife is said to sign 'in token of release of all right of dower in the granted premises' cannot be allowed to control the previous parts of the deed, if these are in the proper form of a joint deed of husband and wife. Bartlett *v.* Bartlett, 4 Allen 440, 444. — Perkins *v.* Richardson, 11 Allen 538.

The validity of a deed conveying the real estate of a mar-

ried woman will not be affected by the fact that she received no portion of the consideration paid. Bartlett *v.* Bartlett, 4 Allen 440, 442.

A deed of real estate of a married woman, not her separate property under our statutes, which the husband signed in token of his assent thereto, but not as a grantor, was held to be wholly void, and not even to be reformed or otherwise affording ground for relief in equity. Jewett *v.* Davis, 10 Allen 68. (This deed was dated 16th July 1857.)

Where the husband is under guardianship, provision is made for the wife to execute deeds of her real estate jointly with the guardian. Gen. St. c. 108, s. 12.

A husband's interest as tenant by the courtesy in his wife's separate estate is not, during her life, an interest which he can convey by his separate deed, or which will pass to his assignee in insolvency. Staples *v.* Brown, 13 Allen . — Lynde *v.* McGregor, 13 Allen .

EXECUTION OF DEEDS.

I. BY CORPORATIONS.

When the grantor in a deed is a corporation, the *in testimonium* clause and the execution should be substantially as follows: —

In witness whereof, the said ——— Corporation has caused its corporate seal to be hereto affixed and these presents to be signed, executed, acknowledged and delivered in its name and behalf by C. D. its President, hereunto duly authorized, this first day of &c.

——— Corporation
by C. D., President.

SEAL.

A form which varies considerably from the above may however be valid, — thus a deed has been held good as the deed of a corporation which read — "In witness whereof the said Corporation has caused these presents to be signed by C. D., its President, and its corporate seal to be hereto affixed. C. D. President," and a seal. Haven *v.* Adams, 4 Allen 80. So also a deed in this form — "In witness whereof the said Corporation, by C. D., its Treasurer, has hereto set its name and seal. C. D., Tr. ——— Corporation," and a seal. Hutchins *v.* Byrnes, 9 Gray 367. But the following form has been held to be bad — "In witness whereof I, the said C. D. in behalf of the said Corporation and as its Treasurer, have hereto set my hand and seal. C. D., Treasurer of ——— Corporation," and a seal. Brinley *v.* Mann, 2 Cush. 337. See also Ellis *v.* Pulsifer, 4 Allen 165, — Abbey *v.* Chase, 6 Cush. 54. — Sargent *v.* Webster, 13 Met. 497. — Fullam *v.* West Brookfield, 9 Allen 1.

"A corporation as well as an individual person may use and adopt any seal." Mill Dam Foundery *v.* Hovey, 21 Pick. 417, 428. See also Brinley *v.* Mann, 2 Cush. 337, 340. The signature of the duly authorized agent of a corporation executing a deed in its behalf being proved, the seal annexed, though mere paper and wafer without any specific stamp or mark, will be presumed to be the seal of the corporation. But if a corporation have adopted a particular seal, *it seems* that it cannot use any other. Where however a seal of a particular description had been annexed to three deeds of a corporation at different times, that fact, in the absence of any vote adopting or ratifying such seal, was held not to prove it to be the corporate seal to the exclusion of other modes of ensealing instruments. Stebbins *v.* Merritt, 10 Cush. 27, 34. See also Damon *v.* Granby, 2 Pick. 345, 352. The mere impression of the corporate seal upon the paper of the deed without the addition of any wafer &c. will be sufficient, see page 50.

As to the authority which an agent should have for executing a deed in behalf of a corporation, see Hutchins *v.* Byrnes, 9 Gray 367. As to his authority in cases of simple contracts, see Melledge *v.* Boston Iron Co., 5 Cush. 158, 175, 178.

It will generally be well to subjoin to the deed of a corporation certified copies of the vote, if any, authorizing its execution, and also of such portions of the charter and by-laws as may relate to the matter.

II. BY PARTNERS.

A deed of real estate owned by partners must be signed and sealed by each and all of them, and a deed executed by one partner only in the name of the firm will convey only the undivided portion of the estate owned by such partner. Dillon *v.* Brown, 11 Gray 179. But a valid transfer of *personal* property of a firm, either absolute or by way of mortgage, may be executed by a single partner, and it is immaterial whether he signs the firm name or the name of each partner separately. Patch *v.* Wheatland, 8 Allen 102. — Tapley *v.* Butterfield, 1 Met. 515. And such transfer will be equally valid though a seal be unnecessarily added. Milton *v.* Mosher, 7 Met. 244.

III. BY ATTORNEY.

A letter of attorney to execute an instrument requiring a seal must itself be under seal, (see Banorgee *v.* Hovey, 5 Mass. 11 — Warring *v.* Williams, 8 Pick. 326. — Burns *v.* Lynde, 6 Allen 305) and, if for the conveyance of real estate, must be acknowledged and recorded. Gen. St. c. 89, s. 29. [If made by husband and wife for the purpose of authorizing a conveyance of her real estate, and not merely for the release of her dower, it must be acknowledged by *both* husband and

wife. Gen. St. c. 89, s. 29.] The acknowledgment and recording of letters of attorney was not required however prior to the passage of St. 1849, c. 205. See Valentine *v.* Piper, 22 Pick. 85, 90.

But where the name of a grantor is subscribed to a deed by another person in the grantor's presence and at his request, no written authority is required, as otherwise a party "physically incapable of making a mark could never make a conveyance or execute a deed." Gardner *v.* Gardner, 5 Cush. 483. In such a case "the act of writing is regarded as the grantor's personal act as much as if he had held the pen and signed and sealed the instrument with his own hand," and *it seems* that it is not necessary that anything be added to the grantor's name to show that it has been written by the hand of another. Wood *v.* Goodridge, 6 Cush. 117, 120.

Where however a deed has been executed by an attorney without any authority under seal, such deed may be rendered valid by a subsequent ratification by parol. McIntyre *v.* Park, 11 Gray 102. See also Copeland *v.* Mercantile Ins. Co., 6 Pick. 198, 203.

A power of attorney given to *two* must be executed by them jointly. Copeland *v.* Mercantile Ins. Co., 6 Pick. 198, 202.

Where a sealed instrument is to be executed for a party by his attorney, it should, except in the in testimonium clause, read exactly the same as if it were to be executed by the party himself. This clause and the signature should be substantially as follows: —

In witness whereof I, the said A. B. by C. D. my attorney hereto duly authorized, [by letter of attorney, dated &c., and recorded &c.,] have hereunto set my hand and seal this first day of &c.

A. B. (SEAL.)
by C. D.

The portion in brackets it is well to insert when the instrument is of such a nature as to require the recording of the letter of attorney.

Though the above is the proper form, other forms may not be invalid, the material points being apparently that the deed should purport to be the deed of the principal and not of the agent, and that the name of the principal should in some way appear in the signature. Thus a deed purporting to be the deed of A. B. and signed "*C. D. for A. B.*" was held to be well executed as the deed of A. B. Mussey *v.* Scott, 7 Cush. 215. But a deed beginning "*I, C. D.,*" or "*I, C. D. as attorney for A. B.*" or "*I, C. D. by virtue of a power of attorney from A. B.,*" and signed "*C. D.*" or "*C. D. attorney to A. B.*" will not be good as the deed of A. B. Copeland *v.* Mercantile Ins. Co., 6. Pick. 198. — Elwell *v.* Shaw, 16 Mass. 42. — Fowler *v.* Shearer, 7 Mass. 14. See also Kimball *v.* Tucker, 10 Mass. 192. — Seaver *v.* Coburn, 10 Cush. 324.

A deed of State lands, executed by an agent pursuant to a resolve of the Legislature, seems to form an exception to the general rule as above stated, such a deed having been held to be sufficient though executed by the agent in his own name as agent and under his own seal. Ward *v.* Bartholomew, 6 Pick. 409, 414.

It seems that, except in cases where one writes the name of another to a deed in his presence and by his direction, an attorney must add his own signature as such to that of his principal, or in some way indicate that the instrument is not executed by the grantor's own hand. Wood *v.* Goodridge, 6 Cush. 117. But in instruments not under seal the simple signature of the principal's name may be sufficient. Greenfield Bank *v.* Crafts, 4 Allen 447, 454, — Brigham *v.* Peters, 1 Gray 139, 146, — Merrifield *v.* Parritt, 11 Cush. 590, 597.

The strictness of the rule applicable to sealed instruments

is not however extended to writings not under seal. In these "the particular form of executing the contract is not material if it indicate a ministerial act on the part of the agent." Rice *v.* Gove, 22 Pick. 161. In fact it is held that in cases of written simple contracts *not negotiable*, it is competent to show by *parol evidence* that the party nominally contracting on the face of the paper is actually the agent of another, who can sue and be sued upon the contract as if it were made in his name. Lerned *v.* Johns, 9 Allen, 419. — Huntington *v.* Knox, 7 Cush. 371, 374 — Brown *v.* Parker, 7 Allen 339. — Slawson *v.* Loring, 4 Allen 342 — Haverhill Ins. Co. *v.* Newhall, 1 Allen 130. — Bank of British N. America *v.* Hooper, 5 Gray 567, 570. In such cases however it would seem that the agent would be liable on the contract as well as the principal, at least unless at the time of making the contract he disclosed the name of his principal, or it was known to the other contracting party. Huntington *v.* Knox, 7 Cush. 374 — Winsor *v.* Griggs, 5 Cush. 210, 212. — Haverhill Ins. Co. *v.* Newhall, 1 Allen 130.

But in cases of negotiable paper the question who is liable on the contract "must be determined by the terms of the paper itself" and not by external evidence as to the fact of agency or the intent of the parties. Draper *v.* Mass. Steam Heating Co., 5 Allen 338. It "depends exclusively on the fair result of the inspection of the writings themselves — that is whether, on the instruments as they appear, it can be reasonably inferred that the person executing disclosed his principal, and that the intent was to bind the principal and not himself." Slawson *v.* Loring, 5 Allen 342. See also Brown *v.* Parker, 7 Allen 337. — Bank of British N. America *v.* Hooper, 5 Gray 567, 571, and cases there cited.

To this general rule there is however this apparent exception, — that where the name of an agent has been adopted by a person or corporation as a substitute for their own name in

signing notes or executing other written contracts, the principal may be liable on such contracts executed under the name of such agent, though on the face of the paper nothing appears to show that the agent did not contract wholly on his own account and without reference to any principal. In such cases the adopted name is held to be in law equivalent to the actual name of the party. Brown *v.* Parker, 7 Allen 337, 338 — Melledge *v.* Bost. Iron Co., 5 Cush. 158, 176, 178.

In considering the question of the intent of parties to negotiable paper as shown on its face one fact, which has a strong influence in determining the contract to be that of the principal, is the introduction of his name as a part of the signature to the instrument. Morell *v.* Codding, 4 Allen 403. Thus in the following cases the contract has been held to be that of the principal.

A note signed "*Pro A. B. — C. D.*" Long *v.* Colburn, 11 Mass. 97.

A note beginning "*I promise*" &c., and concluding "*for the ——— Corporation. C. D.*" Emerson *v.* Providence Hat Manuf. Co., 12 Mass. 237.

A note signed "*C. D. agent for A. B.*" Ballou *v.* Talbot, 16 Mass. 461.

A note beginning "*We jointly and severally promise*" &c., and signed "*C. & D. for A. B.*" Rice *v.* Gove, 22 Pick. 158.

A note beginning "*We promise*" &c. and signed "*——— Corporation. C. D. Treasurer.*" Draper *v.* Mass. Steam Heating Co., 5 Allen 338.

See also Jefts *v.* York, 4 Cush. 371.

But where the only thing tending to show that the party signing acted as agent and not as principal, is the addition to his name in the signature of the words "*President,*" or "*Trustee,*" "*of the ——— Corporation,*" such fact will not relieve the party signing from personal responsibility. Fiske *v.* Eld-

ridge, 12 Gray 474, — Haverhill Ins. Co. *v.* Newhall, 1 Allen 130.

It was indeed held in an early case that a note beginning "*I, the subscriber, Treasurer of the* ——— *Corporation promise*" &c. and signed "*C. D. Treasurer of the* ——— *Corporation,*" was the note of the Corporation. Mann *v.* Chandler, 9 Mass. 335; but it was said in Draper *v.* Mass. Steam Heating Co., 5 Allen 339 that this case "is hardly to be reconciled with the current of authorities;" perhaps however a *treasurer,* as the officer usually charged with the duty of making the notes of a corporation, may stand in a different position from a president or trustee. (See 12 Gray 476.) See to the same effect in Barlow *v.* Cong. Soc. in Lee, 8 Allen 460, 461.

But though the name of the principal does not form a part of the signature, there may still be some expression in the body of the instrument sufficient to show the intent to make it the contract of the principal.

Thus a bill of exchange, stamped in the margin "*A. B.,*" and concluding "*which place to account of A. B. C. D. agent,*" was held to purport to be the bill of A. B. Fuller *v.* Hooper, 3 Gray 334. See also Tripp *v.* Swanzey Paper Co. 13 Pick. 291. — Mayhew *v.* Prince, 11 Mass. 54. But the simple fact that a bill contains a direction to charge the amount thereof to the account of a third person will not make it the bill of such third person. Bass *v.* O'Brien, 12 Gray 477.

So where a note began "I, as treasurer of the ——— corporation, or my successors in office," and was signed "C. D., Treasurer," it was held to be the note of the corporation. Barlow *v.* Cong. Soc. in Lee, 8 Allen 460. The opinion of Gray J. in this case contains a careful examination of all the Massachusetts and of many other American and English decisions upon this subject.

So where a guaranty of a negotiable note was in this form

—"*By authority from A. B. I hereby guaranty the payment of this note. C. D.,*" it was held to be the guaranty of A. B. and not of C. D. New England Ins. Co. *v.* DeWolf, 8 Pick. 56.

See also the case of Northampton Bank *v.* Pepoon, 11 Mass. 288, where a negotiable note payable to the Berkshire Bank was endorsed in blank by its president in this form "*C. D. Attorney,*" and it was held that this endorsement was sufficient, for the reason that C. D. having endorsed in blank, the holder of the note was entitled to write over the signature such words as would give effect to the endorsement.

But in the following cases it has been held that the intent to bind a principal did not sufficiently appear.

A note beginning —"*We, the prudential committee for and in behalf of the Baptist Church in Lee,*" and signed "*C. D.*" "*E. F.*" and "*G. H.*" Morell *v.* Codding, 4 Allen 403.

A note beginning —"*We the subscribers, trustees for the proprietors of a new meeting-house,*" and signed "*C. D.*" and "*E. F.*" Packard *v.* Nye, 2 Met. 47.

A note beginning "*We the subscribers jointly and severally promise to pay X. Y. or order for the ——— Corporation,*" and signed "*C. D.,*" "*E. F.*" and "*G. H.*" Bradlee *v.* Bost. Glass Manufactory, 16 Pick. 347.

See also Simonds *v.* Heard, 23 Pick. 120.

It may be remarked in this connection that one who executes a note in terms as agent for a third person and in his name, but who in fact had no authority to act as such agent, cannot be held personally liable as promisor. Jefts *v.* York, 4 Cush. 371. But he may be liable in an action of tort for *falsely representing* himself as duly authorized as such agent. Jones *v.* Wolcott, 2 Allen 247.

It has been held however that, when one executed a note in this form "*I, C. D. as guardian of A. B. promise*" &c., and

signed "*C. D., Guardian,*" inasmuch as he could not by such note bind the person or estate of his ward, he bound himself personally. Forster *v.* Fuller, 6 Mass. 58.

DELIVERY OF DEEDS.

What Constitutes. — "A deed may be delivered to a party by words without any act of delivery, as if the writing sealed lieth on the table and the feoffor or obligor saith to the feoffee or obligee, go and take up the writing, it is sufficient for you; or it will serve the turn; or take it as my deed; or the like words, it is a sufficient delivery. If however a party throws a writing on the table and says nothing, and the other party takes it up, this does not amount to a delivery, unless it be found to be put there with the intent to be delivered to the party or to be taken up by him." Per Wilde J. in Mills *v.* Gore, 20 Pick. 28, 36.

Delivery to an agent of the grantee is a good delivery to the grantee. Western R. R. *v.* Babcock, 6 Met. 346, 356.

The delivery of a deed by the grantor to a Register of Deeds for record will not of itself amount to a delivery to the grantee. Maynard *v.* Maynard, 10 Mass. 456. — Parker *v.* Hill, 8 Met. 447, 450. — Merriam *v.* Leonard, 6 Cush. 151. — Powers *v.* Russell, 13 Pick. 69, 77. But quære whether the grantor would, as against creditors of the grantee, be allowed in such a case to deny the delivery. See Maynard *v.* Maynard, 10 Mass. 458.

Such delivery to the Register however, if made in accordance with a prior request of the grantee that it should be so delivered, has been held to be a good delivery to the grantee. Shaw *v.* Hayward, 7 Cush. 170. — See also Thayer *v.* Stark, 6 Cush. 11, 14.

So of a delivery to a Register for the use of the grantee, followed by a subsequent assent of the grantee to the same, (Hedge *v.* Drew, 12 Pick. 141, 144,) even though such assent be not given until after the deed has been lost or stolen from the Register's office. Thayer *v.* Stark, 6 Cush. 11. But such subsequent assent has been held to be necessary to complete the delivery as against an attaching creditor of the grantor, even though the deed had been made in pursuance of a prior agreement between the parties. Samson *v.* Thornton, 3 Met. 275, 281. See further on this point remarks of Shaw C. J. in Powers *v.* Russell, 13 Pick. 69, 77.

Where a deed was written by an attorney at the request of both grantor and grantee, and the grantor had signed it, and both parties had looked at it and expressed themselves satisfied with the form of it, and the grantor had taken the deed for the purpose of obtaining the signature of his wife to her release of dower, having received of the grantee a note which was part of the consideration, it was held that there had been no delivery of the deed. Parker *v.* Parker, 1 Gray 409.

Where the grantee on receiving a deed gave a writing acknowledging that he had received it and promising to return it to the grantor on demand or to pay him the consideration, and no demand for a return of the deed had been made, it was held that the deed had been duly delivered and that the title had vested in the grantee. Howe *v.* Dewing, 2 Gray 476.

As to the facts sufficient to constitute a delivery, see also Chandler *v.* Temple, 4 Cush. 285. — Ward *v.* Winslow, 4 Pick. 518. — Mills *v.* Gore, 20 Pick. 28.

Time of. It is no objection to the validity of a deed that it was not delivered until after it was recorded. Parker *v.* Hill, 8 Met. 447. — Harrison *v.* Trustees of Phillips Academy,

12 Mass. 455, 461. — Hedge *v.* Drew, 12 Pick. 141. In the two cases last cited deeds recorded before they were delivered were, after their delivery and without any new recording, held to be valid as against attaching creditors of the grantor.

Evidence is admissible to show that a deed was in fact delivered at a time subsequent to its date. Fairbanks *v.* Metcalf, 8 Mass. 230, 240.

Presumption of. The possession by the grantee of a deed duly executed affords *primâ facie* but not conclusive evidence that the deed has been delivered. Chandler *v.* Temple, 4 Cush. 285, 287. — Ward *v.* Lewis, 4 Pick. 518, 520. — Adams *v.* Frye, 3 Met. 103, 109. And where one executed and acknowledged a deed to an infant of whom he was the guardian, the attestation stating the deed to have been "executed and delivered" in the presence of the witness, it was held that, although the grantor had retained possession of the deed, a delivery was to be presumed, inasmuch as such possession was in accordance with the nature of the grantor's duty as guardian. Moore *v.* Hazleton, 9 Allen 102, 106.

But where a deed, duly executed and recorded, was found in the possession of the grantor, and it was proved that at the time of attestation neither the grantee nor any one acting in his behalf was present, it was held that any presumption that a delivery had been made was rebutted. Powers *v.* Russell, 13 Pick. 69, 75.

Conditional or qualified delivery. Where a deed has been delivered *to the grantee*, parol evidence is inadmissible to show that the delivery was conditional or qualified, or any thing else than absolute, and such that the deed should take full effect immediately. Ward *v.* Lewis, 4 Pick. 518, 520. — Fairbanks *v.* Metcalf, 8 Mass. 230, 238.

"Whether when a deed is executed, and not immediately delivered to the grantee, but handed to a stranger to be delivered to the grantee at some future time, it is to be considered as the deed of the grantor presently, or as an escrow, is often a matter of some doubt, and it will generally depend rather on the words used and the purposes expressed than upon the name which the parties give to the instrument. When the future delivery is to depend upon the payment of money or the performance of some other condition, it will be deemed an escrow. When it is merely to await the lapse of time or the happening of some contingency, and not the performance of any condition, it will be deemed the grantor's deed presently. Still it will not take effect as a deed until the second delivery, but when thus delivered it will take effect by relation from the first delivery. But this distinction is not now very material, because when the deed is delivered as an escrow, and afterwards and before the second delivery the grantor becomes incapable of making a deed, the deed shall be considered as taking effect from the first delivery in order to accomplish the intent of the grantor, which would otherwise be defeated by the intervening incapacity." Per Shaw C. J. in Foster *v.* Mansfield, 3 Met. 412, 415. See also to the same effect in 4 Kent Com. 454. An *escrow* is "a mere writing as distinguished from a perfect deed." Burrill Law Dict. "Escrow."

In accordance with the above principles it was held in the above-cited case of Foster *v.* Mansfield that, where one executed and acknowledged a deed and delivered it to a third person with a request that he would deliver it to the grantee after the grantor's death, upon such delivery the deed took effect by relation as of the time of the first delivery, and divested the estate of the grantor as from that time. See also similar decisions in Hatch *v.* Hatch, 9 Mass. 307, — Wheel-

wright *v.* Wheelwright, 2 Mass. 447, and O'Kelly *v.* O'Kelly, 8 Met. 436. But see Rand's notes to the two cases of Hatch *v.* Hatch and Wheelwright *v.* Wheelwright, in which he doubts the validity of such deeds as being in fact testamentary in their character. The decision in the last named case contains a learned discussion of this subject by Chief Justice Parsons.

When a deed is delivered to a third person as an escrow, or to be delivered to the grantee upon a certain condition or in a certain event, and the condition is not performed or the event does not happen, the title to the property does not pass, and the deed is wholly without effect. Fairbanks *v.* Metcalf, 8 Mass. 230. — Maynard *v.* Maynard, 10 Mass. 456. So also, it seems, when the third party to whom the deed is entrusted, fails to deliver it as directed. See O'Kelly *v.* O'Kelly, 8 Met. 436.

ACKNOWLEDGMENT AND RECORDING OF DEEDS.

For a general statement of the history and theory of the law relative to the acknowledgment of deeds, see the decision of Parsons, C. J., in Pidge *v.* Tyler, 4 Mass. 541.

Importance of. — The statutes provide that — "no bargain and sale or other like conveyance of an estate in fee simple, fee tail, or for life," "no lease for more than seven years from the making thereof," and no "letter of attorney for the conveyance of real estate," "shall be valid and effectual against any person other than the grantor and his heirs and devisees and persons having actual notice thereof, unless it is made by a deed recorded" "in the registry of deeds for the county or district where the lands lie." Gen. St. c. 89, ss. 1, 3, 29. It is

further provided (Gen. St. c. 89, s. 28) that no deed shall be recorded without a certificate of acknowledgment or of proof under Gen. St. c. 89, ss. 20–27. And it has been held accordingly that if a deed be recorded without having been properly acknowledged or proved, such registration will be a mere nullity. Pidge *v.* Tyler, 4 Mass. 541. — Blood *v.* Blood, 23 Pick. 80. — See also 12 Met. 163 — 22 Pick. 91. Where however a deed had been recorded before it was delivered to the grantee, such record was, after the delivery, held to be valid and sufficient as against attaching creditors of the grantor. Hedge *v.* Drew, 12 Pick. 141, 144. — Harrison *v.* Trustees of Phillips Academy, 12 Mass. 455, 461.

