

A TREATISE
ON
THE AMERICAN LAW
OF
REAL PROPERTY.

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BOOK III.

ACQUISITION AND TRANSFER OF ESTATES.

CHAPTER I.

TITLE — DESCENT.

* SECTION I.

[*398]

TITLE GENERALLY CONSIDERED.

1. Title defined.
2. The different stages of title.
3. All title by descent or purchase.
4. Title by act of law and of parties.

1. HAVING treated of estates with their qualities and incidents, both as to corporeal and incorporeal hereditaments, it now becomes proper, in pursuing the objects of this treatise, to consider the subject of the *titles* by which these estates are acquired and held, with a view, in the end, to speak of the modes of transmitting such estates by law from one person to another. It would obviously be of little importance, beyond embodying certain speculative and abstract notions in respect to the forms which property may assume, to define and illustrate the nature and qualities of estates, if law did not go further, and determine by what rule the ownership of such property, or what is commonly called the *title*, may be acquired, held, or parted with, by individuals. It is to this part of the general subject that the attention of the reader

is now to be directed. It is somewhat difficult to define, in brief terms, precisely what is meant by title. But it [*399] may, perhaps, be sufficiently accurate to *adopt the words of Lord Coke, who defines it as "*justa causa possidendi quod nostrum est*, and signifieth the means whereby a man cometh to land. *Et dicitur titulus a tuendo*, because by it he holdeth and defendeth the land."¹ Mr. Burton says: "Every title must rest ultimately upon mere possession." Lord Kaimes, while treating of the history of property, says: "It is taught by all writers that occupation is an essential solemnity in the original establishment of land property." "But so soon as property came to be considered as a right, independent of possession, it was natural to relax from the solemnities formerly requisite to transfer land property."² And, after all the speculations in which these writers have indulged upon the origin of individual property in any portion of what must once have been a common heritage, it seems, upon their hypothesis, to resolve itself back to possession as its element, but to have derived from an enjoyment, sufficiently continued, an abstract notion of ownership, to which the word *property* is applied, which becomes susceptible of being transmitted to others, by being accompanied by a symbolic, rather than an actual, formal transfer of possession.* "Property" is defined by Taylor as "an exclusive right. That is said to be really and emphatically mine when I have a right and power or faculty of denying others the use and fruit of it. *Dominium* is the attribute of the proprietor, and *proprietas* of the thing so

* NOTE.—Mr. Maine, in his learned and ingenious essay upon "Ancient Law," combats the notion of Blackstone and other writers upon the subject, that property in a thing must have been originally derived from occupancy. "I venture," says he, "to state my opinion, that the popular impression in reference to the part played by occupancy in the first stages of civilization directly reverses the truth." "It is only when the rights of property have gained a sanction from long practical inviolability, and when the vast majority of the objects of enjoyment have been subjected to private ownership, that mere possession is allowed to invest the first possessor with dominion over commodities in which no prior proprietorship has been asserted," p. 256. The whole discussion upon the subject, of which the above is but a single thought, will repay the reader who may study the eighth chapter of his work with attention.

¹ Co. Lit. 345 b.

² Burt. Real Prop. § 418; Kaimes, Law Tracts, 98.

appropriated.”¹ Title to property created merely by the act of reducing it to possession necessarily implies that this reduction to possession should be effected by an act which is not of a wrongful nature. This was applied to the killing of game by a trespasser upon another’s land. The game thus killed was the property of the land-owner *ratione soli* as soon as killed, and killing it by the trespasser gave him no right of property in it.²

2. Blackstone divides title to lands, considered in its progressive development, into several stages; namely, naked possession, * right of possession, right of prop- [*400] erty without possession, and right of property united with the right of possession.³ This idea of Judge Blackstone, which has been adopted by Mr. Cruise and other writers, is illustrated by an act of disseisin, followed by possession by the disseisor. If a disseisor enters upon the land of another, and evicts or turns the true owner out of possession thereof, although in one sense, as between him and the true owner, he has no right or title whatever to the land, yet, as to all the world but him, the possession so gained gives him complete dominion over and right to the land, and constitutes, in the eye of the law, a *prima facie* title thereto. In the mean time, however, the one who has been wrongfully evicted has a right to the possession which the disseisor has usurped and retains, so that here is a naked possession in one, and a right to the immediate possession in another. In every State, where the common law prevails, possession of lands, for a period of time sufficiently long, is held to divest the owner thereof of his right to regain his possession by his own act, without the aid of legal process. If, therefore, in the case supposed, this possession shall have been continued by the disseisor for the requisite length of time, nothing will remain in the original owner but a right of property, while the possession, and right of possession, will have become united in the disseisor. It only remains, then, for the right of property to become united with