But though a deed be neither acknowledged nor recorded, it will still be effectual to pass the title as against the grantor, his heirs and devisees, and persons having actual notice of it. Dole *v.* Thurlow, 12 Met. 157, 162. — Marshall *v.* Fisk, 6 Mass. 24. — Call *v.* Buttrick, 4 Cush. 345, 350. — Gilson *v.* Gilson, 2 Allen 115, 117.

There seem however to be some conveyances which do not require to be either acknowledged or recorded to give them full validity. For instance, the conveyance of an insolvent's estate to his assignee in insolvency under Gen. St. c. 118, s. 42. Hall *v.* Whiston, 5 Allen 126. So also *possibly* a conveyance by an executor or administrator under Gen. St. c. 102, s. 10. See Pond *v.* Wetherbee, 4 Pick. 312. And if this be true of such conveyances, it would seem to be equally so of conveyances by guardians and others who are authorized to sell real estate in like manner as executors and administrators. See Gen. St. c. 102, ss. 20, 24, 31, 33. In some cases the statute requires a deed to be recorded within a limited time; the deed of a tax collector conveying land sold for non-payment of taxes will not be valid unless recorded within thirty days of the day of sale. Gen. St. c. 12, s. 35. [First required by St.

1848, c. 166, s. 5. As to necessity of recording prior to this statute, see Tilson *v.* Thompson, 10 Pick. 359.]

BY WHOM THE ACKNOWLEDGMENT IS TO BE MADE. The statute requires the acknowledgment of deeds to be "by the grantors, or one of them, or by the attorney executing the same." Gen. St. c. 89, s. 18.

An acknowledgment by one of two or more grantors is equally good, whether the grantors are seized as tenants in common of the whole estate conveyed, or are separately seized of distinct parts. Shaw *v.* Poor, 6 Pick. 58.

So also it is sufficient if the grantor acknowledging the deed has merely a *contingent* life interest in the estate conveyed: — thus where husband and wife, after issue born, joined in a deed of an estate held by the wife to her separate use under St. 1845, c. 208, an acknowledgment by the husband alone was held to be good. Palmer *v.* Paine, 9 Gray 56. Compare Perkins *v.* Richardson, 11 Allen 538. See also 9 Mass. 218, — 4 Mass. 547.

To the general rule that an acknowledgment by *one* grantor is sufficient, there is however this exception, — that letters of attorney made by husband and wife for the purpose of authorizing conveyances of her real estate, — and not merely for the release of dower by the wife, — must be acknowledged by both husband and wife. Gen. St. c. 89, s. 29. Quære whether this does not render necessary such a double acknowledgment of a power of sale mortgage of the real estate of a married woman.

BEFORE WHOM. The acknowledgment may be made before any notary public (St. 1867, c. 250, s. 1) or justice of the peace in this State; (and such justice may act in his own or any other county, St. 1863, c. 157, s. 1, and might legally have

done so even prior to this Statute. Learnard *v.* Riley, 14 Allen) or before any justice of the peace, magistrate, (for meaning of word "magistrate" in this place, see Scanlan *v.* Wright, 13 Pick. 523, 528, — Palmer *v.* Stevens, 11 Cush. 147) or notary public, or commissioner appointed for that purpose by the Governor of this Commonwealth, within the United States or in any foreign country; or before a minister or consul of the U. S. in any foreign country. Gen. St. c. 89, s. 19.

It would seem that, prior to May 18th, 1867, acknowledgments of deeds before notaries public in this State were not valid, unless an ex post facto validity has been given them by St. 1867, c. 250, s. 2, which provides that all such acknowledgments made prior to the passage of that statute "shall be deemed and taken to be legal and valid."

If a person be in the regular or volunteer land service of the U. S. and without the State, his acknowledgment may be made before any officer in such service above the rank of lieutenant. St. 1863, c. 41, s. 2, 3. — St. 1864, c. 262. If a person be in the naval service of the U. S. and without the State, his acknowledgment may be made before "the paymaster, assistant paymaster, acting assistant paymaster, surgeon, or officer in command of the vessel in which such person shall at the time serve or with which he may be connected." St. 1863, c. 41, s. 2, 3.

Form of certificate. The certificate of acknowledgment must be "under the hand of the officer taking the same" and "indorsed upon the deed or annexed thereto." Gen. St. c. 89, s. 28.

When the acknowledgment is taken before a notary public, his certificate need not be authenticated by his notarial seal. Farnum *v.* Buffum, 4 Cush. 260.

A person executing and acknowledging a deed in behalf of a corporation should acknowledge the deed as that of the corporation. Brinley *v.* Mann, 2 Cush. 337, 340. So it would seem that whenever a deed is executed by an agent, he should acknowledge it as the deed of his principal.

No *stamp* is required upon a certificate of the acknowledgment of a deed. Inter. Rev. Law, s. 160.

1. — CERTIFICATE OF ACKNOWLEDGMENT BY ONE GRANTOR.

COMMONWEALTH OF MASSACHUSETTS.

SUFFOLK ss. BOSTON, 1st January 1867. Then personally appeared the above named A. B. and acknowledged the foregoing instrument to be his free act and deed, before me

X. Y. *Justice of the Peace.*

2. — BY TWO OR MORE GRANTORS.

* * * Then personally appeared the above-named A. B., C. D., and E. F. and severally acknowledged the foregoing instrument to be their free act and deed, before &c.

3. — WHERE DEED IS EXECUTED BY ATTORNEY.

* * * * Then personally appeared the above-named C. D. [*name of attorney*] and acknowledged the foregoing instrument to be the free act and deed of the said A. B., [*name of principal*] before &c.

4. — WHERE A CORPORATION IS GRANTOR.

* * * * Then personally appeared the above-named C. D. and acknowledged the foregoing instrument to be the free act and deed of the ——— Corporation, before me &c.

LEASES.

A LEASE is usually made in two parts, each of which is signed by both lessor and lessee, but if it be made by deed poll and signed only by the lessor, the law, from the acceptance of such deed by the lessee, will imply a promise and obligation on his part to pay the rent reserved and to do such other things as the deed shows that it was intended he should perform. Pike *v.* Brown, 7 Cush. 134, 135. — Goodwin *v.* Gilbert, 9 Mass. 510.

It seems that where a lessor has failed to execute a lease which has been executed by the lessee, who has entered and enjoyed his term, he may maintain an action against such lessee on his covenant to pay rent. Codman *v.* Hall, 9 Allen 335, 338.

FORM OF COMMON LEASE.

THIS INDENTURE made this fifteenth day of December A. D. 1868 between A. B., of Boston, Massachusetts, of the first part, and C. D., of said Boston, of the second part, witnesseth:

That the said A. B. doth hereby demise and lease unto the said C. D. the store and premises numbered one hundred on Washington Street in said Boston, and being the same lately occupied by M. N.

To have and to hold the same for the term of five years from and including the first day of January next [*or*, the day of the date hereof].

Yielding and paying therefor rent at the rate of one thousand dollars per annum, to be paid in equal quarterly payments, the first of such payments, to be made on the first day of April next, and in like proportion for any fraction of a quarter in case this lease shall be determined between two rent days.

And the lessor hereby covenants with the lessee and his executors, administrators and assigns that he and they shall peaceably hold and enjoy the said premises as aforesaid.

And the lessee hereby covenants with the lessor and his heirs and assigns that he will pay the said rent in manner aforesaid, and also all taxes, water rates, and assessments whatsoever, whether now existing or hereafter created, that may be payable for or in respect of said premises or any part thereof during said term, excepting however assessments for any permanent benefit or improvement to said premises under any betterment law or otherwise; that he will not, without the consent in writing of the lessor, his heirs or assigns, being first obtained, assign this lease, nor underlet the whole or any part of said premises, nor make or suffer any alterations or additions in or to the same; — that he will not make or suffer any waste or any unlawful, improper, or offensive use of the said premises; — that he will allow the lessor and his heirs and assigns and their agents at seasonable times to enter upon the said premises and examine the condition thereof and make necessary repairs, — will keep all and singular the said premises in such repair as the same are in at the commencement of said term or may afterwards be put in by the lessor or his heirs or assigns, reasonable use and wearing thereof and damage by accidental fire or other unavoidable casualty only excepted, and at the end of said term will peaceably deliver them up to the lessor or his heirs or assigns in such repair as aforesaid, together with all future erections or additions upon or to the same.

Provided always and these presents are upon this condition, that in case of a breach of any of the covenants to be observed on the part of the lessee, the lessor or his heirs, devisees, or assigns may, while the default or neglect continues, and without any notice or demand, enter upon the premises, or on any part thereof in the name of the whole, and thereby determine the estate hereby created; and may thereupon expel and remove, forcibly if necessary, the lessee and those claiming under him and their effects.

And provided also that in case the buildings on the said premises or any part thereof shall be destroyed or damaged by accidental fire or other unavoidable casualty so that the same shall be thereby rendered unfit for use and occupation, then and in such case the rent hereinbefore reserved, or a just and proportionate part thereof according to the nature and extent of the injury sustained, shall be abated until the said premises shall have been duly repaired and restored by the lessor or his heirs or assigns, or, in case the said buildings shall be substantially destroyed, then at the election of the lessor

or his heirs or assigns the estate hereby created shall thereupon be determined.

In witness whereof the said parties have hereunto set their hands and seals the day and year first above written.

NOTES.

"DEMISE AND LEASE." It seems that these words imply a covenant of title by the lessor, that is, a covenant for quiet enjoyment against him and all that come in under him and against all others claiming by title paramount during the term. See Foster *v.* Peyser, 9 Cush. 242, 246. See also Dexter *v.* Manley, 4 Cush. 14.

"FROM AND INCLUDING." If it be the intention of the parties to include in the term the day named, the word "including" should always be used, for if a lease be made to hold "from" a day named, "from the date," or "from the day of the date," such day is excluded from the term. Thus a lease "for three years from the first day of July" begins on the second day of July. Atkins *v.* Sleeper, 7 Allen 487.— 4 Kent Com. 95, note.

"YIELDING AND PAYING THEREFOR RENT" &c. It is not necessary to state to whom the rent is to be paid. "If rent be reserved generally without saying to whom, the law will make the distribution." "The most clear and sure way to secure rent is to reserve rent during the term and leave the law to make the distribution." Per Wilde, J. in Jaques *v.* Gould, 4 Cush. 384, 387.

"AND IN LIKE PROPORTION FOR ANY FRACTION OF A QUARTER" &c. This clause is inserted by reason of the rule of law that, if a lease determines in accordance with its own

provisions before the day on which the rent is made payable, the tenant is not liable for any portion of the rent which by the terms of the lease is payable on that day, nor is he liable even for use and occupation for any time subsequent to the next preceding rent day. Nicholson *v.* Munigle, 6 Allen 215. Earle *v.* Kingsbury, 3 Cush. 206. The same rule holds where the tenant is evicted by his landlord from the whole or from a portion of the demised premises between two rent days. Leishman *v.* White, 1 Allen 489. But an *interruption* of the tenant by his landlord is not necessarily an *eviction*, and nothing less than an eviction will suspend the rent in whole or in part. Fuller *v.* Ruby, 10 Gray 285.

As to effect of provision in a written lease that the rent shall be payable *in advance*, see Bartlett *v.* Greenleaf, 11 Gray 98. Compare also Elliott *v.* Stone, 1 Gray 571.

To the reddendum clause are sometimes added also words to this effect — "and at that rate for such further time as the said lessee may hold the premises." And in a case where the above provision was inserted, together with a covenant that the lessee would "during the term, and for such further time as he should hold the premises, pay the said quarterly rent upon the day appointed for the payment thereof," and a further covenant to yield up the premises at the end of the term, it was held that the lessee was bound to pay pro rata for the time of actual occupation only, and not, like a tenant at will, for a full quarter if he held over for a few days only. Edwards *v.* Hale, 9 Allen 462.

But it would seem advisable, as the law stands at present, to drop all such provisions as the above. Before the passage of the General Statutes a tenant at sufferance was not liable to pay any rent, (Flood *v.* Flood, 1 Allen 217 — 4 Kent Com. 117) and, in the absence of such provisions in the lease, a landlord had no remedy for the rent against a lessee who held

over beyond his term, though he might recover damages in an action of tort for the unlawful detention of the premises, (Sargent *v.* Smith, 12 Gray 426) but now by Gen. St. c. 90, s. 25 tenants at sufferance are made liable to pay rent for such time as they may occupy or detain the premises, and it would seem preferable not to insert a special provision which would limit the amount of rent which the landlord might recover, while, if the case were left to the operation of the statute, he would apparently be able to recover the actual value of the premises for the time of detention, though such value might greatly exceed the rent named in the lease. And it may be remarked that it is particularly in cases where the rental value of an estate has risen, that landlords are troubled by their tenants holding over after the expiration of their terms. See however the remarks of Chapman J. in the above case of Edwards *v.* Hale at p. 465.

As to the effect of the use in a lease of words similar to those above cited, see further Jaques *v.* Gould, 4 Cush. 384 — Salisbury *v.* Hale, 12 Pick. 416. This last-named case presents an instance in which the insertion of such a clause was of avail to the lessor, for, the performance of the covenants in the lease having been guaranteed by a third party, such guarantor's liability was held to extend to the payment of rent, taxes &c. for a time subsequent to the expiration of the lessee's term.

THE COVENANTS. As a general rule the covenants of the lessee run with the land. Thus the covenant not to use for an unlawful purpose "is binding upon the estate in the hands of sub-tenants. They take only the title of the lessee and with the like limitations and restrictions." Wheeler *v.* Earle, 5 Cush. 31, 35. So an action for the rent, which the lessee covenants to pay, may be maintained by the lessor or his as-

signee against the lessee or his assignee, (Howland *v.* Coffin, 12 Pick. 125. S. C. 9 Pick. 51. — Patten *v.* Deshon, 1 Gray 325. — Torrey *v.* Wallis, 3 Cush. 442, 446. — Daniels *v.* Richardson, 22 Pick. 565.) but not against a sub-lessee, (Campbell *v.* Stetson, 2 Met. 504) who is not, so long as the original lease remains in force, liable to the original lessor even for use and occupation. Shattuck *v.* Lovejoy, 8 Gray 204. [At common law the assignee of the lessee was not liable to the action of the lessor for the rent until after attornment, but this rule was changed by the English statute of 4 Anne c. 16, s. 9, and attornment is now held to be of no importance in this respect. Burden *v.* Thayer, 3 Met. 76, 78. — Farley *v.* Thompson, 15 Mass. 18, 25. The action by or against the assignee is however local, being founded on privity of estate and not on privity of contract, and must be brought in the county where the land lies. See Clark *v.* Scudder, 6 Gray 122. — Lienow *v.* Ellis, 6 Mass. 331. — Also Patten *v.* Deshon, 1 Gray 325, 326.] But in one respect the benefit of the covenant to pay rent appears not to run strictly with the land, for a party to whom the lessor has assigned the rent alone, without the reversion, may maintain an action for such rent in his own name against the lessee or his assignee. Hunt *v.* Thompson, 2 Allen 341 — Kendall *v.* Carland, 5 Cush. 74. See also Patten *v.* Deshon, 1 Gray 325, 326, — Allen *v.* Bryan, 5 Barn. & Cress. 512. But see, contra, 1 Smith's Lead. Cas. H. & W. Notes, 5th ed. p. 162.

But, as to the covenant by the lessee to deliver up the premises at the end of the term, it seems to be an open question whether it will run with the land so that an action can be maintained upon it against an assignee of the lessee. Sargent *v.* Smith, 12 Gray 426.

A waiver of one breach of a covenant in a lease is no answer

to an action for another and distinct breach of the same covenant. Seaver *v.* Coburn, 10 Cush. 324.

A lessee will not be excused from the performance of his covenant, as to pay rent, by the failure of the lessor to perform a covenant on his part, as to make repairs. Leavitt *v.* Fletcher, 10 Allen 119, 121. But if the lessor evict his lessee from the whole or from a portion of the leased premises, they being let at an entire rent, the lessee will no longer be liable to pay any rent under his covenant, unless a special provision to meet the case is inserted in the lease. See page 118, where the cases on this point are cited.

Implied covenants. In a lease of a warehouse, not described as let for any particular purpose, no covenant is implied that the building is safe, well built, or fit for any particular use. Dutton *v.* Gerrish, 9 Cush. 89. And in the lease of a house, though described as "a dwelling-house" and "to be used as a private dwelling-house only and not as a boarding house," there is no implied covenant that it is reasonably fit for habitation. Foster *v.* Peyser, 9 Cush. 242. See also Welles *v.* Castles, 3 Gray 323, 326. But see Dexter *v.* Manley, 4 Cush. 14, 25, — also 9 Cush. 94. Whether the lessee would be restricted in his use of the premises by such a recital, see Shumway *v.* Collins, 6 Gray 227, 231.

There is an implied covenant on the part of the lessor that, so far as he is concerned, he will do no act to interrupt the free and peaceable enjoyment of the premises by the lessee. Dexter *v.* Manley, 4 Cush. 14, 24. It seems that there is also an implied covenant of title. See Foster *v.* Peyser, 9 Cush. 242, 246, where the Court quotes and endorses as "perfectly satisfactory" the following passage from an opinion of Mr. Baron Parke. "It is clear that from the word 'demise' in a lease under seal the law implies a covenant, — in a lease not

under seal, a contract, — for *title* to the estate merely; that is, for quiet enjoyment against the lessor and all that come in under him by title and against all others claiming by title paramount during the term; and the word 'let,' or any equivalent words which constitute a lease, have no doubt the same effect and no more. There is no authority for saying that these words imply a contract for any particular state of the property at the time of the demise; and there are many which clearly show that there is no implied contract that the property shall *continue* fit for the purpose for which it is demised." See also Taylor's Land. & Ten. sect. 304. "No covenant is implied that the lessor shall keep the premises in repair or otherwise fit for occupation." Gray J. in Leavitt *v.* Fletcher, 10 Allen 119, 121.

EXPRESS COVENANTS, — OF LESSOR. "SHALL PEACEABLY HOLD AND ENJOY" &c. It would seem that this covenant is superfluous, inasmuch as, if it were omitted, the law would imply a covenant to the same effect. See above under "implied covenants."

The benefit of this covenant runs with the land, and an action for a breach may be brought against the lessor by an assignee of the lessee. Shelton *v.* Codman, 3 Cush. 318.

Under this covenant the lessor is liable only for evictions, entries, and disturbances made by virtue of rights existing at the time when the covenant is made, but not of rights afterwards acquired. Thus he is not responsible for an ejection by the City authorities in widening the street on which the leased premises are situated. Ellis *v.* Welch, 6 Mass. 246. As to the rights of the parties in such case see Patterson *v.* Boston, 20 Pick. 159 — Parks *v.* Boston, 15 Pick. 198.

As to the measure of damages for breach of this covenant see Hovey *v.* Newton, 11 Pick. 421 — Donahoe *v.* Emery, 9 Met. 63.

EXPRESS COVENANTS, — OF LESSEE. "PAY THE SAID RENT" &c. Though this covenant be omitted, the lessor may still recover his rent, but in that case, if the lessee assigns his interest and the lessor assents thereto and receives rent of the assignee, he can no longer look to the lessee for the rent, but only to the assignee. Where however there is an express covenant to pay the rent, the fact of such assignment and assent will not affect the liability of the lessee on his covenant. Wall *v.* Hinds, 4 Gray 256 — Fletcher *v.* M'Farlane, 12 Mass. 43, 46. — Dwight *v.* Mudge, 12 Gray 23. — Way *v.* Reed, 6 Allen 364, 369. As to the effect of an eviction by the lessor to discharge the lessee from this covenant, see above, page 122.

"ALL TAXES" &c. &c. "EXCEPTING HOWEVER ASSESSMENTS FOR ANY PERMANENT BENEFIT" &c. Under a covenant "to pay all taxes or duties levied or to be levied" on the leased premises, it has been held that a lessee was not bound to repay to his lessor the expense of paving a sidewalk in front of the premises, which expense the town had recovered of the lessor under the provisions of a statute. Twycross *v.* Fitchburg R. R. Co. 10 Gray 293. See also Torrey *v.* Wallis, 3 Cush. 442, 447. Where however, as in the leases now generally used, the lessee covenants to pay "all taxes, water rates, and assessments whatsoever that may be payable for or in respect of the premises during the term," it would seem that the lessee would be bound to pay an assessment for laying a sidewalk or drain and, in the City of Boston, even an assessment under the betterment law. (St. 1866, c. 174.) With a view to exempt the lessee from such liability, which it is evident he would never intentionally assume, the covenant has been framed in the language given above.

When the lease is of a portion of an estate, of the differ-

ent parts of which there has been no separate assessment by the assessors of taxes, the covenant to pay taxes is to be construed as an agreement by the lessee to pay such proportion of the entire tax assessed on the whole estate, as the portion thereof demised to him bears in taxable value to the entire premises. Wall *v.* Hinds, 4 Gray 256, 269.

But it has been held that a usage in the City of Boston might be shown, whereby the whole tax on the building was to be apportioned to the tenants of different portions *according to their respective rents*, and that the covenant to pay taxes should be construed accordingly. Codman *v.* Hall, 9 Allen 335.

It is provided by Statute (Gen. St. c. 11, s. 8,) that taxes on real estate may be assessed either to the *owner* or to the *tenant*, but is further provided (Gen. St. c. 11, s. 9,) that, when the tax has been assessed to the tenant, he may, unless there is an agreement to the contrary, retain out of his rent the taxes paid by him, or may recover the same in an action against his landlord.

"WHICH MAY BE PAYABLE" &c. It is held that under this language the lessee is bound to pay taxes assessed upon the premises during the term but not payable till afterwards, and is not bound to pay those becoming payable within the term but assessed before its commencement. Wilkinson *v.* Libbey, 1 Allen 375. If the language used in the form given above had not received a judicial interpretation, it might be better to use the phrase "which may be assessed or laid upon said premises or any part thereof," and perhaps this latter form is on the whole preferable, inasmuch as the other naturally tends to mislead any person not acquainted with the decision above cited.

"WILL NOT ASSIGN THIS LEASE NOR UNDERLET." Unless restrained by covenant, a lessee may both assign and underlet. 4 Kent Com. 96. An *assignment* is a transfer of the lessee's interest in the whole or a part of the premises *for the whole residue of the term;* — a *sublease* is a transfer of such interest for any time less than the whole of such residue. 1 Gray 330. 4 Kent Com. 96. A breach of this covenant will not of itself determine the lease and revest the estate in the lessor. Shattuck *v.* Lovejoy, 8 Gray 204.

"ANY ALTERATIONS OR ADDITIONS." This covenant does not, it seems, prevent the lessee from making *repairs* without the consent of the lessor. City of Boston *v.* Worthington, 10 Gray 496. See also as to effect of this covenant, Atkins *v.* Chilson, 9 Met. 52.

"ANY WASTE." See Wall *v.* Hinds, 4 Gray 256, 270.

"ALLOW THE LESSOR &c. TO ENTER &c. AND MAKE NECESSARY REPAIRS &c." This covenant may sometimes be important to a lessor when the lease covers a portion only of a building. In such case a right to make repairs in the part demised may be necessary to the safety of the rest of the building.

"WILL KEEP SAID PREMISES IN SUCH REPAIR" &c. In the absence of any express covenant relative to repairs, the landlord is wholly free from any liability to repair, while the tenant "is bound to make ordinary tenantable repairs, such as to keep the house wind and water tight, and to repair windows and doors broken by him, but not to make lasting repairs." 4 Kent Com. 110. — 1 Parsons on Cont. 424. — 7 Gray 553. — 10 Allen 121. As to the general purport of this covenant, see Jaques *v.* Gould, 4 Cush. 384.

It seems that it is a sufficient compliance with this covenant if any want of repair, which may exist, be removed during the term. Atkins *v.* Chilson, 9 Met. 52, 63.

Unless the exception of fire and other casualties be made under this covenant, the lessee will be bound to repair or rebuild, even if the buildings on the premises should be wholly destroyed through such causes. Phillips *v.* Stevens, 16 Mass. 238. — Adams *v.* Nichols, 19 Pick. 275. — Tilden *v.* Tilden, 13 Gray 103, 109. — Leavitt *v.* Fletcher, 10 Allen 119, 121. As to what constitutes an "unavoidable casualty" see page 129.

"PROVIDED ALWAYS" &c. This clause constitutes a *condition* and not a *conditional limitation*, and the estate of the lessee does not determine upon the mere happening of the contingency named, but can only be defeated by the entry of the lessor or his heirs. Fifty Associates *v.* Howland, 11 Met. 99. — Shattuck *v.* Lovejoy, 8 Gray 204.

In some cases where a forfeiture is incurred under this condition by accident or mistake, the Court will refuse to enforce it. Atkins *v.* Chilson, 11 Met. 112.

This condition is equally effectual to work a forfeiture when the covenant which is broken is only a negative stipulation, as that the lessee will not suffer the premises to be used for unlawful purposes. Wheeler *v.* Earle, 5 Cush. 31, 35.

In case of a "neglect or refusal to pay the rent due according to the terms of any written lease" an additional remedy is given by Gen. St. c. 90, s. 30 which provides that "fourteen days' notice to quit, given in writing by the landlord to the tenant, shall be sufficient to determine the lease."

"THE LESSOR OR HIS HEIRS, DEVISEES, OR ASSIGNS MAY ENTER" &c. The old rule of law is that the right to enter for breach of condition can only be reserved to the grantor and his *heirs*,

but not to his *devisees* or *assigns;* (see 4 Kent Com. 122, 123. — Stearns on Real Actions p. 21. — also above p. 27,) and as in the above-cited case of Fifty Associates *v.* Howland it was held that this clause constitutes a condition and not a conditional limitation, it would seem questionable whether a devisee or assignee of the lessor could enforce the forfeiture of a lease under this clause. Whether the mention of the "devisees or assigns" of the lessor can convert what would otherwise be a condition into a conditional limitation, quære. See Brattle Square Church *v.* Grant, 3 Gray 142. But it would seem that if the clause were to be considered as a conditional limitation, it would not, by reason of the rule against perpetuities, be valid in a lease for a definite term of more than twenty-one years. See same case.

"WITHOUT ANY NOTICE OR DEMAND" &c. See Fifty Associates *v.* Howland, 5 Cush. 214, 217. If, although no notice be required, one be given which specifies a particular breach as the cause of entry, the validity of the entry will depend upon the proof of that breach, and all other breaches will be held to have been waived. Atkins *v.* Chilson, 9 Met. 52. Unless expressly waived in the lease, it would seem that a demand of the rent on the day it falls due is strictly required where a lease is to be forfeited for breach of condition in the non-payment of rent. See dictum of Shaw, C. J. in Kimball *v.* Rowland, 6 Gray 224, 225.

"FORCIBLY IF NECESSARY." These words do not authorize such a degree of force as would tend to a breach of the peace, but such only as would sustain a plea of justification of *molliter manus imposuit.* Fifty Associates *v.* Howland, 5 Cush. 214, 218. But as to degree of force see further under "Notice to Quit."

"PROVIDED ALSO" &c. If this proviso be not inserted in a lease, the lessee will be bound to pay the rent to the end of the term, although the buildings on the premises should be wholly destroyed by fire or other casualty, and the lessor should refuse to rebuild. Fowler *v.* Bott, 6 Mass. 63. — Wall *v.* Hinds, 4 Gray 256, 268. See also Leavitt *v.* Fletcher, 10 Allen 119, 121. But if the lease be of a room in a building and such room be wholly destroyed, the lease and all rights under it thereupon terminate. Stockwell *v.* Hunter, 11 Met. 448.

"OR OTHER UNAVOIDABLE CASUALTY." "This phrase does not signify a mere want of repair arising from lapse of time or improper use of the premises; nor from trespasses or nuisances occasioned by the acts of the tenant or of third persons. Neither does it include any injuries which may happen by reason of the common and ordinary use and occupation of the estate leased or of the adjoining premises. The term has a much more restricted meaning and comprehends only damage or destruction arising from supervening and uncontrollable force or accident. By a strict definition, as applied to the subject matter, it signifies events or accidents which human prudence, foresight and sagacity cannot prevent. Looking at the connection in which they stand and applying to them the maxim of construction, *noscitur a sociis*, they clearly signify occurrences of an unusual and extraordinary character, that is from causes like fire, such as lightning, earthquakes and wind, which usually result without any direct agency of the tenant and which are ordinarily beyond human control." Bigelow J. in Welles *v.* Castles, 3 Gray 323, 325. See also on this point Bigelow *v.* Collamore, 5 Cush. 226. — Kramer *v.* Cook, 7 Gray 550.

"RENDERED UNFIT FOR USE AND OCCUPATION." See Welles *v.* Castles, 3 Gray 323.

"OR IN CASE THE SAID BUILDINGS SHALL BE SUBSTANTIALLY DESTROYED" &c. Inasmuch as it may often be very important to a landlord, in case of the destruction of his building by fire, to erect one quite different and perhaps wholly unsuited to the purposes for which the lessee had previously been using the estate, it would seem that the insertion of such a clause as the above would be generally desirable as a means of giving the owner of an estate, in case of its substantial destruction by fire, but not for any lesser injury, the power to free himself and his estate from any further liability to his lessee, who might, if he chose, in the absence of such a clause, insist that the landlord should either let his estate remain unimproved and without rent during the remainder of the lease, or should rebuild such an edifice as stood there before, or, if he allowed the landlord to erect a better one, could claim to occupy it at the probably wholly inadequate rent of the old one.

STAMP. Upon every "lease, agreement, memorandum, or contract for the hire, use, or rent of any land, tenement, or portion thereof, where the rent or rental value is three hundred dollars per annum or less," is required a stamp of fifty cents, and a like stamp is required for every additional two hundred dollars, or fractional part thereof, of such rent or rental value. Inter. Rev. Law Schedule B., "Lease." It is customary in Boston to place the full amount of stamps required by law upon *both* parts of a lease; this, however, does not seem to be necessary, for if one part alone be stamped, that will constitute a valid lease, and the other may be regarded simply as a copy. But as both lessor and lessee are

usually equally desirous of having a valid and legal instrument in their own hands, and are unwilling to be satisfied with a mere copy, it is usual, as above stated, for them to stamp both parts of the lease, each bearing half the expense of the stamps required.

SPECIAL COVENANTS SOMETIMES INSERTED.

(*A covenant to renew.*) That he, the said lessor, or his heirs or assigns, will on or before the expiration of this present lease at the request and expense of the said lessee, his executors, administrators, or assigns execute to and with him or them a new lease of the premises hereby demised for the further term of three years, to commence from the expiration of the term hereby granted, at the same yearly rent, payable in like manner, and with and subject to the like covenants, agreements, and provisoes (except a covenant for further renewal) as are herein contained.

(*Covenant relative to damage from Cochituate water.*) That the said lessee &c. will save the said lessor and his representatives harmless from all loss or damage occasioned by the use, misuse, or abuse of the Cochituate water, or bursting of the pipes.

For cases in which other special covenants and provisoes have been the subject of consideration by the Supreme Court, see the following:

Kramer *v.* Cook, 7 Gray 550. Lease for a certain term and at the election of the lessee for a further term at an increased rent.

Baker *v.* Adams, 5 Cush. 99. Proviso that either party by giving notice may terminate the lease before the end of the term.

Wall *v.* Hinds, 4 Gray 256. Similar proviso except that lessee upon receiving such notice may elect to remain at an increased rent.

Hayden *v.* Bradley, 6 Gray 425. — Leavitt *v.* Fletcher, 10 Allen 119. — Flynn *v.* Trask, 11 Allen 550. Covenants by *lessors* to keep the premises in repair.

Way *v.* Reed, 6 Allen 364. Proviso that, upon failure to pay rent or breach of any covenant by lessee, lessor may re-enter and relet the premises at the risk of the lessee.

Clapp *v.* Thomas, 7 Allen 188. Covenant in lease of *farm* that lessee will consume on the premises all the hay and fodder produced thereon during the term.

Bartlett *v.* Greenleaf, 11 Gray 98. Rent payable in advance.

Torrey *v.* Wallis, 3 Cush. 443. Covenant by lessor to pay all taxes, and by lessee to pay all costs, expenses, and charges, except the yearly taxes.

Hunt *v.* Thompson, 2 Allen 341. Provision that the lessee may "deduct and reserve from the first rents" "the cost of the floors and such further sums as the parties shall hereafter agree, or shall hereafter be determined, is due."

CERTAIN MATTERS RELATING TO LEASES IN GENERAL.

A lease *not in writing* can create only an estate at will. Gen. St. c. 89, s. 2.

A lease *for more than seven years* should be under seal, acknowledged, and recorded, as otherwise it will be valid only against the lessor, his heirs and devisees, and persons having actual notice of it. Gen. St. c. 89, s. 3.

The estate created by a lease *for one hundred years or more*, so long as fifty years of the term remain unexpired, is to be regarded as an estate in fee simple, so far as concerns the descent and devise thereof and certain other matters. Gen. St. c. 90, s. 20.

The use of leased premises for the illegal keeping or sale of intoxicating liquors or as a place of resort for prostitution, lewdness, or illegal gaming will make void the lease, and the lessor may take immediate possession either with or without

process of law. Gen. St. c. 87, s. 8, 6. But such use of leased premises does not make the lease void as against the lessor, so as to deprive him of his remedy on the lessee's covenants, unless at least the lessor has actual knowledge of the illegal use. Way *v.* Reed, 6 Allen 364, 370.

Whoever knowingly lets a building or tenement owned by him or under his control for any of the above purposes, or knowingly permits it or any part of it while under his control to be used for such purpose, or after due notice of any such use omits to take all reasonable measures to eject therefrom the persons occupying the same as soon as it can lawfully be done, is liable to be punished by a fine of not less than $50.00 nor more than $100.00 and imprisonment in the house of correction for not less than three nor more than twelve months, but at the discretion of the Court he may be sentenced to be punished by such imprisonment without the fine or by such fine without the imprisonment in all cases where he shall prove or show to the satisfaction of the Court that he has not before been convicted of a similar offence. Gen. St. c. 87, s. 9 — St. 1866, c. 280, s. 1, 3.

A sealed lease of an estate belonging to partners, executed by one partner in the name of the firm, will not pass the estate of the other partners, even though the lease be for a term of less than seven years. Dillon *v.* Brown, 11 Gray 179. Compare Kendall *v.* Carland, 5 Cush. 74, 79.

As to when informal instruments in the nature of agreements &c. will be construed as leases, see Fiske *v.* Framingham Manuf. Co., 14 Pick. 491, 493. — Dutton *v.* Gerrish, 9 Cush. 89, 93.

The tenant, and not the landlord, is during his term responsible to the owners of neighboring estates and to the public for all injuries caused to them by the improper use or condition of the leased premises. Thus a lessor was held not to

be liable to the owner of an adjoining estate for the act of his lessee in drawing off the water of a pond upon the leased premises and allowing it to overflow and injure such adjoining estate. Fiske *v.* Framingham Manuf. Co., 14 Pick. 491. So a lessor was held not to be liable for an injury caused to a passer in the highway by reason of a defective covering of a cellar way on the leased premises, — but in this case it was said that if the landlord had expressly covenanted to keep the premises in repair, he would, to avoid circuity of action, have been directly liable to the person injured. City of Lowell *v.* Spaulding, 4 Cush. 277. On the other hand a lessee has been held to be liable for an injury caused to a passer in the highway by reason of an uncovered cellar way, not protected by a railing as required by a city ordinance, and the fact that the lease provided that no alteration or addition in the leased premises should be made by the lessee was held not to affect his liability. City of Boston *v.* Worthington, 10 Gray 496.

But where the owner of a building leases it out in separate parts to different tenants, he will be liable for damages arising from the improper condition of the roof, eaves, chimneys, or other parts of the building not appropriated to the exclusive use of any particular tenant, or to the use of all of them to the exclusion of the landlord. Kirby *v.* Boylston Market Association, 14 Gray 249. — Milford *v.* Holbrook, 9 Allen 17.

ASSIGNMENT OF LEASE BY LESSOR.

A lease is seldom assigned by a lessor except where, by reason of a conveyance of the leased premises by him, an assignment of the lease to the grantee is effected by operation of law and without any instrument or writing other than the deed of conveyance. See Farley *v.* Thompson, 15 Mass. 18. — Howland *v.* Coffin, 9 Pick. 52 — Howland *v.* Coffin, 12 Pick. 125. — Montague *v.* Gay, 17 Mass. 439, 440. A mortgage by the

lessor will have the same effect in this respect as an absolute conveyance. Burden *v.* Thayer, 3 Met. 76. — Russell *v.* Allen, 2 Allen 42, 43. Compare remarks above at page 61.

For cases in which the lessor has assigned the lease alone without any interest in the reversion, see Hunt *v.* Thompson, 2 Allen 341, — Kendall *v.* Carland, 5 Cush. 74. — Compare also Patten *v.* Deshon, 1 Gray 325. — Russell *v.* Allen, 2 Allen 42. — Smith *v.* Jennings, 15 Gray 69.

Where an assignment of a lease is effected by a simple conveyance or mortgage of the leased premises, the grantee or mortgagee will acquire a right to such rent only as falls due after the date of his deed. Burden *v.* Thayer, 3 Met. 76, 80. — Russell *v.* Allen, 2 Allen 42, 44. But it seems that the tenant will be protected against further liability for any rent he may have paid to his lessor after the date of the conveyance or mortgage, but before any notice thereof has been given to him. Russell *v.* Allen, 2 Allen 42, 44.

ASSIGNMENT OF LEASE BY LESSEE.

I. — BY INDENTURE.

This indenture made this 1st January 1866 between C. D., of &c., of the first part, and E. F., of &c., of the second part, witnesseth : —

That whereas the said C. D. is the lessee named in a certain lease, dated 15th December 1864, whereby A. B. leased to him the store and premises numbered 100 on Washington Street in said Boston for the term of five years from the 1st January 1865.

Now therefore the said C. D. in consideration of the sum of $200.00 to him paid by the said E. F., the receipt whereof &c., and in further consideration of the covenants of the said E. F. hereinafter contained, doth hereby assign, transfer and set over unto the said E. F. the said lease, the premises thereby demised, and all his right, title and interest in or under the same.

To have and to hold the said demised premises for the residue of the term of said lease.

And the said C. D. hereby covenants with the said E. F. that the afore-

said lease is good and effectual in law and in nowise surrendered, forfeited, or rendered void or voidable; — that he hath good power and authority to make this assignment; — and that the said E. F. and his representatives shall peaceably hold and enjoy the said demised premises for the remainder of said term without any hinderance or interruption from him, the said C. D., or from any person claiming by, through or under him, and shall be acquitted and discharged and held harmless and indemnified from all arrearages of rent or other charges or incumbrances made or suffered by him, the said C. D.

And the said E. F. hereby covenants with the said C. D. that he and his representatives will well and truly pay the rent which may hereafter become due according to the terms of said lease, and will perform all the covenants and agreements in said lease contained, which are to be performed on the part of the lessee, and in default of such payment or performance will save the said C. D. and his representatives harmless and indemnified from all payments, costs, or expenses which they may be put to by reason of such default.

In witness whereof the said parties have hereunto set their hands and seals the day and year first above-written.

II. — BY DEED-POLL WITH BOND.

Know all men that I, C. D., of &c., the lessee named in a certain lease given by A. B., dated 15th December 1864, and demising the store &c. for the term of five years from the 1st January 1865, do, in consideration of the sum of $200.00 to me paid by E. F., of &c., the receipt whereof &c., and in further consideration of a certain bond this day given me by the said E. F., hereby assign, transfer and set over unto the said E. F. the said lease, the premises thereby demised, and all my right, title and interest in or under the same.

To have and to hold the said demised premises for the residue of the term of said lease.

And I hereby covenant with the said E. F. that the aforesaid lease is good and effectual in law and in nowise surrendered, forfeited, or rendered void or voidable; — that I have good power and authority to make this assignment; — and that the said E. F. and his representatives shall peacably hold and enjoy the said demised premises for the remainder of said term without any hinderance or interruption from me or any person claiming by, through or under me, and shall be acquitted and discharged and held harmless and indemnified from all arrearages of rent or other charges or incumbrances made or suffered by me.

In witness whereof I have hereunto &c. &c.

CONDITION OF BOND TO BE GIVEN IN CONNECTION WITH ABOVE DEED.

The condition of this obligation is such that if the above bounden E. F., or his executors, administrators, or assigns, shall well and truly pay the rent which shall hereafter become due according to the terms of a certain lease of the store &c., which lease has this day been assigned to the said E. F. by the said C. D., and shall perform all the covenants and agreements in said lease contained, which are to be performed on the part of the lessee, or, in default of such payment or performance shall save the said C. D. and his representatives harmless and indemnified from all payments, costs, and charges which they may be put to by reason of such default, then this obligation shall be void, otherwise of full force and effect.

NOTES.

An assignment of a lease under seal should itself be under seal, — otherwise it will not transfer the legal title, but only an equitable one, and the assignee cannot bring an action on the covenants in his own name. Bridgham *v.* Tileston, 5 Allen 371, — Brewer *v.* Dyer, 7 Cush. 337, — Dennis *v.* Twitchell, 10 Met. 180, — Hunt *v.* Thompson, 2 Allen 341.

It seems that there is no *implied* covenant that the lease assigned is of any validity. Waldo *v.* Hall, 14 Mass. 486.

Stamps. "Upon each and every assignment of any lease a stamp duty shall be required and paid equal to that imposed on the original instrument, *increased* by a stamp duty on the consideration or value of the assignment, equal to that imposed upon the coveyance of land for similar consideration or value." Inter. Rev. Law, Schedule B., under "Mortgage." If a bond is given in connection with the assignment, as above, it will of course require an additional stamp.

EXTENSION OF LEASE.

The term of the within lease is hereby extended for the period of one year from the expiration thereof, subject to the like rent, payable in like man-

ner as within mentioned, and to all the provisoes, covenants, and agreements within contained, — and thereto we, the undersigned, parties to the said lease, mutually bind ourselves.

Witness our hands and seals this tenth day of &c.

STAMP. Upon the above, as 'being a renewal or continuance of an agreement or contract,' is required a stamp equal to that imposed on the original lease. Inter. Rev. Law, Schedule B, under "Mortgage."

NOTICE TO QUIT.

I. When necessary.

1. To terminate tenancies at will on the part of either landlord or tenant. Gen. St. c. 90, s. 31. — Howard *v.* Merriam, 5 Cush. 571. — Whitney *v.* Gordon, 1 Cush. 266.

a. Even though there be an express verbal agreement that the tenant may quit when he pleases. Batchelder *v.* Batchelder, 2 Allen 105.

2. To terminate a tenancy under a written or verbal lease before the expiration of the term for non-payment of rent due on such lease. Gen. St. c. 90, s. 30, 31.

a. *Quære* whether rent payable in advance under a verbal lease, and not so paid, can be considered as 'rent due' within the meaning of the statute. Elliott *v.* Stone, 12 Cush. 174, 176.

II. When not necessary.

1. At the expiration of a lease, whether written or verbal, for a definite time. Creech *v.* Crocket, 5 Cush. 136. — Elliott *v.* Stone, 1 Gray 574. — Hollis *v.* Pool, 3 Met. 351. — Dorrell *v.* Johnson, 17 Pick. 263, 266. — Danforth *v.* Sergeant, 14 Mass. 491.

2. When by the terms of the lease, whether it be written or verbal, the tenancy is upon condition, either subsequent or precedent, or is to expire upon the happening of some contin-

gent event, and the condition has been broken or the contingency has arisen.

a. As where a written lease contained a condition that if the lessee should fail to perform any of his covenants, the lessor might enter &c. Fifty Associates *v.* Howland, 11 Met. 99. — Same case, 5 Cush. 214, 218.

b. So where in a *verbal* lease it was agreed that, when the tenant failed to pay his rent quarterly in advance, he should leave the premises. Elliott *v.* Stone, 1 Gray 571.

And it seems that in all cases of *verbal* leases with rent payable in advance, the payment of the rent constitutes a condition precedent to the commencement of each term, and no special agreement to leave is necessary. Elliott *v.* Stone, 1 Gray 571, 576. But compare the earlier decision in the same case in 12 Cush. 174, 176 where the contrary is held. In cases of *written* leases the rule is perhaps different, and that a failure to pay rent payable in advance does not determine such lease. See Bartlett *v.* Greenleaf, 11 Gray 98.

c. Or where a verbal lease was made on condition that the premises should be used as a barber's shop. Creech *v.* Crockett, 5 Cush. 133.

d. Or where in a verbal lease it was agreed that the tenant was to hold "as long as he kept a good school." Ashley *v.* Warner, 11 Gray 43.

e. Or that the tenancy should cease when the estate should be sold. Hollis *v.* Pool, 3 Met. 350.

f. But not where the tenant had agreed to take care of certain young trees in lieu of paying rent, and had neglected the trees. Gleason *v.* Gleason, 8 Cush. 32.

3. In certain cases in which a tenancy at will is determined by act of law and converted into a tenancy at sufferance. Such cases are —

First. When the lessor at will alienes his estate. Howard

v. Merriam, 5 Cush. 563, 574. — Hollis *v.* Pool, 3 Met. 350. — Benedict *v.* Morse, 10 Met. 223. — Rooney *v.* Gillespie, 6 Allen 74.

a. A conveyance of an undivided share of an estate by tenants in common to a third person, whereby such third person becomes a tenant in common with the grantors, is a sufficient alienation to determine a tenancy at will. McFarland *v.* Chase, 7 Gray 462.

b. A tenant will not be allowed to show that the conveyance by his lessor was merely colorable and made *for the purpose* of terminating his tenancy. Curtis *v.* Galvin, 1 Allen 215.

Second. When the lessor at will makes a written lease of the premises to a third person. Pratt *v.* Farrar, 10 Allen 519. — Furlong *v.* Leary, 8 Cush. 409. — Kelly *v.* Waite, 12 Met. 300. — Dillon *v.* Brown, 11 Gray 179. — Mizner *v.* Monroe, 10 Gray 290.

a. Such lease will be equally effectual, although it contains a provision that no rent shall be claimed of the lessee until he shall obtain possession. Pratt *v.* Farrer, 10 Allen 519.

b. But a lease executed by one of several tenants in common, under whom one holds as tenant at will, cannot terminate the tenancy at will in the undivided shares of the other tenants in common. Dillon *v.* Brown, 11 Gray 179.

But the tenant is entitled to notice of the conveyance or lease, before he can be treated as a trespasser, or legal process can be commenced against him for the possession of the premises. McFarland *v.* Chase, 7 Gray 462. — Furlong *v.* Leary, 8 Cush. 409. The form of this notice is not material; it may be given either by the landlord or by his grantee or lessee and, it seems, need not even be in writing. Mizner *v.* Munroe, 10 Gray 290. — Howard *v.* Merriam, 5 Cush. 563. See also 8 Cush. 410. — 7 Gray 463. — 10 Allen 520. If the no-

tice refers to a lease, it need not state such lease to be in writing, and, if signed by an attorney of the landlord, the authority of such attorney need not be known to the tenant. Mizner *v.* Munroe, 10 Gray 290.

The following would seem to be a proper form for such a notice as is above referred to.

BOSTON, 3d Jan. 1868.

To A. B.

Sir — You will please take notice that Mr. C. D. has executed a written lease to me of the premises now occupied by you at No. 400 Court Street in this City, for the term of five years from the 1st instant. As I desire the premises for my own occupancy, you will please vacate them without delay.

Yours &c. E. F.

Quœre, whether after the notice the tenant is entitled to a reasonable time in which to remove his family or property. See Pratt *v.* Farrar, 10 Allen 519, 521. See also Mann *v.* Hughes (in Superior Court) 20 Law Reporter 628. If he is entitled to such reasonable time, the question what length of time is a reasonable allowance is, where the facts are not in dispute, a question of law for the Court. Pratt *v.* Farrar, 10 Allen 519, 521. (In this case forty-eight hours was held to be a reasonable time.) See also 1 Pick. 43. — 5 Cush. 570.

Third. Upon the death of either lessor or lessee. Ferrin *v.* Kenney, 10 Met. 294. — Ellis *v.* Paige, 1 Pick. 47. — Rising *v.* Stannard, 17 Mass. 284.

Fourth. Upon partition between tenants in common, one of whom was the lessor. Rising *v.* Stannard, 17 Mass. 282, 286.

Fifth. Where the tenant at will commits waste, as by removing manure. Daniels *v.* Pond, 21 Pick. 367.

Sixth. Where the tenant at will assigns his estate. Cooper *v.* Adams, 6 Cush. 87.

4. In the case of an under-tenant who holds over after the

termination of the lease to his lessor, and this even though the underletting was with the consent of the original lessor. Evans *v.* Reed, 5 Gray 308.

5. Nor to terminate a tenancy at sufferance in any case. Kinsley *v.* Ames, 2 Met. 29. — Howard *v.* Merriam, 5 Cush. 571.

6. When either party expressly waives his right to a notice, as where a landlord tells his tenant that he shall not require a written notice from him. Farson *v.* Goodale, 8 Allen 202. — See however Batchelder *v.* Batchelder, 2 Allen 105.

III. Form of.

1. — From landlord to tenant for nonpayment of rent.

Boston, 3d January 1868.

To C. D.

Sir: — You are hereby notified to quit and deliver up in fourteen days from this date the premises now held by you as my tenant at No. 100 Washington Street in this City.

A. B.

2. — From landlord to tenant to terminate tenancy at will.

Boston, 27th Dec. 1867.

To C. D.

Sir: — You are hereby notified to quit and deliver up on the first day of April next the premises now held by you as my tenant at No. 100 Washington Street in this City.

A. B.

3. — Another form for the same.

Boston, 27th Dec. 1867.

To C. D.

Sir: — You are hereby notified to quit and deliver up at the end of that quarter [or "month," "week," &c.] of your tenancy which shall begin next after this date, the premises now held by you as my tenant at No. 100 Washington Street in this City.

A. B.

4. — From tenant to landlord for same purpose.

Boston, 27th Dec. 1867.

To A. B.

Sir: — You are hereby notified that I shall on the first day of April next quit and deliver up the premises now held by me as your tenant at No. 100 Washington Street in this City.

C. D.

5. — The preceding may be varied so as to correspond with No. 3.

The notice to quit for non-payment of rent is authorized by Gen. St. c. 90, ss. 30 & 31, which provide that "upon neglect or refusal to pay the rent due according to the terms of any written lease" or "due on a lease at will" "fourteen days' notice to quit, given in writing by the landlord to the tenant, shall be sufficient to determine the lease."

The notice to terminate a tenancy at will is authorized by Gen. St. c. 90, s. 31, which provides that — "Estates at will may be determined by either party by three months' notice in writing for that purpose given to the other party; and when the rent reserved is payable at periods of less than three months, the time of such notice shall be sufficient if it is equal to the interval between the days of payment."

"The notice must fix a day or time to quit at or after the expiration of the required time of notice by definitively naming the day or denoting such time with reasonable exactness and certainty." Currier *v.* Barker, 2 Gray 224, 228. — Steward *v.* Harding, 2 Gray 335. — Sanford *v.* Harvey, 11 Cush. 93. — Oakes *v.* Munroe, 8 Cush. 282.

But it has been held in England that a notice to terminate a tenancy at will is bad, which names a day *after* the expiration of the required time, though the notice be given a sufficient time before the earlier day which should properly have been named. Spicer *v.* Lea, 11 East 312.

A notice which requires the tenant to quit in a certain number of days "from the service of this notice" is not valid if left at the house of the tenant during his absence therefrom for several days, for "he is not bound on his return to inquire when it was left, or, if he does inquire, to act upon the information that may be given him." Hultain *v.* Munigle, 6 Allen 220.

It is not necessary that a notice should state the cause or reason for giving it, as that it is to terminate a tenancy at will or for non-payment of rent. Granger *v.* Brown, 11 Cush. 191.

A notice for nonpayment of rent, which requires the tenant to quit "within fourteen days from date," is good, the day of the date being excluded in reckoning the fourteen days. Johnson *v.* Stewart, 11 Gray 181.

A notice to quit for nonpayment of rent need not be preceded by a demand for the rent. Kimball *v.* Rowland, 6 Gray 224.

The time for quitting fixed by a notice to terminate a tenancy at will (except in the case of the fourteen days' notice for nonpayment of rent) must be *at the expiration* of a quarter, month, week, &c. of the tenancy, according to the length of the intervals between the days of payment. Prescott *v.* Elm, 7 Cush. 346. — Currier *v.* Barker, 2 Gray 224, 226.

Such time for quitting may be fixed in the notice either by expressly naming the day, as in forms 2 and 4 above given, or by describing it in the manner shown in form 3. The latter form will be found preferable where, as is often the case, there is doubt as to the exact time of the commencement of the terms of the tenancy. If the day is expressly named in the notice, such day must be that of the *commencement* and not of the conclusion of a term, for as the tenant is entitled to the *whole* of his term and is not bound to leave till

the first moment of the succeeding day, the law, knowing no fractions of a day, gives him the whole of that day to leave in, and consequently that day and not the preceding one is that on which he may legally be notified to quit. Taylor's Land. & Ten. sect. 477. — Adams on Eject. p. 126. — Smythe L. & T. p. 608. — Doe dem. Jordan *v.* Ward, 1 H. Bl. 97. — Doe dem. Eyre *v.* Lamblay, 2 Esp. 635. It may be remarked further that, as the rent, unless there is a special agreement to the contrary, is not due till the *whole* term has been enjoyed, the terms of a tenancy must as a general rule be considered as expiring at the midnight preceding the rent days, and such rent days must consequently be the proper ones upon which the notice may require the tenant to leave. Hultain *v.* Munigle, 6 Allen 220. — Sanford *v.* Harvey, 11 Cush. 93, 96. — See also Walker *v.* Sharpe, 14 Allen .

Notices according to forms 3 & 5 must of course be dated at some time prior to the rent day. Those according to forms 2 & 4 however may be dated and served on the rent day. See Hultain *v.* Munigle, 6 Allen 220.

The case of Bay State Bank *v.* Kiley, 14 Gray 492 seems to be somewhat at variance with the positions taken above. It is difficult however to understand what position the Court intended to assume in that case, an evident blunder upon a vital point being made in the decision, which twice states the notice there in question to have been given on the *second* day of the term, while the statement of the facts shows that it was given on the *first*.* The true objection to the notice in this case would seem to be, not, as stated by Judge Dewey in his decision, that it was *given* too late, but that *too late a time for quitting was named.* The notice, which was dated on the first

* It may be remarked that we have ascertained by a personal examination of the original documents in this case that this error is not one for which the Reporter or the printer is responsible.

of the month, notified the landlord of the tenant's intention to leave "at the expiration of one month from this date," and as in such cases the day of the date is to be excluded in computing the time named, (See Johnson *v.* Stewart, 11 Gray 181) such month from date would not expire till the midnight *following* the first day of the next month, — a point of time just one day later than the true expiration of the term. If this view be correct, all notices are bad which are dated on the first day of a term and notify a quitting "*at the expiration*" of a month, &c. "from date." It would seem to be otherwise however if, being so dated, the language were "*in*" or "*within* one month from date." See Johnson *v.* Stewart, 11 Gray 181.

The case of Atkins *v.* Sleeper, 7 Allen 487, also throws doubt on the rule above laid down, that the day to be named for the quitting should be that of the commencement and not that of the termination of a term, for in that case it seems to have been assumed that a notice given by a tenant of an intention to quit on the *last* day of his term was a good and sufficient notice and terminated his tenancy, while it was equally assumed that a notice naming the first day would have been bad, the point in dispute being whether the day named in the notice was actually the first or the last day of a term. Can there be a difference on this point between notices given by landlords and those given by tenants?

In the very recent case of Walker *v.* Sharpe, 14 Allen , however, it has been decided that, *where the first day of the term is that upon which the rent is payable*, a notice given on the first day of one term, requiring the tenant to quit on the first day of the next term, is good. This case might seem to set at rest the questions raised above, were it not that in the decision much stress is laid upon the fact that the day named in the notice was that upon which the *rent was payable*, and it

is apparently implied that if the rent day were any other than the first day of the term, such rent day might still be the true day to name in a notice to quit.

Notice of an intention to quit directed to an agent of the landlord in his own name is sufficient, if given to and received by him as such agent. Bay State Bank *v.* Kiley, 14 Gray 492.

Where parties have specially agreed that the tenancy may be terminated by a notice of a certain length, the time fixed by such notice must be the end of a term. Baker *v.* Adams, 5 Cush. 99. See also 7 Cush. 348 — 8 Cush. 288.

IV. Service of.

Service of notice at the dwelling-house of the party is sufficient, whether upon the party in person, or his wife, or servant. And if there are two joint lessees, service on one of them is *primâ facie* evidence of a service on both. 2 Greenl. Evid. sect. 324.

It is provided by statute (Gen. St. c. 18, s. 64) that constables may serve notices to quit by copies by them attested, and that their returns of service thereof shall be *primâ facie* evidence.

V. Waiver of, &c.

1. In the case of a notice to quit for nonpayment of rent under a *written* lease, a tender of the rent due, with interest and costs, four days at least before the return day of the writ in a suit brought for the possession, will restore the rights of the lessee. Gen. St. c. 137, s. 3.

2. This rule does not apply to cases of *verbal* leases, in which the *actual receipt* of the rent by the landlord will not operate as a waiver of his notice, if at the time of receiving the rent he informs his tenant that he does not intend such

waiver; though *it seems* that, if he "received such rent without protest or notice of any sort, it might be inferred from his silent acceptance of the rent in arrear that, the cause of his notice being removed, it was his intent to revoke it and waive his right to terminate his lease." Kimball *v.* Rowland, 6 Gray 224, 226.

3. The acceptance of rent, as rent, for a time *subsequent* to the expiration of a notice to quit is, however, a waiver of such notice. Collins *v.* Canty, 6 Cush. 415.

4. A notice to quit may also be waived by the landlord telling his tenant that he need not quit. Tuttle *v.* Bean, 13 Met. 275, 277.

5. But where a landlord at the request of his tenant told him that he might remain a while longer to sell off his goods, it was held to be no waiver of a notice previously given. Babcock *v.* Albee, 13 Met. 273.

VI. After notice to quit, how possession may be recovered.

"When the lessee of land or tenements, or a person holding under such lessee, holds possession without right after the determination of the lease by its own limitation, or by notice to quit, or otherwise, the person entitled to the premises may be restored to the possession" by a suit in the manner provided in Gen. St. chapter 137.

A landlord may of course obtain possession of his premises without legal process, if he can do so peaceably, but if he commit a breach of the peace in entering or in ejecting his tenant or his effects, he will be liable to a criminal prosecution for such breach. Commonwealth *v.* Haley, 4 Allen 318.

What will amount to a breach of the peace under such circumstances seems to be a matter open to much doubt. Blackstone, in enumerating the different modes in which a breach

of the peace may be committed, mentions as one, *forcible entry or detainer*, which, he says, "is committed by violent taking or keeping possession of lands or tenements with menaces, force and arms and without authority of law. This was formerly allowable to every person disseized or turned out of possession, unless his entry was taken away or barred by his own neglect or other circumstances. But being found very prejudicial to the public peace, it was thought necessary by several statutes to restrain all persons from the use of such violent methods even of doing themselves justice, and much more if they have no justice in their claim. So that the entry now allowed by law is a peaceable one, — that forbidden is such as is carried on and maintained with force, with violence, and unusual weapons. By the statute 5 Ric. II. st. 1, c. 8 all forcible entries are punished with imprisonment and ransom at the king's will. And by the several statutes of 15 Ric. II c. 2. — 8 Hen. VI c. 9. — 31 Eliz. c. 11 and 21 Jac. I c. 15 upon any forcible entry, or forcible detainer after peaceable entry, into any lands, or benefices of the church, one or more justices of the peace, taking sufficient power of the county, may go to the place and there record the force upon his own view, as in case of riots, and upon such conviction may commit the offender to jail till he makes fine and ransom to the king. And moreover the justice or justices have power to summon a jury to try the forcible entry or detainer complained of, and if the same be found by that jury, then, besides the fine on the offender, the justices shall make restitution by the sheriff of the possession without inquiry into the merits of the title; for the force is the only thing to be tried, punished, and remedied by them: and the same may be done by indictment at the general sessions. But this provision does not extend to such as endeavor to maintain possession by force where they themselves or their ancestors have been in the peaceable enjoyment

of the lands and tenements for three years immediately preceding." 4 Bl. Com. 148. See to the same effect in Stearns on Real Actions p. 20. See, in addition to statutes above cited, St. 4 Hen. IV c. 8. The English statutes above referred to, especially that of 8 Hen. VI, c. 9, were the foundation of the Massachusetts statutes of forcible entry and detainer, — St. 1784, c. 8, Rev. St. c. 104, and Gen St. c. 137, — which however do not, like the English statutes, provide a punishment for forcible entry or detainer as a crime, but only make provision for restitution of premises forcibly entered upon or held. It is however expressly enacted in Gen. St. c. 137, s. 1 that a person, though entitled to possession, "shall not enter by force, but in a peaceable manner," and it would seem that the old English rule, that a forcible entry or detainer constitutes of itself a breach of the peace, still remains in force in Massachusetts as a part of its common law. The amount of force necessary to constitute a forcible entry or detainer in Massachusetts has been considered in the following cases. Benedict *v.* Hart, 1 Cush. 487. — Saunders *v.* Robinson, 5 Met. 343, 345. — Commonwealth *v.* Bigelow, 3 Pick. 31. — Commonwealth *v.* Dudley, 10 Mass. 403, 409. — See also Fifty Associates *v.* Howland, 5 Cush. 214, 218. In the above case of Saunders *v.* Robinson, Chief Justice Shaw says — "A mere unlawful entry into lands, though it would justify the common averment of *vi et armis*, or force and arms, is not the forcible entry contemplated by the statute. It must be something more, either an original entry or subsequent detainer with strong hand; and this may be by the use of actual force and violence or by menace of force, accompanied by arms and a manifest intent to carry such threat into effect, or by a show of force calculated to create terror and alarm, by an exhibition of arms, a display of numbers, or other means manifesting an open and visible determination forcibly to make an entry or forcibly to resist the entry of another."

If the law in Massachusetts is the same that Blackstone states it to have been in England, — that upon the forcible entry or detainer being proved, the justices are to order restitution "without inquiring into the merits of the title, for the force is the only thing to be tried, punished, and remedied by them," — a tenant holding over without right might, upon being forcibly ejected by his landlord without legal process, maintain an action under Gen. St. c. 137 to be reinstated in the premises from which he had been thus forcibly, and therefore wrongfully, removed.

But a tenant holding over without right cannot, though forcibly ejected without process of law, maintain for the damages caused thereby an action of tort for breaking and entering, corresponding to the old action of trespass *quare clausum fregit*. Curtis *v.* Galvin, 1 Allen 215. — Moore *v.* Mason, 1 Allen 406. — Meader *v.* Stone, 7 Met. 147. — Sampson *v.* Henry, 13 Pick. 36. And as to the tenant's right to an action for personal damages caused by assault and battery in ejecting him, it has been held that, where the landlord has obtained peaceable possession of a portion of the premises, he may, without being liable to such action, use as much force, short of committing a breach of the peace, as is necessary to overcome the tenant's resistance to his taking possession of the residue. Mugford *v.* Richardson, 6 Allen 76. — Winter *v.* Stevens, 9 Allen 526, 530. In both these cases however the court seem to have entertained a view different from that above set forth, regarding what constitutes a breach of the peace.

AGREEMENT FOR PURCHASE AND SALE OF REAL ESTATE.

AGREEMENT made this first day of May 1864 between A. B., of &c., of the first part, and C. D., of &c., of the second part.

The said A. B. agrees to sell, and the said C. D. to purchase, for the sum of $10000.00 cash [*or*, for the sum of $10000.00, of which $4000.00 is to be paid in cash and the remaining $6000.00 is to be secured by a power of sale mortgage payable in five years upon the premises hereinafter described] the unincumbered fee-simple of the estate numbered 100 on Court Street in the City of Boston and bounded as follows: —

The said premises are to be conveyed within two weeks from this date by the full warranty deed of the said A. B. and full possession of the same, free of all tenants by sufferance or otherwise, is to be delivered to said purchaser at the time of executing the conveyance, said premises to be then in the same condition in which they now are, reasonable use and wear of the buildings thereon only excepted.

Witness our hands and seals the day and year first above-written.

NOTES.

By Gen. St. c. 105, s. 1 it is provided that no action shall be brought upon any contract for the sale of lands, tenements, or hereditaments, or of any interest in or concerning them, unless the promise, contract, or agreement, upon which such action is brought, or some memorandum or note thereof, is in writing and signed by the party to be charged therewith, or by some person thereunto by him lawfully authorized.

Where a bond provided that the obligor should "*execute and deliver a good and sufficient warranty deed of*" certain premises, it was held that he had not bound himself to give a good title, but merely to give a warranty deed in such form as

should be good and sufficient to pass what title he had. Such deed to be prepared by him and not by the obligee. Tinney *v.* Ashley, 15 Pick. 546. See also Aiken *v.* Sanford, 5 Mass. 494, where the condition of the bond was that the obligor should "*sell and convey by a good and sufficient deed of warranty.*"

But where the bond provided that the obligor should "*convey*" the premises "*in fee,*" it was held that he was bound not merely to give a deed which should purport to convey a title in fee, but that he must possess the absolute fee simple so as to give his deed full effect. Stone *v.* Fowle, 22 Pick. 166.

Where the terms of a sale of real estate at auction were "*Warranty deeds to be given; ten days will be allowed purchasers to examine the title* and make the first payment," &c., it was held that the vendor undertook, not to make a deed merely, but to make a good and clear title to the land. Mead *v.* Fox, 6 Cush. 199.

The time limited for the performance of a contract for the sale of real estate is to be reckoned from the *date* of the instrument and not from the time of its *delivery*, unless its delivery has been so delayed as to make performance according to such rule impossible or unreasonable. Goldsmith *v.* Guild, 10 Allen 239.

The doctrine that time is not of the essence of a contract in equity is not, as a general rule, to be applied to a contract for the sale of real estate in this country. Goldsmith *v.* Guild, 10 Allen 239.

As to the definiteness of description of the property sold that is required in an agreement for the sale of real estate, see Farwell *v.* Mather, 10 Allen 322.

STAMP. The above requires a five cent stamp for every sheet or piece of paper upon which it is written. Inter. Rev. Law, Schedule B. "Agreement."

BONDS.

A GENERAL FORM OF.

KNOW all men by these presents that we A. B., of &c., as principal, and C. D. and E. F., of &c., as sureties, are holden and stand firmly bound unto G. H., of &c., in the sum of one thousand dollars, to the payment of which to the said G. H. or his executors, administrators, or assigns, we hereby jointly and severally bind ourselves, our heirs, executors, and administrators.

The condition of this obligation is such that if * * * * * * * then this obligation shall be void, otherwise it shall be and remain in full force and virtue.

In witness whereof we, the said A. B., C. D., and E. F., have hereunto set our hands and seals this &c.

NOTES.

"The condition of an obligation may be either in the same or in another deed, or it may be endorsed on the back of the obligation, subscribed under it, or contained within it; but the best way to make it is the usual way, viz.: The condition of this obligation is such &c." Sheppard's Touchstone, p. 370.

The obligee in a bond will not as a general rule be entitled to recover of the obligors, in case of a failure to perform the condition, the full penal sum named in the bond, but only such an amount, not exceeding that sum, as corresponds to the damage which he can prove himself to have actually suffered by such failure. And this rule will hold even though the penal sum be called in express terms "a full and just sum,

mutually agreed upon as liquidated damages." Fisk *v.* Gray, 11 Allen 132. — See also Higginson *v.* Weld, 14 Gray 165. — Heard *v.* Bowers, 23 Pick. 455. But in some cases where the damages likely to arise from the breach of an agreement are of such a nature that they would be difficult to prove and to estimate in money, the sum named has been held to be a fixed measure of liquidated damages and subject to no deduction. Hall *v.* Crowley, 5 Allen 304. — Lynde *v.* Thompson, 2 Allen 456. — Chase *v.* Allen, 13 Gray 42.

An obligor may be liable, in addition to the penal sum, for interest thereon as damages for failure to pay such sum when properly demanded. Bank of Brighton *v.* Smith, 12 Allen 243.

As to the liability of sureties binding themselves severally, each for a portion of the penalty, and not jointly for the whole, see Bank of Brighton *v.* Smith, 12 Allen 243.

The attestation of a bond by a witness or witnesses does not affect its validity in any way, — it only affects the nature and kind of evidence required to prove the execution of the instrument. Adams *v.* Frye, 3 Met. 103, 105.

Stamp. A bond "*for indemnifying any person for the payment of any sum of money*" requires a fifty cent stamp for every thousand dollars, or fractional part thereof, of the penal sum. Inter. Rev. Law, Schedule B, "Bond."

A "personal bond *given as security for the payment of any definite or certain sum of money*, exceeding one hundred dollars and not exceeding five hundred dollars," requires a fifty cent stamp, and for every additional five hundred dollars, or fractional part thereof, of such sum, an additional fifty cent stamp. Inter. Rev. Law, Schedule B, under "Mortgage."

A bond "for the due execution or performance of the duties of any office" requires a one dollar stamp. Inter. Rev. Law, Schedule B. "Bond."

Where a bond is "secured by a mortgage, but one stamp shall be required to be placed on such papers; provided, that the stamp duty placed thereon shall be the highest rate required for said instruments, or either of them." Inter. Rev. Law, s. 160.

Bonds "required in *legal* proceedings" would seem to be exempt from stamp duty. See Inter. Rev. Law, Schedule B, under "Bond." But this would not seem to extend to *probate* bonds, for by Act of March 2nd. 1867, s. 9 it is specially provided that no stamp "on administrator or guardian bond shall be required where the value of the estate and effects, real and personal, does not exceed one thousand dollars."

On all bonds, other than those above enumerated, a twenty-five cent stamp is required. Inter. Rev. Law, Schedule B. "Bond."

BOND OF OFFICER OF CORPORATION.

Know all men by these presents that we A. B. of Boston, Massachusetts, as principal, and C. D. and E. F., both of said Boston, as sureties, are holden and stand firmly bound unto the ——, a corporation duly established under the laws of the Commonwealth of Massachusetts, in the sum of ten thousand dollars, to the payment of which to the said Corporation, its successors or assigns, we hereby jointly and severally bind ourselves, our heirs, executors, and administrators.

The condition of this obligation is such that whereas the said A. B. has this day been duly elected Treasurer of the above-named corporation and has accepted said office, now therefore if the said A. B. shall faithfully perform and discharge all the duties of said office during the term for which he has been elected, and during such further time as he may continue to hold said office, whether by reëlection or otherwise, then this obligation shall be void, otherwise it shall be and remain in full force and virtue.

In witness whereof we, the said A. B., C. D., and E. F., have hereunto set our hands and seals this first day of &c.

NOTES.

As a general rule if it be recited in the bond that the officer, for the faithful performance of whose duties it is given, has been elected for a limited time, or if by the charter or by-laws of the corporation or otherwise it is required that such officer shall be chosen annually or at other regular intervals, such bond will be good only during the period so fixed and during such further time as is reasonably sufficient for the election and qualification of a successor. Chelmsford Co. *v.* Demarest, 7 Gray 1. — Bigelow *v.* Bridge, 8 Mass. 275. — Deyo *v.* Jennison, 10 Allen 410, 413.

It is otherwise however where there is no such recital and no such requirement, even though the officer may be in fact many times reëlected. Dedham Bank *v.* Chickering, 3 Pick. 335. — Amherst Bank *v.* Root, 2 Met. 522.

But whatever may be the recital or the requirement of law regarding the term of office, a bond which, as in the form above given, specially provides for the faithful performance of the officer's duties 'during the term for which he has been elected and *during such further time as he may continue in his office by reëlection or otherwise*,' will cover all defaults during his *continuous* holding of the office, however long it may be. Middlesex Manuf. Co. *v.* Lawrence, 1 Allen 339.

As to the effect of a bond which provides for the faithful discharge of the duties of an officer "during his continuance in office during the present year and for such further periods as he may from time to time be elected to said office," see Lexington & W. C. R. R. *v.* Elwell, 8 Allen 371.

"FAITHFULLY PERFORM AND DISCHARGE" &c. As to the meaning of these words see American Bank *v.* Adams, 12 Pick. 303.

"ALL THE DUTIES OF SAID OFFICE." A failure to perform the duties through the death of the officer, or his resignation accepted by the corporation, would not involve a forfeiture of the penalty of a bond in this form. "If the condition of a bond be possible at the time of making it and afterwards becomes impossible by the act of God, the act of the law, or the act of the obligee himself, the penalty of the obligation is saved." 2 Bl. Com. 340.

It would seem that as a general rule no formal vote of acceptance of an official bond by the corporation to which it is given is required. Lexington & W. C. R. R. *v.* Elwell, 8 Allen 371, 379 — Amherst Bank *v.* Root, 2 Met. 522, 533.

Where an officer of a corporation is required by Statute to give bond, but gives one which does not meet the requirements of the Statute, such bond will nevertheless be binding on the parties. Bank of Brighton *v.* Smith, 5 Allen 413.

For a case arising upon the bond of a bank cashier, see Bank of Brighton *v.* Smith, 12 Allen 243.

STAMP. A bond in the above form requires a one dollar stamp. Inter. Rev. Law, Schedule B. "Bond."

BILL OF SALE OF PERSONAL PROPERTY.

KNOW all men that I, A. B., of &c., in consideration of the sum of one thousand dollars to me paid by C. D., of &c., the receipt whereof is hereby acknowledged, do hereby grant, sell, transfer and deliver unto the said C. D. the following goods and chattels, namely: —

To have and to hold all and singular the said goods and chattels to the said C. D. and his executors, administrators, and assigns, forever.

And I do hereby covenant with the said grantee that I am the lawful owner of the said goods and chattels and have good right to sell and dispose of the same as aforesaid; — that the same are free from all incumbrances, — and that I will warrant and defend the same against the lawful claims and demands of all persons.

In witness whereof I have hereto set my hand and seal this &c.

NOTES.

A sale of personal, unlike one of real property, may be perfectly valid and complete without the execution of any bill of sale or writing whatsoever, except in the following cases where by statute a writing is required.

BILLS OF SALE OF VESSELS. — By a statute of the United States it is provided that no bill of sale or conveyance of any vessel or part of any vessel of the United States shall be valid against any person other than the grantor, his heirs and devisees and persons having actual notice thereof, unless recorded in the office of the collector of customs where such vessel

is registered or enrolled. Stat. U. S. 29 July 1850, s. 1. — 9 Stat. 440. But this statute has been held not to apply to a pleasure yacht not registered, enrolled, or licensed under the laws of the United States. Veazie *v.* Somerby, 5 Allen 280.

As against the grantor, his heirs and devisees and persons having notice, no bill of sale or other writing is essential to the validity of a sale of a vessel. Bixby *v.* Franklin Ins. Co., 8 Pick. 86. See also 14 Pick. 406, — 9 Met. 236. But see dictum of Story J. to the contrary in Weston *v.* Penniman, 1 Mason 306, 317.

In order to be recorded such bill of sale must be "duly acknowledged before a notary public or other officer authorized to take acknowledgment of deeds." Stat. U. S. 3 March 1865, — 13 Stat. 519.

As to the proper place of record, see Potter *v.* Irish, 10 Gray 416.

Upon any sale or transfer, in whole or in part, of a *registered* vessel, such vessel must be registered anew, and the bill of sale must recite at length the former certificate of registry. Stat. U. S. 31 Dec. 1792, s. 14. — 1 Stat. 294.

But the failure to obtain a new register will not affect the validity of the sale, the only effect will be that the vessel will lose the privileges of an American vessel. Hatch *v.* Smith, 5 Mass. 42, 53. — Weston *v.* Penniman, 1 Mason 306. And the effect of an inaccurate recital of the former certificate of registry will be the same. Philips *v.* Ledley, 1 Wash. C. C. Rep. 226.

"All bills of sale of vessels registered or enrolled shall set forth the part of the vessel owned by each person selling and the part conveyed to each person purchasing." Stat. U. S, 29 July 1850, s. 5. — 9 Stat. 441.

STAMP. Upon every bill of sale of a "ship or vessel, or any

part thereof," is required a fifty-cent stamp for every five hundred dollars, or fractional part thereof, of the consideration. Inter. Rev. Law, Schedule B. "Bill of Sale."

STATUTE OF FRAUDS. When goods, wares, or merchandise are sold for a price of fifty dollars or more, and the purchaser neither receives a part of the goods so sold, nor gives something to bind the bargain or in part payment, — in such cases it is requisite to the validity of the sale that a note or memorandum in writing of the bargain be made and signed by the party to be charged thereby or by some person thereunto by him lawfully authorized. Gen. St. c. 105, s. 5.

SALES OF STOCKS, BONDS, GOLD AND SILVER BULLION AND COIN, NOTES AND SECURITIES. On every sale and contract for the sale of stocks, bonds, gold and silver bullion and coin, promissory notes or other securities made by brokers, banks, or bankers, whether made for the benefit of others or on their own account, and on every sale and contract for the sale of gold or silver bullion, coin, promissory notes, stocks, bonds or other securities, *not his or their own property*, negotiated and made by any person, firm, or company, not paying a special tax as a broker, bank, or banker, there shall be made and delivered by the seller to the buyer a bill or memorandum of such sale or contract, showing "the date thereof, the name of the seller, the amount of the sale or contract, and the matter or thing to which it refers." And such bill or memorandum requires to be stamped at the rate of *one* cent for every one hundred dollars, or fractional part thereof, of the amount of the sale or contract for which it is given, if such sale or contract is made by a broker, bank, or banker, — in other cases at the rate of *five* cents for every hundred dollars, or fractional part thereof, of such amount. Inter. Rev. Law, s. 99.

IMPLIED WARRANTY. In the absence of any writing the law will even imply a warranty of title in the vendor, if he has possession of the goods sold at the time of sale and sells them as his own and not as agent for another. But if the goods be in the possession of a third person, no such warranty is implied. 4 Kent Com. 478. — 1 Parsons on Cont. 457, 458. — Coolidge *v.* Brigham, 1 Met. 551. — Bucknam *v.* Goddard, 21 Pick. 70.

The law also implies a warranty by the vendor that the goods sold answer the written description given of them in the bill of sale. Henshaw *v.* Robins, 9 Met. 83. — Hastings *v.* Lovering, 2 Pick. 214. — Brown *v.* Bigelow, 10 Allen 242. — Hogins *v.* Plympton, 11 Pick. 97. — Winsor *v.* Lombard, 18 Pick. 57.

IMPORTANCE OF ACTUAL DELIVERY OF THE GOODS SOLD. A sale of personal property, accompanied by a delivery of a bill of sale, will not be valid against attaching creditors of the vendor unless there be a delivery, actual, constructive, or symbolical, of the articles sold. Burge *v.* Cone, 6 Allen 412. And after such delivery the continued, or rather renewed, possession by the vendor of the goods sold, though not *conclusive* evidence of fraud which would render the sale void as against such creditors, is nevertheless a badge or indication of such fraud. Allen *v.* Wheeler, 4 Gray 123, 127. — Macomber *v.* Parker, 14 Pick. 497. — Fletcher *v.* Willard, 14 Pick. 464. — Brooks *v.* Powers, 15 Mass. 244. In cases of sales of vessels or goods at sea, and in other cases where the thing sold is from its situation or other cause incapable of actual delivery, the simple transfer of the bill of sale will be sufficient to transfer the *property* in the thing sold to the vendee. See 2 Kent Com. 501 — 5 Allen 289. — Gibson *v.* Stevens, 8 Howard 384.

But though no delivery of the property be made at the time of the sale, the bill of sale gives the vendee a right to the possession as against the vendor, and the former may at any subsequent time, by exercising such right and taking the possession, make his title perfect against third parties whose title accrues afterwards. And though the possession be not taken till within six months of the vendor's insolvency, the vendee's rights will, if the bill of sale had been given prior to the six months. be equally as good as if the sale had been completed by delivery of the property at the earlier date. Mitchell *v.* Black, 6 Gray 100.

Parol Evidence to vary receipted Bills of Parcels. With regard to simple receipted bills of parcels, such as are usually given upon sales of personal property, it is held that these form an exception to the general rule that parol evidence is not admissible to vary, explain, or control a written contract. being said to be "informal documents, intended only to specify prices, quantities, and a receipt of payment, and not used or designed to embody or set out the terms and conditions of a contract of bargain and sale," and therefore always open to evidence to prove the real terms upon which the agreement of sale was made between the parties. Hazard *v.* Loring, 10 Cush. 267, 268. — Dunham *v.* Barnes, 9 Allen 352. — Hildreth *v.* O'Brien, 10 Allen 104. — Olmstead *v.* Mansir, 10 Allen 424. — Caswell *v.* Keith, 12 Gray 351. A formal bill of sale under seal is not however liable to be thus explained and varied, at least in an action at law. Harper *v.* Ross, 10 Allen 332. But in a suit in equity it would *seem* that, though absolute in its terms, a bill of sale may be shown to have been given merely as collateral security for a debt. See Newton *v.* Fay, 10 Allen 505, in which it was held that a transfer of stock in a corporation might be so qualified.

STAMP. A bill of sale of personal property would seem, as a general rule, to require, as a contract not otherwise specified in Schedule B., a five cent stamp for each sheet or piece of paper upon which it is written. Inter. Rev. Law, Schedule B. "Agreement."

Bills of sale of vessels require however a different stamp as shown above at page 161.

So also bills or memoranda of sales of stocks, bonds, coin, &c. in certain cases, as shown above at page 162.

MORTGAGE OF PERSONAL PROPERTY.

THIS differs from the bill of sale before given only in the insertion after the covenants of two clauses substantially as follows: —

Provided nevertheless that if the said grantor, or his executors or administrators, shall pay unto the said grantee, or his executors, administrators, or assigns, the sum of one thousand dollars in one year from this date, with interest semi-annually at the rate of six per cent per annum; and until such payment shall keep the said property insured against fire in a sum not less than one thousand dollars for the benefit of the said grantee and his executors, administrators, and assigns, at such Insurance Office as he or they shall approve; — then this deed as also a note of even date herewith, signed by the said A. B., whereby he promises to pay to the said grantee or order the said sum and interest at the times aforesaid, shall both be void.

And it is agreed that, until default in the performance of the condition of this deed, the said grantor, his executors, administrators, and assigns, may retain possession of the said goods and chattels and use and enjoy the same, [but upon such default or in case the said property or any part thereof shall be attached as the property of the said mortgagor or of his assigns, or in case he or they shall, without the assent in writing of the said mortgagee or his representatives, attempt to sell or to remove from the City of Boston the said property or any part thereof, then the said mortgagee or his representatives may take immediate possession of the whole of said property and hold the same to his or their own use, subject nevertheless to redemption according to law.]

NOTES.

It is perhaps as well in many, if not in most cases, to omit that portion of the last paragraph which is enclosed in brackets.

At common law a mortgage of personal property, without delivery to the mortgagee of the articles mortgaged, was invalid as against creditors of the mortgagor. Bonsey *v.* Amee, 8 Pick. 236. — Gale *v.* Ward, 14 Mass. 352. But since the passage of St. 1832, c. 157, s. 1 (reënacted in Rev. St. c. 74, s. 5 and in Gen. St. c. 151, s. 1,) providing for the registration of mortgages of personal property, such registration renders any delivery of the mortgaged property unnecessary. Bullock *v.* Williams, 16 Pick. 33 — Forbes *v.* Parker, 16 Pick. 462. But *it seems* that this rule does not extend to cases where the property is not so described in the mortgage that it can be identified, or where it requires to be weighed, measured, counted off, or otherwise separated from other or larger parcels or quantities. Per Shaw, C. J. in Bullock *v.* Williams, 16 Pick. 33, 35.

As to the *description* of the property mortgaged, it has been decided that a general description will be valid, such as "all my tools and implements in my shop in B." Harding *v.* Coburn, 12 Met. 333, 338. — Comins *v.* Newton, 10 Allen, 518. And if certain articles be specifically enumerated, following which enumeration is a clause including "all other my personal property situated in my shop" &c., such enumeration will not prevent other articles of like kind to those enumerated, if included in the general description, from passing under the mortgage. Same case. See also to the same point, Veazie *v.* Somerby, 5 Allen 280, 285, — Goulding *v.* Swett, 13 Gray 517. And if such general description be clearly false in some particular, such false recital may be rejected, if what remains is sufficient to identify the articles mortgaged. Pettis *v.* Kellogg, 7 Cush. 456. And the fact that the general description is followed by the words, — "a particular schedule of which shall be annexed hereto as soon as conveniently may be," which schedule is never added, does not affect

the validity of the mortgage. Winslow *v.* Merchants' Ins. Co., 4 Met. 306. But so far as the description included "also such other machinery, engines, tools, and other property as is now contemplated to be put in said building," such description was held to be too indefinite and uncertain to cover articles which were at the time in the possession of the mortgagor and were afterwards actually placed in the said building. Same case.

Where a portion of the property mortgaged was described as "one ton brass wire," the mortgagee was allowed to show that by this expression was meant, not an exact ton by weight, but a certain mass of wire stored in a certain place which in fact weighed 2662 pounds. Barry *v.* Bennett, 7 Met. 354.

A mortgage of goods which the mortgagor does not own when the mortgage is made, though he afterwards acquires them, is, so far as concerns such after acquired goods, void as against attaching creditors and subsequent vendees and mortgagees. Jones *v.* Richardson, 10 Met. 481. — Chesley *v.* Josselyn, 7 Gray 489. — Henshaw *v.* Bank of Bellows Falls, 10 Gray 568, 571. — Pettis *v.* Kellogg, 7 Cush. 456, 461. — Codman *v.* Freeman, 3 Cush. 306, 309. — Barnard *v.* Eaton, 2 Cush. 294, 303. — Moody *v.* Wright, 13 Met. 17, 29. — 1 Parsons on Cont. 453. But *it seems* that a mortgage may include property of which the mortgagor is *potentially*, though not *actually*, possessed, — for instance, the wool that shall grow on sheep owned by him at the time of the mortgage. Per Wilde J. in Jones *v.* Richardson, 10 Met. 488. *It seems* also that a provision in a mortgage intended to cover after acquired goods may operate as an executory agreement that such goods shall be holden by the mortgagee as security, when acquired by the mortgagor, under which agreement the mortgagee would have a right to take possession of the property at such subsequent time and then to hold it, not strictly under the mortgage, but by virtue of a valid lien or pledge. Moody

v. Wright, 13 Met. 17, 32. — Pettis *v.* Kellogg, 7 Cush. 456, 462. See also Rowley *v.* Rice, 11 Met. 333.

As to the effect of additions of labor and materials to the mortgaged property by the mortgagor after the mortgage, and while they remain in his possession, see Harding *v.* Coburn, 12 Met. 333, 340. — Crosby *v.* Baker, 6 Allen 295. — Putnam *v.* Cushing, 10 Gray 334. — Comins *v.* Newton, 10 Allen 518.

As to mortgages *to secure future advances*, see page 66.

When there is no express stipulation to the contrary, the mortgagee has the right to the immediate possession of the mortgaged property, though before breach of condition. Brackett *v.* Bullard, 12 Met. 308, 310. But an agreement that the mortgagor shall continue in possession of the mortgaged property, and make sales of the same in the ordinary course of business, and apply the proceeds to his own use, tends to show a fraudulent intent, which however may be explained away by other evidence of the actual honest intentions of the parties. Briggs *v.* Parkman, 2 Met. 258, 263, 264. It would seem however that, if a mortgage is recorded under the statute, a simple provision that the mortgagor might retain possession until breach of condition would not give rise to any presumption or suspicion of fraud. See Gen. St. c. 151, s. 1. — Bullock *v.* Williams, 16 Pick. 33.

Where a mortgage contains a proviso to the effect that the mortgagor shall not sell the property without the *written* consent of the mortgagee, a sale made by the mortgagor under a subsequent *verbal* consent of the mortgagee will nevertheless pass a good title. Shearer *v.* Babson, 1 Allen 486.

A mortgage of personal property may, if desirable, be made with a *power of sale* like that usually inserted in mortgages of real estate. See Hosmer *v.* Sargent, 8 Allen 97.

A mortgage of personal property of a partnership may be executed by one partner in the name of the firm, (Milton *v.*

Mosher, 7 Met. 244) or by signing the name of each copartner separately, (Patch *v.* Wheatland, 8 Allen 102) but if executed by but one partner in his individual name, it will pass no title. (Clark *v.* Houghton, 12 Gray 38.)

A mortgage of personal property need not be under seal. Milton *v.* Mosher, 7 Met. 244.

By statute it is made a criminal offence for a mortgagor of personal property to sell or convey it without the written consent of the mortgagee and without informing the purchaser that it is mortgaged. G. S. c. 161, s. 62. And one to whom property is so sold or mortgaged may treat such sale or mortgage as void. Bryant *v.* Pollard, 10 Allen 81. It is also a punishable offence for a mortgagor or any other person to conceal the mortgaged property from the mortgagee with a fraudulent intent. G. S. c. 161, s. 61.

Recording of. It is required by statute that all mortgages of personal property, when the property mortgaged is not delivered to and retained by the mortgagee, shall be recorded. Gen. St. c. 151, s. 1. This statute has been held to apply equally to a mortgage made by executing a bill of sale and a separate defeasance. Potter *v.* Bost. Locomotive Works, 12 Gray 154.

But the statute itself excepts from this general rule mortgages of ships and vessels, and also mortgages of goods at sea or abroad, provided that the mortgagee takes possession of such goods "as soon as may be after their arrival in this State." Gen. St. c. 151, s. 2. It has been decided however that a yacht of sixteen tons burthen, kept for the use of visitors at a hotel, and not registered, enrolled, or licensed under the laws of the United States, was not to be considered a "ship or vessel" within the terms of the above exception, and that a mortgage of such yacht was required to be recorded. Veazie *v.* Somerby, 5 Allen 280, 286.

By statute of the United States however mortgages of vessels are required to be recorded in the office of the collector of customs where such vessel is registered or enrolled. In this respect they are subject to the same rules before set forth with regard to bills of sale of vessels; — see page 160.

By "personal property" in the Massachusetts statute is meant only goods and chattels capable of delivery, and it is not necessary that a mortgage of a *chose in action* should be recorded. Marsh *v.* Woodbury, 1 Met. 436.

This statute does not apply to a mortgage made out of the State, though made by a citizen of this State, when temporarily in another State with the property mortgaged, and who, after executing the mortgage, immediately returned with the property to this State, and the same remained here in his possession. Langworthy *v.* Little, 12 Cush. 109.

When the record must be made. "The time when the record shall be made is not specially prescribed, though it must undoubtedly precede the possession by others subsequently acquiring an interest in the mortgaged property. To prevent it from passing to them, it will be sufficient that the record is made at any time before such possession is taken, though it be long after the execution of the mortgage." Per Merrick J. in Mitchell *v.* Black, 6 Gray 100, 106.

Where the record must be made. The statute requires the record to be made "on the records of the city or town where the mortgagor resides when the mortgage is made and on the records of the city or town in which he then principally transacts his business or follows his trade or calling." And if he resides without the State, then on the records of the city or town where the property is when the mortgage is made. Gen. St. c. 151, s. 1. [As to the law regarding the place of

record prior to the passage of the General Statutes, see Rev. St. c. 74, s. 5. — St. 1843, c. 72, s. 2. — Witham *v.* Butterfield, 6 Cush. 217. — Brigham *v.* Weaver, 6 Cush. 298, — Whitney *v.* Heywood, 6 Cush. 82.]

Though the statute requires that mortgages of personal property should be recorded, it does not require that subsequent changes in the title, as by *assignment* or *release*, shall be shown upon the record. See Bigelow *v.* Smith, 2 Allen 264, 265.

If unrecorded, a mortgage of personal property, not delivered to and retained by the mortgagee, will be valid only against the parties to it. Gen. St. c. 151, s. 1. — Simpson *v.* M'Farland, 18 Pick. 427, 432. And it has been decided that the assignee in insolvency of the mortgagor is not to be regarded as in this sense a "party," and that consequently such unrecorded mortgage will not be valid as against him. Bingham *v.* Jordan, 1 Allen 373.

The fact that a subsequent purchaser or attaching creditor has *notice* of the existence of such mortgage, will not make the mortgage good as against him. Travis *v.* Bishop, 13 Met. 304. But *quære* as to the case of the attaching creditor, though there seems no good ground for any distinction between him and a purchaser. See Shapleigh *v.* Wentworth, 13 Met. 358, 362. — Denny *v.* Lincoln, 13 Met. 200, 202.

Stamp. A mortgage of personal property requires the same stamp as one of real estate, except that upon one containing a power of sale there will be required for the power of attorney, which it contains, an additional stamp of fifty cents only instead of one dollar. Inter. Rev. Law, Schedule B, "Mortgage," and "Power of Attorney."

NOTICE TO FORECLOSE. The statute provides that, after condition broken, the mortgagee or his assigns may give to the mortgagor, or the person in possession of the property claiming the same, written notice of his intention to foreclose the mortgage for breach of the condition thereof. Such notice to be served as provided in said statute, and with an affidavit of service to be recorded wherever the mortgage is recorded. Gen. St. c. 151, s. 6, 7.

If a mortgage be given to secure a note payable on demand, such note being payable immediately, no demand is necessary to constitute a breach of condition, and the mortgagee may give notice to foreclose immediately after the mortgage is given and without making any demand whatever. Southwick *v.* Hapgood, 10 Cush. 119, 121.

The following would seem to be a proper form for such notice —

BOSTON, 10 January, 1866.

To C. D.

Sir — I hereby give you notice that I intend to foreclose for breach of the condition thereof your mortgage to me of certain personal property therein described, which mortgage is dated the 7th October 1865 and recorded on the records of the City of Boston with the records of mortgages of personal property liber 17, folio 62. Yours &c.

A. B.

TENDER.

In what cases and at what time it may be made. At common law a tender could be made only when the demand was for money, definite in amount or capable of being made so, and it was of no avail unless made on the exact day when the debt fell due. Dewey *v.* Humphrey, 5 Pick. 187 — Suffolk Bank *v.* Worcester Bank, 5 Pick. 106. — Saunders *v.* Frost, 5 Pick. 259, 267. See also 2 Parsons on Contracts 149, 154.

But in this State it is provided by Statute that in cases of *casual and involuntary trespass on real estate* "the trespasser may tender sufficient amends before an action is brought." Gen. St. c. 138, s. 11, 12.

It is also provided that "tender of the whole sum due on any contract for the payment of money" may be made after the day when the money becomes due or even after action brought, provided it is made four days at least before the return day of the writ, — the legal costs being included in the tender if it is made after action brought. Gen. St. c. 130, s. 23, 24. Costs must be added if the tender be made after a writ has been sent to an officer for service, though not actually served. Emerson *v.* White, 10 Gray 351.

To whom to be made. Tender may be made to the creditor personally or to his agent or attorney. See Gen. St. c. 130, s. 25. — McIniffe *v.* Wheelock, 1 Gray 600. — 2 Parsons on Cont. 151.

FORM OF TENDER. At common law a tender was required to be an unconditional offer of the money, unaccompanied by any qualifying words or by a demand or request of anything, beyond the mere receipt of the money, to be done by the party to whom it is made. The money must not be offered *as the whole amount due to the creditor*. Richardson *v.* Boston Chem. Lab. 9 Met. 42, 52. — Loring *v.* Cooke, 3 Pick. 48, 51. — Thayer *v.* Brackett, 12 Mass. 450. "If a party takes a sum properly tendered he does not thereby compromise his future claim to more." Baron Alderson in Sutton *v.* Hawkins, 8 Car. & Payne 259. In this case the money was offered 'as all that was due' and it was held not to be a good tender. "If it was not an unconditional offer so that the creditor might have taken up the money, and, if there was more due, still bring an action, the tender was bad." Baron Vaughan in Mitchell *v.* King, 6 Car. & Payne 237. See also 1 Chitty's Gen. Pract. 508. But the validity of a tender will not be affected by the fact that the party offering the money protests at the same time that it is not legally due. Scott *v.* Uxbridge & Ricksmansworth Railway Co., Law Rep. 1 C. P. 596. Chitty gives the following form for a writing to accompany a tender.

"Sir — The bearer is directed by me to pay or tender to you the sum of —— in respect of the debt or sum of money claimed by you, and such tender and offer is and will be made unconditionally and without any reserve or any condition or terms whatsoever, and to avoid all possible doubt I beg you to understand that the same sum of money is to be offered, paid, and received without prejudice to any claim you may have on me for any larger or different sum of money. Dated &c. Yours, A. B."

But a right to make certain demands in connection with a tender is in certain cases given by Statute, for instance. —

When a tender is made after suit brought, the debtor may request a certain certificate or notice to the officer who has the writ. Gen. St. c. 130, s. 26.

A party tendering the amount due on a mortgage may demand a discharge, he paying all reasonable charges incurred in making the same. Gen. St. c. 140, s. 18 &c. — c. 89, s. 30, 31. See Saunders *v.* Frost, 5 Pick. 259, 270. The fact that the party tendering demands a *quit-claim deed* will not affect the validity of the tender. Walden *v.* Brown, 12 Gray 102, 106.

On a tender for the redemption of real estate set off on execution, or of the equity of redemption of a mortgaged estate sold on execution, a deed of release may be demanded, such deed being prepared by the party tendering or at his expense. Gen. Stat. c. 103, s. 26, 44. See Loring *v.* Cooke, 3 Pick. 48.

As to the *kind of money* in which a tender may be made, see Const. U. S. Art. 1, sections 8 & 10. See also Hallowell Bank *v.* Howard, 13 Mass. 235. — Snow *v.* Perry, 9 Pick. 539, 542. An offer of a promissory note due from the party to whom it is offered will not avail as a tender of the amount due upon it. Cary *v.* Bancroft, 14 Pick. 315.

"The party must have the money about him wherewith to make the tender, though it is not necessary to count it." Breed *v.* Hurd, 9 Pick. 356. See also Clarke *v.* Moies, 11 Gray 133. "The production of the money and the actual offer of it to the creditor is dispensed with, if the party is ready and willing to pay it and is about to produce it, but is prevented from so doing by a declaration on the part of the creditor that he will not receive it." Hazard *v.* Loring, 10 Cush. 267. So also if the creditor absents himself with the intent of evading a tender. Southworth *v.* Smith, 7 Cush. 391. — Gilmore *v.* Holt, 4 Pick. 257.

The *exact amount due*, as nearly as, from the value and divisions of the current coin, it can conveniently be made, must be offered, or the tender will not be good. Boyden *v.*

Moore, 5 Mass. 364, 370. But it would seem that a tender could not be rendered invalid by the fact that *more* was offered than was due, see 2 Parsons on Cont. 152.

If less than the full amount due be tendered, the creditor may refuse to receive it, and may recover judgment for the *whole* amount due. Holmes *v.* Leland, 1 Gray 625.

But the debtor is not required to tender the whole amount he owes his creditor, when he owes him several distinct debts. A tender of the whole amount due on any such distinct debt will be good. See 2 Pars. Cont. 151.

A tender will be rendered void if the creditor, after refusal of the tender, subsequently at a reasonable time and place demands of the debtor the money before tendered, and such demand is refused. The debtor must have the money "in readiness to be delivered at his residence or place of business, or if in a large sum, in some safe and convenient place of deposit." And if the debtor, after refusal by the creditor to accept, in his presence deposits the amount tendered in the hands of a third party, directing him to pay it to the creditor whenever he calls for it, and afterwards the creditor demands it of the debtor personally and he refuses to pay, the tender is rendered void. Town *v.* Trow, 24 Pick. 168.

CONSEQUENCES OF TENDER. If a creditor accepts a tender properly made, he does not thereby admit that the sum received is all that is due him, and may still bring an action for the balance. See Sutton *v.* Hawkins and Mitchell *v.* King, above cited.

A tender, though not accepted, is an admission by the party making it that he owes the amount tendered. See Howlett *v.* Holland, 6 Gray 418. — Hubbard *v.* Knous, 7 Cush. 556.

An offer of payment, which does not amount to a technical tender, may sometimes avail to prevent the accruing or stop

the running of interest. See Goff *v.* Rehoboth, 2 Cush. 475, 479. — Suffolk Bank *v.* Worcester Bank, 5 Pick. 106.

For other cases relative to tender see 2 Allen 435 — 11 Gray 410 — 9 Allen 522. — 12 Gray 102.

Where a suit has been brought upon a claim on which tender has been made, the defendant must plead his tender with a *profert in curia*, and must pay the money tendered into Court. See Storer *v.* McGaw, 11 Allen 527, 528.

The importance of the law upon the subject of tender is in a great degree destroyed by the statute provisions relative to "offer of judgment." Gen. St. c. 129, s. 62, 63.

WILLS.

A SHORT FORM FOR A WILL.

I, A. B., of Worcester, Massachusetts, Tailor, make this my last will and testament.

After the payment of my just debts and funeral charges I devise and bequeath as follows:

1st. To my wife, S. B., my house and farm where I now live, for her life.

2nd. To my son, J. B., my estate on —— Street in said Worcester.

3rd. To my son, H. B., the sum of ten thousand dollars in money.

4th. To my daughter, S. M., wife of G. M., a like sum of ten thousand dollars.

All the rest and residue of my property and estate to be divided equally between my three children aforesaid, J. B., H. B., and S. M.

I hereby nominate my said son, J. B., to be the executor of this my will.

In testimony whereof I have hereunto set my hand this first day of January A. D. 1867.

A. B.

Signed and published as his last will by the said A. B. in the presence of us, who in his presence and in the presence of each other have hereto subscribed our names as witnesses.

C. D.
E. F.
G. H.

A SHORT FORM FOR A CODICIL.

I, A. B., of Worcester, Massachusetts, make this codicil to my last will heretofore made and published by me and dated 1st January A. D. 1867, which will I hereby ratify and confirm in all respects save as the same may be changed by this instrument.

Whereas by said will I gave to my daughter, S. M., wife of G. M., the sum

of ten thousand dollars, I do hereby revoke said legacy, and do hereby bequeath the said sum of ten thousand dollars to R. S. in trust to pay over the net income thereof to the said S. M., during her life, and at her decease to pay over the principal to her children then living, if any, and to the issue of any deceased child by right of representation, or if she shall leave no child nor the issue of any deceased child living at the time of her death, then to such person or persons as would be entitled to her personal estate under the statute of distributions.

In testimony whereof I have hereto set my hand this tenth day of February A. D. 1867.

A. B.

Signed and published by the said A. B. as a codicil to his last will in the presence of us, who in his presence and in the presence of each other have hereto subscribed our names as witnesses.

E. F.
G. H.
J. K.

CLAUSE EXEMPTING EXECUTOR FROM GIVING SURETIES.

(See Gen. St. c. 93, s. 5.)

I hereby nominate C. D. to be the executor of this will and I request that he shall be exempt from giving a surety or sureties on his official bond.

ANOTHER FORM OF ATTESTATION CLAUSE.

On this first day of January A. D. 1867 A. B. of Boston, Massachusetts, signed the foregoing instrument in our presence, declaring it to be his last will, and as witnesses thereof we have in his presence and in the presence of each other hereto subscribed our names.

NOTES.

A will executed on the *Lord's day* is valid. Bennett *v.* Brooks, 9 Allen 118.

A *seal* is not necessary to the validity of a will, and as it does not in the case of a will even have the effect which it has on other instruments, — that of raising a presumption of a

consideration, — there seems no sufficient reason for annexing one.

The *signature* may be made either "by the testator or by some person in his presence and by his express direction." Gen. St. c. 92, s. 6.

And it has been held to be a sufficient signing by the testator, if he makes a mark or cross, and his name is added by one of the attesting witnesses. Nickerson *v.* Buck, 12 Cush. 332. Compare 11 Allen 59.

Where a testator wishes to devise real estate situate in another State, it may be important that his will should be executed in accordance with the laws of such State, for it is not always provided by Statute, as it is in Massachussetts, (Gen. St. c. 92, s. 8,) that wills made out of the State, if valid according to the laws of the State or country where they are made, shall be allowed to be valid here. See Rev. St. Maine (1847) c. 64, s. 10. Also Sts. New York.

Though a will be written on several *separate* pieces of paper, it will be considered valid, if the different papers be obviously connected in their provisions and sufficiently shown to have composed a connected series and the same that are shown to have been attested by the witnesses. Ela *v.* Edwards, 16 Gray .

A testator cannot by a duly executed will reserve to himself a power to declare testamentary bequests by another instrument to be signed by himself, but not attested by witnesses as required by the Statute regulating wills. Thayer *v.* Wellington, 9 Allen 283. But a testator may refer to a paper *already executed*, whatever may be the *form* of its execution, in such a way as to incorporate it into his will. Same case p. 292.

"A good will or testamentary paper may be made in the form of a letter, if in other respects it bears the character and

is executed according to the requisites of a will." Per Shaw C. J. in Bayley *v.* Bailey, 5 Cush. 245, 261.

WHO MAY MAKE A WILL. The statute provides that "every person of full age and sound mind" may make a will. Gen. St. c. 92, s. 1, 2. [Rev. St. c. 62, s. 1, 5.] Before the passage of the Revised Statutes a male minor over fourteen years of age, and, it seems, a female over twelve, might make a will bequeathing personal property. Deane *v.* Litchfield, 1 Pick. 239.—2 Kent Com. 242.—4 Kent Com. 506.—See also Rept. of Comsnrs. on Rev. St. Notes to ch. 62, s. 18, 19.

A person under guardianship as *non compos mentis* may make a will, if at the time of its execution he be of sound mind. Breed *v.* Pratt, 18 Pick. 115.—Stone *v.* Damon, 12 Mass. 488.—Crowninshield *v.* Crowninshield, 2 Gray 524.

At common law a married woman could not make a will except in certain cases where she had a power of appointment or a license from her husband. 2 Blacks. Com. 498.—4 Kent Com. 506. In Ela *v.* Edwards, 16 Gray , it was held that where the estate of a married woman had been before marriage by a proper instrument secured to her sole use, although without the intervention of a trustee, with a power to dispose of the same by will, she might, as regarded the personal property so secured, exercise that power by a will made by her during coverture.

In Massachusetts however she is enabled by Statute to make a will of her real and her separate personal property; but, without her husband's assent in writing, it will not operate to deprive him of his tenancy by the courtesy nor of more than one half of her personal property. Gen. St. c. 108, s. 9, 10. The first statute on this subject was St. 1842, c. 74, which was followed by St. 1850, c. 200, St. 1855, c. 304, s. 5, and St. 1857, c. 249, s. 4. See on this subject Ela *v.*

Edwards, 16 Gray . With the husband's assent in writing, however, her will may be valid and effectual to pass the *whole* of her real and personal estate, cutting off the husband's tenancy by the courtesy. Silsby *v.* Bullock, 10 Allen 94. And the insolvent circumstances of the husband, when such assent is given, will not affect the validity of the will. Same case.

ATTESTATION. The statute (Gen. St. c. 92, s. 6) requires a will to be *attested and subscribed in the testator's presence by three or more witnesses competent as such at the time of attestation.*

A person may be incompetent as a witness to a will either by reason of crime or of interest, the statute expressly excepting attesting witnesses to wills from the general rule that no person shall be excluded from giving evidence for such reasons. Gen. St. c. 131, s. 13, 14, 15. See also Amory *v.* Fellowes, 5 Mass. 219. — Sears *v.* Dillingham, 12 Mass. 358. — Haven *v.* Hilliard, 23 Pick. 10, 16. — Sparhawk *v.* Sparhawk, 10 Allen 155, 156. An incompetent witness is one who, at the time of attestation, would not be entitled to be heard and examined as a witness in a court of justice on the question of the due execution of the will. Haven *v.* Hilliard, 23 Pick. 10, 18.

But one to whom a beneficial devise or legacy is given in a will is not by reason thereof incompetent as a witness thereto, — such devise or legacy being made void by Statute. But this does not apply where there are, besides such witness, three other competent witnesses to the will. Gen. St. c. 92, s. 10. Quære as to effect of a devise or legacy given to an attesting witness *in trust* for a third person. See Loring *v.* Park, 7 Gray 42. Compare Paine *v.* Prentiss, 5 Met. 396, 399.

"A mere charge on the lands of the devisor for the payment

of debts shall not prevent his creditors from being competent witnesses to his will." Gen. St. c. 92, s. 10.

"An interest to disqualify a witness must be a present vested interest and not uncertain and contingent." It must also be "*pecuniary* or such as directly or indirectly affects property." Per Wilde, J. in Hawes *v.* Humphrey, 9 Pick. 350, 357.

A member of a corporation, to which property is given by will in trust for charitable purposes, is a competent witness to such will. Loring *v.* Park, 7 Gray 42.

An heir at law of a testator is a competent witness to a will which disinherits him. Sparhawk *v.* Sparhawk, 10 Allen 155.

A person named as an executor in a will is competent as a witness thereto. Wyman *v.* Symmes, 10 Allen 153. It was formerly held that, though not incompetent as an attesting witness, yet, if he had not declined the trust, he could not testify in support of the will, being rendered incompetent by reason of his liability for costs. Sears *v.* Dillingham, 12 Mass. 358. But since St. 1856, c. 188, and St. 1857, c. 305, and now under Gen. St. c. 131, s. 14, even this incompetency is removed. See Wyman *v.* Symmes, 10 Allen 153. — Baxter *v.* Abbott, 7 Gray 71, 82.

Before the passage of the General Statutes the members of certain corporations, — counties, cities, towns, districts, precincts, parishes, religious societies, school districts, and mutual insurance companies, — were by statute made competent witnesses in all matters in which the corporations, of which they were members, were interested, (Rev. St. c. 94, s. 54. — St. 1850, c. 34. — Haven *v.* Hilliard, 23 Pick. 10) but as this provision has been omitted in the General Statutes, and as witnesses to wills are specially excluded from the general rule making interested persons competent witnesses, it would seem that members of such corporations are not competent witnesses to

wills made since the passage of the General Statutes, and in which the corporations of which they are members are named as devisees or legatees. See Boston *v.* Tileston, 11 Mass. 468,— also Loring *v.* Park, 7 Gray 42. It would seem that it cannot be claimed in such a case that under Gen. St. c. 92, s. 10, the devise would be void and the witness competent, inasmuch as it is not to the attesting witness himself, but only to a corporation of which he is a member, that the devise or legacy is made. But the nature of the devises or bequests likely to be made to any of these corporations is such that an interest would seldom be created thereby in the members of such a character as to disqualify them from being attesting witnesses to the will. See Hawes *v.* Humphries, 9 Pick. 350, 358.

No formal *publication* of a will, properly so called, is necessary, that is, no declaration by the testator in the presence of the attesting witnesses that the instrument is his will. It is not necessary that the witnesses should be informed of or should know the nature of the instrument which they attest, but it is requisite that there should be proof that the deceased knew and understood the instrument to be his will. Osborn *v.* Cook, 11 Cush. 532. — Tilden *v.* Tilden, 13 Gray 110. — Swett *v.* Boardman, 1 Mass. 258.

Such knowledge is of course best proved by the testator's express declaration to that effect, — but it may also be inferred from the fact that the will is in his own handwriting (Osborn *v.* Cook, 11 Cush. 532 — Hogan *v.* Grosvenor, 10 Met. 54,) or from the facts that he was the agent in procuring the attestation of the witnesses, having the instrument at the time in his own possession. (Ela *v.* Edwards, 16 Gray , — Tilden *v.* Tilden, 13 Gray 110.) It is not necessary that the witnesses should actually see the testator sign the will, — it will be sufficient if he by words or by *acts* makes known to them that the

signature is his, and any act or declaration that carries by implication an averment of such fact will be effectual for this purpose. Nickerson *v.* Buck, 12 Cush. 332. For instance a declaration that the instrument is his will. Dewey *v.* Dewey, 1 Met. 349, 352. See also Hall *v.* Hall, 17 Pick. 373 — Hogan *v.* Grosvenor, 10 Met. 54. — Ela *v.* Edwards, 16 Gray .

It is sufficient evidence that the attestation is made in the *presence of the testator*, if the facts show a possibility of his seeing the witnesses sign, unless controlled by other evidence showing that in fact he did not see them. Dewey *v.* Dewey, 1 Met. 349. But a will subscribed by the witnesses in a room connected with that in which the testator was lying, but not actually in his presence, view, or hearing, has been held not to be valid. Boldry *v.* Parris, 2 Cush. 433.

But a will has been held not to be sufficiently attested, where a witness subscribed his name in the absence of the testator, and in anticipation of the testator's signature, although he afterwards acknowledged his signature in the testator's presence; — and *it seems* that the attesting witnesses must actually sign, and not merely acknowledge their signatures, in the presence of the testator, and that they must not subscribe their names until after the testator has himself signed the will. Chase *v.* Kittredge, 11 Allen 49. See also Boldry *v.* Parris, 2 Cush. 433, 438.

It is not necessary to the validity of the will that the witnesses should sign in the *presence of each other.* Dewey *v.* Dewey, 1 Met. 349, — Hogan *v.* Grosvenor, 10 Met. 54. It would however seem advisable that, as a general rule, the witnesses should so sign, and that such fact should be recited in the attestation clause, and for this reason. Large interests are often at stake upon the question of the validity of a will,

and in such cases there is great temptation to tamper with the witnesses. Now if each witness signs separately, one of the three might be found who for a consideration would be willing to swear that he did not subscribe in the presence of the testator, a point upon which in such a case it would be difficult to contradict him, and which, if uncontradicted, would be fatal to the will. But if the witnesses sign in the presence of each other, any one of them who might be willing to misstate the facts would be liable to be contradicted by the other two, and thus his perjury would be rendered harmless. The recital in the attestation clause of the signing in the presence of each other is important as serving to remind the witnesses of the fact, or at least as raising a presumption that such was the fact.

The full form of attestation given above is by no means necessary. Thus a will has been held to be well executed, to which the names of the witnesses were subscribed without being preceded by any clause whatever. Ela *v.* Edwards, 16 Gray . In this case the court say that "instead of its being shown by the attestation clause that there was a compliance with the statutes, the court or jury, if tried by jury, are to be reasonably satisfied of the fact of proper attestation from other sources and the circumstances of the case." See also a case in which the word "witness" alone was used. Osborn *v.* Cook, 11 Cush. 532. In a similar case, in which the words "witness to signature" were used, although one witness was dead, and the others had no recollection as to whether they had signed in the presence of the testator, the correct attestation was presumed simply on the ground that *omnia rite acta presumuntur.* Eliot *v.* Eliot, 10 Allen 357.

To the general rule requiring the formalities above set

forth in the execution of a will there are the following exceptions.

A will made out of the State will be valid here if executed in accordance with the laws of the State or country where it was made. Gen. St. c. 92, s. 8. See Bayley *v.* Bailey, 5 Cush. 245.

A soldier in actual military service or a mariner at sea may dispose of his personal estate by a nuncupative will. Gen. St. c. 92, s. 9. As to the nature of a nuncupative will see 1 Jarman on Wills 89.

Revocation of Wills. It is provided by statute that "no will shall be revoked unless by burning, tearing, cancelling, or obliterating the same, with the intention of revoking it, by the testator himself or by some person in his presence and by his direction; or by some other will, codicil, or writing, signed, attested, and subscribed in the manner provided for making a will;" or a revocation may be "implied by law from subsequent changes in the condition or circumstances of the testator." Gen. St. c. 92, s. 11.

As to revocation by a subsequent will or writing, see Reid *v.* Borland, 14 Mass. 208, — Laughton *v.* Atkins, 1 Pick. 535.

'An entire revocation by implication of law is limited to a very small number of cases. The marriage of a feme sole is held to be a revocation of her previous will, or at least a suspension, for there may be some doubt on that point. In the case of a man, a rule is now firmly established that marriage and the birth of a child shall be held to be an entire revocation. And a posthumous child is held to be within the rule. But when the facts, on which such revocation is ordinarily implied, have been contemplated and provided for in the will, no such presumption arises and the will is not revoked.' Per Shaw C. J. in Warner *v.* Beach, 4 Gray 162, 163.

A will is not revoked by the subsequent insanity of the testator, however long continued, and though circumstances have arisen which render it possible that, had he been sane, he would have altered his will. Warner *v.* Beach, 4 Gray 162.

A *partial* revocation of a will may arise from an alienation of the estate devised, (Hawes *v.* Humphrey, 9 Pick. 350) or from a material alteration in the devisor's title or interest in it. (Ballard *v.* Carter, 5 Pick. 112.)

SOME IMPORTANT POINTS RELATING TO WILLS.

MENTION OF "HEIRS" IN GIVING A FEE.

With regard to the use of the word "heirs" in making a devise of a fee, it may be remarked that it seems now to be unnecessary, the statute providing that every devise of land "shall be construed to convey all the estate of the devisor therein which he could lawfully devise, unless it clearly appears by the will that the devisor intended to convey a less estate." Gen. St. c. 92, s. 5.

Such intent need not however be declared in express terms, but may be gathered from the will by a comparison of its several provisions and a clear deduction from them. Such inference must be clear and satisfactory to the mind, and it may be drawn from particular provisions inconsistent with an intent to give a fee, or from the general import, scheme and object of the will. Fay *v.* Fay, 1 Cush. 93, 102. See also to the same point, Gleason *v.* Fayerweather, 4 Gray 348. — Bacon *v.* Woodward, 12 Gray 376.

As to the rule of the common law upon this point prior to the statute, see Richardson *v.* Noyes, 2 Mass. 56, 59. — Parker

v. Parker, 5 Met. 134, 138. Also Colony Law of 1651 in 3 Mass. Col. Rec. p. 222 by which it is provided that the rule requiring the use of the word "heirs" in creating a fee, "shall not extend to any houses or land given by will or testament." The new rule is in express terms made to apply to wills *made after the last day of April in the year* 1836." Gen. Stat. c. 92, s. 5. — Rev. St. c. 62, s. 4.

AFTER ACQUIRED LANDS.

At common law it was not possible to devise any real estate except such as belonged to the testator at the time he made the will, (See 3 Cush. 369. — 5 Pick. 112. — 6 Mass. 149, 156.) but this rule was changed in this State by statute in 1836, (Rev. St. c. 62, s. 3) and now any after-acquired estate, right, or interest in lands will pass by will, provided that "such clearly and manifestly appears by the will to have been the intention of the testator." Gen. St. c. 92, s. 4. And it has been held that this proviso is satisfied where "it appears by the whole scheme and tenor of the will that the testator intended to make a full and entire disposition of his whole property, real and personal." Winchester *v.* Forster, 3 Cush. 366, 371. And it seems to be laid down as a general rule that where a will purports to dispose of the testator's whole estate or property, an intention to dispose of after-acquired property will be inferred, unless something in the will be opposed to such inference. Cushing *v.* Alwyn, 12 Met. 169, 175. — Brimmer *v.* Sohier, 1 Cush. 118, 133.

It has been held that the new rule established by the Revised Statutes of 1836 affected not merely wills made after that time, but those made before, provided the testator had not died before the passing of the statute. Cushing *v.* Aylwin, 12 Met. 169, 174. — Pray *v.* Waterston, 12 Met. 262, 264.

WIDOW'S PORTION.

The provisions made in any will for the wife of the testator may, if she so elect, be waived by her, in which case she will be entitled to such portion of her husband's real and personal estate as she would have been entitled to if he had died intestate, except that if she would thus become entitled to more than $10000.00 out of the personal estate, she will take only the income during her life of the excess over that sum. Gen. St. c. 92, s. 24. St. 1861, c. 164. It becomes important then that, in drawing a will, the amount to which the widow of an intestate is entitled, should be borne in mind; — this is fixed by statute and is as follows: —

In the real estate she is entitled to her dower, which is, in general terms, a life estate in one third of all the real estate of which her husband was seized at any time during the coverture, and in which she has not released her rights. Gen. St. c. 90, s. 1. — 4 Kent Com. 35.

If her husband *leave no issue*, she is entitled to a life estate in one half the real estate of which he *died seized, or* to her dower as she may elect. Gen. St. c. 90, s. 15, 16. — See Brigham *v.* Maynard, 9 Gray 81.

Of the personal estate she is entitled, if her husband *leaves issue*, to one third, or if he *leaves no issue*, to the whole to the amount of $5000.00, and to one half the excess over $10000.00. Gen. St. c. 94, s. 16, 17.

A widow is further entitled to her articles of apparel and ornament, to the use of her husband's house and the furniture therein for forty days after his death, and also to such other parts of the personal estate as the Probate Court may allow for necessaries and for provisions, &c. for her reasonable sustenance. Gen. St. c. 94, s. 16, — c. 96, s. 4, 5. — c. 90, s. 18. It would seem that a widow will be entitled to these allow-

ances even where she elects to take the provisions made for her in her husband's will. See Williams *v.* Williams, 5 Gray 24, — but it is to be noted that this case arose prior to St. 1854, c. 428, (reënacted, Gen. St. c. 92, s. 24.)

As instances of the confusion which the waiver by a widow of the provisions of her husband's will may work among the other provisions of the will, and as showing the course adopted by our Supreme Court in such cases, see Sturtevant *v.* Bowker, 11 Met. 291. — Plympton *v.* Plympton, 6 Allen 178. — Firth *v.* Denny, 2 Allen 468. — See also Gen. St. c. 92, s. 36, 37. — Blaney *v.* Blaney, 1 Cush. 107. — Lobdell *v.* Hayes, 12 Gray 236.

A widow will be entitled to her *dower in addition to* the provisions of the will, if it plainly appears by the will that such was the intention of the testator. Gen. St. c. 92, s. 24. As to what is sufficient to show such intention, see Reed *v.* Dickerman, 12 Pick. 146. — Adams *v.* Adams, 5 Met. 277. — Pratt *v.* Felton, 4 Cush. 174.

OMISSION OF CHILDREN IN WILL.

"When a testator omits to provide in his will for any of his children, or for the issue of any deceased child, they shall take the same share of his estate, both real and personal, that they would have been entitled to if he had died intestate; unless they shall have been provided for by the testator in his lifetime, or unless it appears that such omission was intentional and not occasioned by accident or mistake." Gen. St. c. 92, s. 25.

The above provisions apply only to *legitimate* children. Kent *v.* Barker, 2 Gray 535.

They apply not only to children living when the will is made, but also to those *born afterwards* and before the death of the testator. Bancroft *v.* Ives, 3 Gray 367.

Posthumous children are provided for by a separate section, which places them on the same footing as the children born in the testator's lifetime, except that, as regards them, the intention of the testator is of no effect, and, if not provided for by will or otherwise, they will take their own share, however plainly it may appear that the testator intended to exclude them. Gen. St. c. 92, s. 26.

For the purpose of showing that the "omission was intentional" in the language of Gen. St. c. 92, s. 25, above cited, not only the language of the will itself may be used, but parol evidence of the acts and declarations of the testator in his lifetime may be resorted to. Wilson *v.* Fosket, 6 Met. 400.— Converse *v.* Wales, 4 Allen 512.

For cases where, from the tenor of the will itself, the omission has been presumed to have been intentional, see Prentiss *v.* Prentiss, 11 Allen 47. — Wilder *v.* Goss, 14 Mass. 357. — Church *v.* Crocker, 3 Mass. 17. — Terry *v.* Foster, 1 Mass. 146. — Wild *v.* Brewer, 2 Mass. 570.

In the case of children born after the will was made and before the death of the testator, it would seem that some very positive evidence of an intent to omit to provide for them would be required. Bancroft *v.* Ives, 3 Gray 367, — Prentiss *v.* Prentiss, 11 Allen 47.

LAPSED DEVISES AND LEGACIES.

If it be the intention of a testator that the heirs or personal representatives of a devisee or legatee named in his will should take the devise or legacy in the case of the death of the devisee or legatee before the testator, it will be necessary, except in the cases mentioned below, to expressly limit it over to them on such contingency, as otherwise it will lapse and sink into the residue of the testator's estate. Ballard *v.* Ballard, 18 Pick. 41. — Prescott *v.* Prescott, 7 Met. 141. — Hoop-

er *v.* Hooper, 9 Cush. 122. — Fisher *v.* Hill, 7 Mass. 86. — 1 Jarman on Wills, 293, 294.

It is provided by statute that, if such devisee or legatee be *a child or other relation* of the testator, and die before the testator *leaving issue who survive the testator*, such issue shall take in the same manner as the devisee or legatee would have done if he had survived the testator, unless a different disposition is made or required by the will. Gen. St. c. 92, s. 28. (Rev. St. c. 62, s. 24. — St. 1783, c. 24, s. 8.) And it has been decided that this statute applies to devises and legacies made *in trust for* such child or relation, as well as to those made directly to them. Paine *v.* Prentiss, 5 Met. 396. *Quœre* whether the wife of the testator and her relations are, in the sense of the statute, "relations" of the testator. It would seem that they are.

If a devise or legacy be made to a plurality of persons as joint-tenants, no lapse can occur unless *all* such persons die in the testator's lifetime, but any one or more who survive will take the whole. So also where the devise or legacy embraces a fluctuating class of persons who are to be ascertained at the death of the testator or at any subsequent period, the death of any such persons in the testator's lifetime will not occasion any lapse, even though they are to take as tenants in common. 1 Jarman on Wills 295. — Hooper *v.* Hooper, 9 Cush. 122, 130.

Lapsed devises and legacies will as a general rule fall into the residue. See below under "Residuary Clause."

RESIDUARY CLAUSE. — WHAT PASSES BY.

A general residuary clause will, unless it is manifestly contrary to the declared purpose of the testator as found in other parts of the will, pass all the estate, both real and personal, of

the testator not otherwise disposed of, — including all devises and legacies that lapse, or are void, or that fail for want of using proper language to create the same or to designate the legatee, the rule being the same as to both real and personal property. Thayer *v.* Wellington, 9 Allen 283, 295. It will also pass the right or possibility of reverter remaining in the grantor and his heirs after the creation of an estate on condition subsequent. Austin *v.* Cambridgeport Parish, 21 Pick. 215. — Brigham *v.* Shattuck, 10 Pick. 306 — Hayden *v.* Stoughton, 5 Pick. 528. — Brattle Square Church *v.* Grant, 3 Gray 142, 159, 161. See also above p. 27. So also the reversion expectant on the determination of an estate tail. Steel *v.* Cook, 1 Met. 281.

DEVISE OR LEGACY TO "HEIRS," TO "CHILDREN," &c.

The word *heirs* in a will, "when unexplained and uncontrolled by the context, is to be construed according to its strict technical import, in which sense it designates the persons appointed by the statutes to succeed to the real estate in case of intestacy," — and this is the rule whether the property given consists of real or personal estate or of both united. Clarke *v.* Cordis, 4 Allen 466, 480. — Smith *v.* Harrington, 4 Allen 566. And not only the persons to take, but the proportions in which they are to take, as whether *per capita* or *per stirpes*, are to be determined according to the statutes. Daggett *v.* Slack, 6 Met. 450, 453. — Tillinghast *v.* Cook, 9 Met. 143, 147.

In certain cases however the word *heirs* has been said to be equivalent to *children*. See Ellis *v.* Props. Essex Merrimack Bridge, 2 Pick. 243. — Bowers *v.* Porter, 4 Pick. 198.

As a general rule a devise or bequest of a *remainder* to the *testator's* "*heirs*" or "*heirs at law*" will be construed as referring, not to those who may be the heirs of the testator at the

time when the estate in remainder commences, but to those who are such *at the time of the testator's decease*, — and such remainder will accordingly vest in them at that time. Abbott *v.* Bradstreet, 3 Allen 587 — Childs *v.* Russell, 11 Met. 16 — Brown *v.* Lawrence, 3 Cush. 390 — See also Smith *v.* Harrington, 4 Allen 566. — 2 Jarman on Wills 66 — Redfield on Wills 392. A similar rule applies where a remainder is devised to the testator's "children," "next of kin," "relations," &c. Nash *v.* Cutler, 16 Pick. 491, 497. — Childs *v.* Russell, 11 Met. 23.

But this rule will not hold where a different intent is plainly manifested by the will. Sears *v.* Russell, 8 Gray 86, 95 — Abbott *v.* Bradstreet, 3 Allen 587, 589. As to the question whether such intent would be sufficiently manifested in the case of a devise to trustees to pay the income to certain persons for life *and then to convey the trust estate to the heirs* of the testator, see Sears *v.* Russell, 8 Gray 86, 96 — Childs *v.* Russell, 11 Met. 16.

Where an estate in remainder is devised to the *heirs of a person to whom an intervening life estate is given*, it would seem that contingent remainders will be created for those who may be such heirs at the time of the death of such devisee of the life estate. Richardson *v.* Wheatland, 7 Met. 169 — White *v.* Woodberry, 9 Pick. 136.

But it is to be noted that in the above case of Richardson *v.* Wheatland, the opinion delivered by the Court, while apparently favoring the rule as above stated, carefully abstains from adopting any definite rule on the subject, the facts in the case not requiring any decision upon the point. See also Bowers *v.* Porter, 4 Pick. 198, where it was held that "heirs" meant "children," and that those children who were living at the testator's death took vested remainders. (See next page.)

Where a remainder is devised to "*the children*" of a per-

son other than the testator, or to "*the grandchildren*" of the testator himself, the parties who are to take will not be determined as of the date of the testator's death, nor even as of that of the termination of the particular estate, but those children or grandchildren who may be living at the time of the testator's death will take *vested* remainders, subject however to open and let in children or grandchildren afterwards born, even though born *after* the termination of the particular estate. Ballard *v.* Ballard, 18 Pick. 41. — Weston *v.* Foster, 7 Met. 297. — Annable *v.* Patch, 3 Pick. 360. — White *v.* Curtis, 12 Gray 54. So as to a devise to the "*sons*" of another. Dingley *v.* Dingley, 5 Mass. 535. So also perhaps in some cases of devises to "heirs," where "heirs" may be construed to mean "children." See Bowers *v.* Porter, 4 Pick. 198, 208, 210. But see Richardson *v.* Wheatland, 7 Met. 169, 173. But as to the letting in of children &c. born after the termination of the particular estate, see next page.

It seems that a different rule should apply in the case of a devise of an *immediate* estate instead of an estate *in remainder*, and that in such case only the children, &c. living at the time of the testator's decease will be included. 2 Jarman on Wills 74. But in Annable *v.* Patch, 3 Pick. 360, after born children were held to be entitled to share in such a devise. In this case however the immediate estate was included with an estate in remainder in a general devise of a *residue*, and the word "children" in the residuary clause received the same construction as applied to both estates.

Where however, though no intermediate estate is given, the period when the estate devised is to take effect in possession is postponed to a date later than that of the testator's death, as, for instance, until the attainment of a given age by the devisees, then after born children &c. will be entitled to share.

Hubbard *v.* Lloyd, 6 Cush. 522. — Fosdick *v.* Fosdick, 6 Allen 41, 43. — 2 Jarman on Wills 78. In the above case of Hubbard *v.* Lloyd it was *said*, though the point does not seem to have been directly involved, that children born *after* the date fixed for the devise to take effect in possession would be excluded. This seems to be in conflict with the case of Ballard *v.* Ballard above-cited, where it was directly held that children, born after the remainder devised had vested in possession, should be let in. The case of Ballard *v.* Ballard, however, on that point seems to be unsupported by the authorities and perhaps might not now be followed. See 2 Jarman on Wills 75, 79.

The above rules apply equally to legacies of *personal* as to devises of real estate, the case of Denny *v.* Allen, 1 Pick. 147, in which the contrary was held, having been overruled. See Bowditch *v* Andrew, 8 Allen 339, 343, and cases there cited. — Annable *v.* Patch, 3 Pick. 360, 364. — Fosdick *v.* Fosdick, 6 Allen, 41, 43. — 2 Jarman on Wills 73. See however the case of Amory *v.* Leland, 12 Allen 281, where it was held that a remainder in personal property, bequeathed to children after the death of their father, did not *vest* in them so as to go to their representatives in case they did not survive him.

"A child is to be considered *in esse* at a period commencing nine months previously to its birth, and where there is no evidence to rebut the presumption, it is conclusive." Hall *v.* Hancock, 15 Pick. 255, 257.

DEVISES AND LEGACIES TO TWO OR MORE.

All *devises of lands* made to two or more persons will create estates in common and not in joint tenancy, except in cases of devises made in trust, or to husband and wife, or where it is expressed that the devisees shall take jointly, or as joint tenants, or in joint tenancy, or to them and the survivor of them, or where it otherwise manifestly appears from the tenor

of the will that it was intended to create an estate in joint tenancy. Gen. St. c. 89, s. 13, 14.

As to what will be sufficient to show such 'manifest intent,' see Nash *v.* Cutler, 16 Pick. 491, 497, — also Stimpson *v.* Batterman, 5 Cush. 153, 155.

The above rule was first established by St. 1785, c. 62, s. 4, which statute was, in Miller *v.* Miller, 16 Mass. 59, held to be applicable to estates created before, as well as to those created after, its enactment, it not being considered to be unconstitutional as a retrospective law, if thus interpreted, inasmuch as its operation would be to make the estates affected by it more valuable to all parties concerned. See also as to the effect of the statute of 1785, Shaw *v.* Hearsey, 5 Mass. 521, — Appleton *v.* Bird, 7 Mass. 131.

But it seems that where a legacy of personal property is given to two or more persons, and there are no words of severance of the interests, the legatees will take as joint tenants, unless from the whole will a contrary intention is indicated. See Tillinghast *v.* Cook, 9 Met. 143, 146, in which case such intention was held to have been sufficiently indicated in the will. See also Emerson *v.* Cutler, 14 Pick. 108, 114.

DEVISE TO ONE FOR LIFE, REMAINDER TO HIS HEIRS IN FEE.

Prior to St. 1791, c. 60, s. 3 the rule in Shelley's case (1 Co. 94) was in force in Massachusetts. According to that rule a conveyance or devise of an estate to one for life, with remainder to his heirs, was held to vest the fee in the first taker, the word "heirs" being construed as a word of limitation and not of purchase. (See Steel *v.* Cook, 1 Met. 281. — 4 Kent Com. 214 — 7 Met. 172.) But by the above mentioned Statute this rule was altered, and it was provided that in *devises* such language should vest an estate for life only in the

first taker and a remainder in fee in his heirs. (For the terms and effect of this statute of 1791, see Bowers *v.* Porter, 4 Pick. 198, 206.) This provision was extended to lands given by *deed* as well as by will by Rev. St. c. 59, s. 9, re-enacted in Gen. St. c. 89, s. 12. See Richardson *v.* Wheatland, 7 Met. 169, 172. — White *v.* Woodberry, 9 Pick. 136, 138. See also 3 Cush. 394 — 13 Met. 496.

The above-cited statutes were not intended to prohibit or restrain the creation of estates tail by language which, as in the case of a devise to one, and if he dies without issue then to his heirs, has according to well established rules been held to create such estates. Speaking of the provision of Rev. St. c. 59, s. 9, Judge Bigelow says, — "It was only intended to be applicable to those cases where the devise was in express terms or in substance and effect to the first taker for life, and was designed to give effect to the particular intent creating a life estate to the exclusion of the general intent to create a fee tail, which the rule of the common law implied from a gift so expressed." Hayward *v.* Howe, 12 Gray, 49, 52.

As to the rule by which the "heirs" who take the estate in remainder under the above statutes are to be determined, and whether they take *vested* estates at the time of the testator's decease, see Richardson *v.* Wheatland, 7 Met. 169 — Bowers *v.* Porter, 4 Pick. 198 — White *v.* Woodberry 9 Pick. 136. See above, page 196.

As to the rule in case of a bequest of *personal* property to one for life, remainder to his heirs, *quære.* See Ellis *v.* Merrimack Bridge, 2 Pick. 243.

"DYING WITHOUT ISSUE" &c.

There are certain expressions by the use of which in a will an estate tail may often be unintentionally created, and it is important to note these expressions in order that they may be

avoided, except in the few cases in which it may be desired to avail ourselves of their peculiar force and effect.

When by will an estate is given to A, and, if he die without issue, then over to B in fee, the law construes such '*dying without issue*' to refer, not to a definite failure of issue at the time of the death of A, but to what is called a general or indefinite failure of the issue of A; — that is, the law construes the intention of the testator to have been that the limitation over to B should take effect, not only upon the death of A leaving no issue then living, but upon the event of the failure of the issue of A at any subsequent time; and this supposed intent of the testator is carried out by giving an estate tail to A with remainder over in fee to B. There are several other forms of expression, similar to that above cited, which are construed in a similar manner, — for instance where the limitation over is to take effect *on failure of issue*, or upon *dying without heirs*, *without leaving issue*, *leaving no issue*, *without any legal heir of his body*, &c. 4 Kent Com. 273 — 2 Jarman on Wills 417. The same effect may also perhaps be given to the words '*without children*,' '*leaving no children*,' &c. See 4 Kent Com. 277, 279, — 10 Met. 502.

Expressions differing but slightly from the preceding have a totally different effect. Thus if a devise be made to A, and if he die *without issue living at the time of his death*, then over to B, it is held that A will take an estate in fee, determinable on the contingency of his dying, leaving no issue then living, upon which contingency the fee vests in B by way of executory devise. See 4 Kent Com. 274 — 2 Jarman on Wills 432. A similar effect has also been given to the phrases, '*leaving no issue living*,' '*leaving no issue behind him*,' &c. 2 Jarman on Wills 432, — 4 Kent. Com. 277.

From the preceding observations it readily appears that if in a will any reference be made to '*dying without issue*,' or if any

similar expression be used, it will be of the utmost importance to add the words '*living at the time of his death*,' or words to that effect, unless the intention really be, as it very seldom is, to create an estate tail.

The following decisions have been made in Massachusetts upon the points above considered.

A devise to one, with a subsequent proviso that, in case he "shall die without lawful issue," the property given to him shall descend to the testator's heirs in fee, was held to give such devisee an estate tail. Hayward *v.* Howe, 12 Gray 49.

A devise of a share of the testator's estate to each of his children and their respective heirs, with a subsequent proviso that "*in case of the decease of either of said children without issue*, the share of such deceased child or children shall be equally divided to and among his or her *surviving brothers and sisters*," was held, so far as such share consisted of real estate, to create estates tail in each of said children with cross remainders over in fee to the other children on the determination of such estates tail, — and, so far as such share consisted of personal estate, it was held to vest it absolutely in the children, the limitation over upon an indefinite failure of issue being, as applied to personal estate, too remote and therefore void. Hall *v.* Priest, 6 Gray 18.

So where a testator devised real estate to his five sons "to be equally divided among them," "and if any or either of them *should die before they arrive to the age of twenty-one years, or should die without any legal heir of their body*, then and in that case their share or shares shall descend equally to their *surviving brother or brothers*," — it was held that each son took an estate tail in one fifth of the estate devised, with cross remainders over as in the preceding case. Parker *v.* Parker, 5 Met. 134. But *quære* whether the reference in this case to

the devisee's death before reaching the age of twenty-one did not call for a different decision. See 2 Jarman on Wills 428.

So where a devise was made to B and his heirs and assigns forever, and if it should happen that B *should decease leaving no heirs of his body lawfully begotten*, then over &c., — it was held that B took an estate tail. Hawley *v.* Northampton, 8 Mass, 3.

So where a devise was made to a daughter "*and her children*," but if she "*should die and leave no children*," then to the testator's "*surviving daughters and their children*," — it was held that an estate tail was created. Nightingale *v.* Burrell, 15 Pick. 104.

But where a devise was made to three, and "if either or any of them *should die without children, the survivor or survivors* to hold the interest or share of each or any of them so dying without children as aforesaid," — it was held that the three devisees took, not estates tail, but estates in fee simple determinable on the contingency of their dying without issue, and on that contingency vesting in the survivor or survivors by way of executory devise. Richardson *v.* Noyes, 2 Mass. 56. This early decision seems however to have been based on a distinction between the laws of England and of this country. It was said that in England lands *generally* descend to the eldest male issue, while here as a general rule they descend to all the children equally, and that it was absurd for the law to say that by the clause in the will the testator *intended* to create that unusual thing, an estate tail, by which the estate devised would go solely to the eldest son of his devisee, contrary to anything that may be supposed to have fallen within the testator's experience. These considerations seem however to have been disregarded in later decisions, and it may be doubtful whether the decision in this case would not now be overruled.

Where the limitation over upon the death of the devisee

without issue was of "*what estate he shall leave,*" it was held that, as the estate limited over was what the *devisee* should leave, and not what *his issue* should leave, a failure of issue at his death must have been intended, and that an estate tail was not created, but a fee simple qualified only by the limitation over on the contingency of the first named devisee's death without issue. But for other reasons, more fully considered on p. 211, it was held that the limitation over was void and that the first named devisee took an absolute fee. Ide *v.* Ide, 5 Mass. 500.

In this connection it may be well to note the following points.

"A devise *to one and his children, he having no children at the time,* is equivalent to a devise to him and his issue, and creates an estate tail." Per Shaw, C. J. in Nightingale *v.* Burrell, 15 Pick. 104, 114. — 2 Jarman on Wills 307. See also Wheatland *v.* Dodge, 10 Met. 502. But see Annable *v.* Patch, 3 Pick. 360, 363.

A devise *to one and his issue* will confer an estate tail without reference to the fact whether he has or has not issue at the date of the will or at any other period. 2 Jarman on Wills 329.

A devise to one "and the heirs of his body" will of course create an estate tail. Hall *v.* Thayer, 5 Gray 523 — Wight *v.* Thayer, 1 Gray 284. — Holland *v.* Cruft, 3 Gray 162. For cases of estates tail created by similar expressions in a will, see Buxton *v.* Uxbridge, 10 Met. 87 — Cuffee *v.* Milk, 10 Met. 366. — Canedy *v.* Haskins, 13 Met. 389 — Weld *v.* Williams, 13 Met. 486.

Any words which, in a devise of real estate, would give an estate tail to the first taker, will in a bequest of personal property give him the absolute ownership. Albee *v.* Carpenter, 12 Cush. 382. — Adams *v.* Cruft, 14 Pick. 16. Also 2 Met. 215. But see Hall *v.* Priest, 6 Gray 22.

LAW AGAINST PERPETUITIES.

An estate cannot be devised in perpetual trust, nor can the final and absolute vesting of the fee be limited to take effect beyond the term of a life or lives in being at the death of the testator, and twenty-one years afterwards, as a term in gross, or, in case of a child *en ventre sa mere*, twenty-one years and the period of gestation, and any limitation of which it cannot be determined with absolute certainty at the time of the testator's death that it must *beyond any possibility* take effect within such term, is void as too remote and tending to a perpetuity. Brattle Square Church *v.* Grant, 3 Gray 142 — Sears *v.* Russell, 8 Gray 86.

A definite term of years not exceeding twenty-one, may under the above rule be fixed for the future vesting of an estate without any reference to any life or lives. See Odell *v.* Odell, 10 Allen 1, 12, 14.

The same restrictions apply to a bequest of *personal* property. Fosdick *v.* Fosdick, 6 Allen 41. — Sears *v.* Russell, 8 Gray 86, 100.

The above rules however do not apply to devises and bequests for the benefit of public charities, — not that a gift may be made to individuals and then over to a charity, or to a charity and then over to individuals, except where the final vesting must happen within the time above specified, — but a gift may be made in *perpetual trust* for a charity, and even for one not existing at the date of the gift and the beginning of whose existence is uncertain, or it may be made to take effect upon a contingency which may not happen within the time allowed by the rule against perpetuities, provided however that there is no gift of the property meanwhile to or for the benefit of any individual or private corporation. Odell *v.* Odell, 10 Allen 1, 6, 7. But where property is left in trust

for particular charitable objects or purposes, and these by accident or otherwise fail at a subsequent time however remote, a resulting trust for the benefit of the testator and his heirs will then arise by implication of law. Easterbrook *v.* Tillinghast, 5 Gray 17, 21. — 2 Sto. Eq. Jur. s. 1200. But no neglect, misapplication of the funds, or other breach of trust by the trustees will raise any resulting trust for the heirs. Sanderson *v.* White, 18 Pick. 328, 334.

It seems that if a bequest be made to a public charity, on condition that the trustees of such charity continue indefinitely to perform some act not of public charity, as to maintain the testator's tomb, such condition will be void, the bequest however being good and freed from the condition. See Giles *v.* Bost. Fatherless & Widows' Soc., 10 Allen 355, 357.

As to what are public charities, see Saltonstall *v.* Saunders, 11 Allen 446. — Drury *v.* Natick, 10 Allen 169, 177. — Dexter *v.* Gardner, 7 Allen 243.

The rule against perpetuities, as applicable to *real estate*, is however subject to the following exceptions.

1st. An estate may be devised *upon condition*, i.e. to determine upon the happening of a certain event, no matter how remote, and thereupon to revest in the testator's heirs, (Austin *v.* Cambridgeport Parish, 21 Pick. 215. Consult also remarks of Bigelow J. in Brattle Square Church *v.* Grant, 3 Gray 148, 160,) or *perhaps* in the residuary devisee or his heirs. See Brigham *v.* Shattuck, 10 Pick. 306 — Hayden *v.* Stoughton, 5 Pick. 528. — Brattle Square Church *v.* Grant, 3 Gray 142, 159, 161.

But see an article in the Am. Law Rev. Vol. 1, p. 265, which claims that it is an unsettled point upon Massachusetts decisions whether estates on condition are subject to the rule against perpetuities.

2nd. The final vesting of the fee may be postponed till

after the expiration of an estate tail, which may of course continue far beyond the term mentioned above. Hall *v.* Priest, 6 Gray 18.

As a general rule when a limitation over, which in terms abridges a preceding estate, is held to be void as too remote, such preceding estate becomes vested absolutely according to the terms in which it was devised, — if for life, then as a life estate, — if in fee, then as a fee simple absolute. Brattle Square Church *v.* Grant, 3 Gray 142, 156. — Sears *v.* Russell, 8 Gray 86. See also Fosdick *v.* Fosdick, 6 Allen 41, 43. — Smith *v.* Harrington, 4 Allen 566, 567.

Where personal property was bequeathed to trustees to invest and accumulate during a certain term, which just reached the legal limit above set forth, and *after that* to pay over the income to certain persons during their lives, and finally at the death of the last survivor of such persons to distribute the principal, — it was held that, the provisions relative to the disposal of the principal and income of the accumulated fund being void, the directions to invest and accumulate were also void, as being merely auxiliary and subservient to the other provisions. Fosdick *v.* Fosdick, 6 Allen 41. Compare Hooper *v.* Hooper, 9 Cush. 122.

Directions to *accumulate the income* of property devised are in Massachusetts subject to the same limitation as provisions postponing the final vesting of the fee, there being in this State no statute, as in England and in some of the United States, restraining accumulation within still narrower limits. Odell *v.* Odell, 10 Allen 1, 5. It seems that no rule limiting accumulations is applicable to devises and bequests for the benefit of public charities. Saltonstall *v.* Saunders, 11 Allen 446, 471. — Odell *v.* Odell, 10 Allen 1, 9, 13.

A devise may be good, though accompanied by a void direction for accumulation. See Odell *v.* Odell, 1 Allen 1, 14.

PROVISIONS IN RESTRAINT OF ALIENATION.

"A condition annexed to a conveyance in fee or by devise that the purchaser or devisee should not alien is unlawful and void. The restraint is admitted in leases for life or years, but is incompatible with the absolute right appertaining to an estate in tail or in fee." 4 Kent Com. 131.

Thus a proviso in a will that lands devised in fee shall not "be subject or liable to conveyance or attachment," has been held to be void. Blackstone Bank *v.* Davis, 21 Pick. 42.

And it has been held that such restraint upon alienation will be equally void, even though it be only for a limited time, as during the life of the devisee. Gleason *v.* Fayerweather, 4 Gray 348, 351. So where a vested remainder after a life estate was given to one with a proviso that he should not alien such remainder before the termination of the life estate. Hall *v.* Tufts, 18 Pick. 455, 460. But compare the remarks of Wilde J. in Blackstone Bank *v.* Davis, 21 Pick. 43, 44.

In Gleason *v.* Fayerweather, above-cited, it was said that restraints upon alienation are equally invalid in the case of a *life* estate as in that of a *fee*. 4 Gray 351.

POWERS TO SELL.

With regard to the form of *powers to sell* given in a will to executors or trustees, the following points have been settled in Massachusetts.

When a power to sell is given to two executors as such, and as incident to the execution of the appropriate duties of executors, if one declines the trust, the other may execute the power. Thus where the provision of the will was — "And I do hereby constitute and appoint my brothers, E. H. and G. H., executors of this my last will and testament, and fully authorize them to take upon themselves the trust hereby created,

and to do and execute whatever is herein ordered or authorized to be done, and, if necessary for the execution thereof, to sell at public or private sale any part or all my real estate " &c.; — and E. H. declined the trust, and G. H. acted as sole executor; a sale by him to raise money for the payment of debts and legacies was held to be valid. Warden *v.* Richards, 11 Gray 277.

Where a naked power to sell, not coupled with any trust, and the execution of which was not required for the purpose of effecting any other provisions of the will, was given by a testator *to his executors or such of them as should take upon themselves the probate of his will*, and one of such executors accepted the trust, but afterwards resigned the same and was discharged therefrom by the Probate Court, a sale by the other executor alone was held to be invalid. Shelton *v.* Homer, 5 Met. 462.

A power to sell given to an executor, but not *virtute officii*, nor necessary to the discharge of the ordinary duties of an executor, can not, in case of the executor's death or inability to act, be executed by an administrator with the will annexed, even though it be not a naked power, but be coupled with a trust for third parties who are beneficially interested in its execution. Greenough *v.* Wells, 10 Cush. 571. — Tainter *v.* Clark, 13 Met. 220. — Larned *v.* Bridge, 17 Pick. 339.

Where the provision of the will was — " I hereby nominate and appoint J. T. to be the sole executor of this my last will and testament, and hereby authorize and fully empower him to sell and convey such of my property as in his judgment will best promote the interest of all concerned, to raise the $2,000 for the use of my wife and daughter, and to pay my just debts," — and J. T. was also made a trustee under the will, and he declined to act as executor, but accepted the office of trustee, it was held that a sale made by him was valid, on the ground that the power was a personal confidence and

coupled with a trust. Clark *v.* Tainter, 7 Cush. 567,— Tainter *v.* Clark, 13 Met. 220. But doubt seems to be expressed as to the correctness of the above decision in the remarks of the Court in 7 Cush. 571.

Where a power to sell coupled with a trust, which required the execution of it for the benefit of the children of the testatrix, was given "to W. C. and any other trustee or trustees he may appoint pursuant to the power herein given him," and by a prior clause of the will the testator, "to prevent a failure of trustees to execute this will," authorized and requested the judge of probate to appoint such trustees as he should deem fit and suitable, and W. C. died without appointing a successor, and a trustee was appointed by the judge of probate, it was held that such trustee might execute the power. Gibbs *v.* Marsh, 2 Met. 243.

Where the power was given in these words — "I hereby authorize and empower my said executors to sell at private or public sale such portions or all of my estate, real or personal, as they shall judge expedient," &c., and by a later clause A., B., and C. were appointed executors; but by a codicil the testator revoked the appointment of C. and appointed D. an executor "in the place and stead of the said C," — and A., B., and D. acting as executors made a sale under the power, it was held that such sale was valid, even though the power were considered to have been a naked one and to have been given to the donees *nominatim*, and for the reason that "the effect of the codicil was to republish the will, modified and changed by the codicil, and thereafter to be taken and construed as a will of the date of the codicil," and to make it read as though the three names of A., B., and D. had been originally inserted in it. Pratt *v.* Rice, 7 Cush. 209.

See in connection with this subject, a case where an executor was given a power to sell with the written consent of cer-

tain parties, and all such parties having died, it was held that a valid sale might be made without such consent. Leeds *v.* Wakefield, 10 Gray 514.

See also Treadwell *v.* Cordis, 5 Gray 341, 358 — Stevens *v.* Winship, 1 Pick. 318. — Alley *v.* Lawrence, 12 Gray 373.

A power to sell may sometimes be *implied* as necessary to the performance of the duties imposed on trustees. Goodrich *v.* Proctor, 1 Gray 567, 570. — Purdie *v.* Whitney, 20 Pick. 25.

The following will serve as forms for powers of sale to executors and to trustees.

"I hereby authorize and empower my said executors, or such person or persons as may be entrusted with the execution of this will, if in the performance of the duties of their trust it becomes in their opinion necessary or expedient, to sell at public or private sale any part or all of my real estate and to make, execute, and deliver proper and sufficient deeds to convey the same."

"I hereby authorize and empower my said trustees, or such persons or person as may for the time being be the trustees or trustee under this will, to sell at public or private sale any portion or the whole of the real estate which he or they may hold under the trust hereby created, and to make, execute, and deliver good and sufficient deeds to convey the same."

If it be intended that the power shall be executed only by a particular person, it should be given to him *nominatim*, thus: "I hereby authorize and empower A. B. to sell" &c.

POWER TO SELL IN FIRST TAKER RENDERING VOID A LIMITATION OVER.

Whenever in a will a remainder is limited over which can take effect only by way of executory devise, any expressions in the will showing an intention on the part of the testator that the first taker shall have power to dispose of the property,

while it is in his possession, will render the limitation over void and give the first taker an absolute estate. 4 Kent Com. 270.

Thus when a fee is limited after a fee, as where an estate is devised to one in fee, but with a limitation over on a certain contingency to another in fee, such limitation over will be void, if a power of disposal of the estate be given to the first taker. Ide *v.* Ide, 5 Mass. 500, — Sears *v.* Russell, 8 Gray, 86, 100.

The same rule applies in the case of a similar bequest of personal property. Homer *v.* Shelton, 2 Met. 194, 200 — Sears *v.* Russell, 8 Gray 86, 100.

In fact, in cases of bequests of *personal* property, every gift to one for life, with remainder to another, will be subject to the same rule, inasmuch as such limitation over of personal property can take effect only by way of executory devise. Burbank *v.* Whitney, 24 Pick. 146. — Merrill *v.* Emery, 10 Pick. 507. See also 2 Kent. Com. 352 — 4 Kent Com. 269, 270.

But it would seem that in devises of *real estate* to one for life, remainder to another in fee, a power to dispose of the fee might be given to the life tenant without affecting the validity of the remainder, inasmuch as such devise would be valid at common law, and does not take effect by way of executory devise. Compare Blanchard *v.* Blanchard, 1 Allen 223. — Stevens *v.* Winship, 1 Pick. 318 — Minot *v.* Prescott, 14 Mass. 496.

Where however, by reason of the death of the person named as the first taker before the testator, or for any other cause, the prior estate, which according to the above decisions would carry the whole interest, never vests, the limitation over will be held to be valid and will take effect. Burbank *v.* Whitney, 24 Pick. 146, 156.

With regard to the language which will show an intention on the part of the testator that the first taker shall have power to dispose of the estate or property devised or bequeathed to him, it has been held that, where the limitation over was of what estate the first taker "shall leave," such intent was sufficiently shown. Ide *v.* Ide, 5 Mass. 500. See also Merrill *v.* Emery, 10 Pick. 507. — Blanchard *v.* Blanchard, 1 Allen, 223, 225. But it was held that no such intent was shown when both real and personal property were given to the first taker and his heirs "to be held by him to his own use and benefit forever," with a contingent limitation over. Homer *v.* Shelton, 2 Met. 194, 200. See however the dissenting opinion of Putnam J. in this case, p. 207.

BEQUEST OF LIFE INTEREST IN PERSONAL PROPERTY.

A bequest of personal property may be made to one for life with remainder over to another absolutely. 2 Kent Com. 352 — Dorr *v.* Wainwright, 13 Pick. 328. So the absolute ownership of personal property may be given to one, subject to a contingent limitation over at his death. Homer *v.* Shelton, 2 Met. 194, 206. In fact the final vesting of the property may be postponed to the same extent as in an executory devise of real estate. 4 Kent Com. 269, 271 — Fosdick *v.* Fosdick, 6 Allen 41 — Sears *v.* Russell, 8 Gray 86, 100.

But *personal* cannot, like *real* property, be given to one in tail with remainder over. Albee *v.* Carpenter, 12 Cush. 382, 387.

Where a life interest in personal property is given by will, and the testator has not named any trustee to hold such property during the continuance of the life estate, it will be the province and duty of the executor so to hold it, and to pay over the income from time to time to the legatee for life, and at his death to pay over the principal to the person then enti-

tled to receive it. Carson *v.* Carson, 6 Allen 397 — Dorr *v.* Wainwright, 13 Pick. 328. But see Homer *v.* Shelton, 2 Met. 194, 205, 206.

With regard to the executor's duty as to investment in such cases, see Dorr *v.* Wainwright, 13 Pick. 332. — Kinmonth *v.* Brigham, 5 Allen 270, 276.

As to what returns, arising out of the property bequeathed, are to be considered as income belonging to the party having the life interest, see Kinmonth *v.* Brigham, 5 Allen 270 — Johnson *v.* Bridgewater Iron Manuf. Co., 14 Gray 274.

The proceeds of the sale of rights to take new shares in a corporation must be treated as capital and added to the principal fund. Atkins *v.* Albree, 12 Allen 359.

MINOR POINTS.

As to the effect of a codicil, see Pratt *v.* Rice, 7 Cush. 209, 212. — Brimmer *v.* Sohier, 1 Cush. 118. — Miles *v.* Boyden, 3 Pick. 213, 216.

An *alteration* in a will by interlining an additional legacy, done by the direction of the testator, but subsequent to the execution and attestation of the will, does not render the whole will void. Wheeler *v.* Bent, 7 Pick. 61.

In a will "the word 'give' is of the largest signification, and is applicable as well to real as personal estate." Per Shaw C. J. in Hooper *v.* Hooper, 9 Cush. 129.

"If there are two meanings of a word, one of which will effectuate, and the other will defeat, the testator's object, the Court is bound to select that meaning of the word which will carry out the intention and objects of the testator." Saltonstall *v.* Saunders, 11 Allen 446, 455.

Where the words used in a will, if construed according to their technical force and meaning, would defeat the obvious intention of the testator, such a construction is not to be adopted. Brimmer *v.* Sohier, 1 Cush. 118.

As to the cases in which a will is to be construed as executing a power vested in the testator under a trust deed, see Amory *v.* Meredith, 7 Allen, 397. — Willard *v.* Ware, 10 Allen 263. — 4 Kent Com. 334.

"The presumption that, as a will speaks from the death of the testator, it refers to the state of things then existing, must yield when the will manifests the testator's intention to refer to the state of things existing at the time of making it." Per Gray J. in Morse *v.* Mason, 11 Allen 36. See Miles *v.* Boyden, 3 Pick. 213 where it was held that a legacy to "the two oldest children" of M. went to the two oldest children living at the time of the testator's decease and not at the date of the will.

A devise to one of the same estate that he would take as heir of the testator is void, and the heir in such case takes by descent and not by the devise, — and this rule applies even though the estate devised is made subject to the payment of debts or legacies, or though it be a remainder or reversion to take effect only after an intermediate estate devised to another. Sedgwick *v.* Minot, 6 Allen 171. — Ellis *v.* Page, 7 Cush. 161. — 4 Kent Com. 506.

Where a testator makes a devise or legacy to one to whom he is indebted, such devise or legacy is to be regarded as a bounty and not as a payment of the debt, unless a contrary intention is expressed. Smith *v.* Smith, 1 Allen 129, 130 —

Strong *v.* Williams, 12 Mass. 390. — Parker *v.* Coburn, 10 Allen 82, 84.

In case of the devise of an estate, which is subject to a mortgage made by the testator, the devisee will be entitled to have the mortgage discharged out of the testator's personal estate, unless an intent to the contrary is expressed in the will. Plimpton *v.* Fuller, 11 Allen 139. — Hewes *v.* Dehon, 3 Gray 205. It seems that the same rule will hold where the mortgage is one made by the testator's ancestor, or for which the testator or his ancestor has rendered himself personally liable. Hewes *v.* Dehon, 3 Gray 208.

Formerly in Massachusetts a testator could not devise lands of which he had been disseized, and in which he had not recovered his seizin at the time of his death. See Smithwick *v.* Jordan, 15 Mass. 115. — Ward *v.* Fuller, 15 Pick. 185, 190. — Poor *v.* Robinson, 10 Mass. 131. But the law in this respect was altered by Rev. St. c. 62, s. 1, 2, — reënacted by Gen. St. c. 92, s. 1, 3. See 12 Met. 503.

Where property is given in trust for the benefit of a certain person or persons, with no limitation over and in such a manner that no other person can have any beneficial interest in it, the trustees will in equity be *allowed*, and, it would seem, might perhaps be *compelled*, to transfer and convey such property to the *cestui* or *cestuis que trust*, freed from the trust, even though in the instrument creating the trust the time at which the property is to be paid over is made to depend upon the happening of a certain contingency which has not yet arisen, — as for instance, where it was "to be appropriated by my executors to the relief of my heirs, if they at any time shall need pecuniary assistance." Smith *v.* Harrington, 4 Allen

566, 569. Compare South Scituate Savings Bank *v.* Ross, 11 Allen 442.

If one gives another a bond that he will devise or bequeath to him certain real or personal property, such bond will be valid, and if the obligor does not make his will in accordance with his bond, his executor or administrator will be liable to an action upon the bond for damages. And such bond may cover not only property which the obligor has in possession at the time of giving it, but also property which he may thereafter acquire as heir or legatee of another. Jenkins *v.* Stetson, 9 Allen 128.

As a general rule, where no special provision is made in the will, a legacy will be payable in one year after the appointment of the executor. Brooks *v.* Lynde, 7 Allen 64. — Howland *v.* Howland, 11 Gray 469, 476. — Compare also Gen. St. c. 97, s. 21.

And as a general rule, interest is not to be allowed on legacies until after the expiration of a year from the death of the testator. But this rule is subject to the exception, that "where money is given by will for the maintenance and support of a minor child of the testator who has no other means of support, interest is to be allowed from the death of the testator, because in such case the presumption is that the testator intended that such support and maintenance should commence immediately after his decease. The same presumption exists where a legacy is given to a widow in lieu of dower, and no other means of support during the first year after the death of the testator are provided by will." Per Bigelow, C. J. in Pollard *v.* Pollard, 1 Allen 490, 491.

Where however "an annuity, or the use, rent, income, or interest of any property, real or personal, or the income of

any fund is given to, or in trust for the benefit of, a person for life, or until the happening of a contingent event," such person will be entitled to such annuity &c. from the decease of the testator, unless a different provision is made in the will. Gen. St. c. 97, s. 23. See also Lovering *v.* Minot, 9 Cush. 151. But the legatee cannot require the annuity &c., or any part of it, to be paid over until after the expiration of one year after the executor assumed his trust by giving bonds. Gen. St. c. 97, s. 24, last clause.

Where the estate of a testator is not sufficient to satisfy all the devises and legacies made by him, they will, unless some other provision is made in the will, share the estate proportionately. Gen. St. c. 92, s. 29, 30.

But this rule is subject to two exceptions, — 1st. *Specific* devises and bequests will be exempt from any deduction or contribution. Gen. St. c. 92, s. 30. A *residuary* devise or legacy is not to be considered specific. Blaney *v.* Blaney, 1 Cush. 107. — Hays *v.* Jackson, 6 Mass. 149.

2nd. A widow, to whom a legacy is given in lieu of dower, is entitled to be paid in full in case of a deficiency of assets, in preference to legatees who are mere volunteers. Pollard *v.* Pollard, 1 Allen 490. — Hubbard *v.* Hubbard, 6 Met. 50.

As to the rule where the specific devises and specific bequests amount to more than the whole estate after payment of debts, see Hubbell *v.* Hubbell, 9 Pick. 561. — Ellis *v.* Page, 7 Cush. 161, 163.

THE END.

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