¹ Civil Law, 476.

² *Blades v. Higgs*, 11 H. L. Cas. 621; *Rigg v. Lonsdale*, 1 H. & N. 987, *ante*, vol. 1, p. *4.

³ 2 Bl. Com. 195-199.

the possession, and right of possession, to perfect the disseisor's title. And here again, for the sake of quieting titles, there is, in every State, a period beyond which no man may enforce his naked right of property, after he shall have lost his right of possession; and if, in the case supposed, he suffers the disseisor to retain the possession beyond this prescribed period of time, no one can call in question the right of property as well as of possession of the latter, and he thereby becomes clothed with a complete title to the land; or, as Lord Coke says, it was anciently called *jus duplicatum*, *droit* [*401] *droit*.¹ * Judge Walker, in his introduction to the American law, disposes of this question in these words: "Such refinements serve to perplex rather than inform the mind. The truth is, title means the same thing as ownership. A man may be in possession of a thing which he does not own, and he may own a thing of which he is not in possession." "It would seem, therefore, that the perfection of title consists in the union of possession with the right of possession; for when these meet in the same person, he cannot be rightfully dispossessed. In other words, he is the lawful owner of the property; and this is the whole of the matter."²

3. In one thing all writers agree, and that is in considering that there are two modes only, regarded as classes, of acquiring a title to land; namely, descent and purchase; purchase including every mode of acquisition known to the law, except that by which an heir, on the death of an ancestor, becomes substituted in his place as owner by the act of the law.³

4. Some writers make a distinction, in respect to estates acquired by purchase, between titles created by act of the law and those by act of the parties, estates by escheat being an example of the first class. Others still incline to regard estates in dower and by curtesy as properly coming within the doctrine of descent.⁴

¹ 2 Bl. Com. 195-199; Co. Lit, 266 a; 3 Cruise, Dig. 312-315; 4 Kent, Com. 373; Güterbock, Bracton by Coxe, 100; Reeves' Hist. 4th ed. 234.

² Walk. Am. Law, 317.

³ 2 Bl. Com. 241; James v. Morey, 2 Cow. 290; Co. Lit. 18 b.

⁴ 3 Cruise, Dig. 317; 2 Flint, Real Prop. 446; Co. Lit. 18 b, note 106; 4 Kent, Com. 373, note.

SECTION II.

TITLE BY DESCENT.

1. Title by descent defined.
2. *Heir* created only by law.
3. Title by heirship not till ancestor's death.
4. Heir's title is independent of his own act.
- 5-7. Origin and changes in English law of descent.
8. Hale's canons of descent.
9. All rules of descent arbitrary and artificial.
10. Feudal rules never adopted here.
11. Rules of construction as to descent.
12. Rules for computing degrees of kindred.
- 13-19. English canons of descent.
20. What is accounted as "lands."
21. American law of descent traced to the civil law.
- 22, 23. How civil law differs from American and English law.
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37. Title of ancestor vests at once in his heir.
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39. What is embraced under "ancestor."
40. Effect of omission of child's name in a will.
41. Marshalling assets in paying ancestor's debts.
42. What interests in lands are descendible.
43. Rents descendible.
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NOTE. — Statute Rules of Descent.

1. IN what is said of the subject in the following pages, the ordinary division of titles into those by descent and those by purchase will be observed. And first of descent. "Property of * lands by descent is," says Lord Bacon, [*402] "where a man hath lands of inheritance, and dieth,

not disposing of them, but leaving it to go (as the law casteth it) upon the heir. This is called a descent of law.”¹

2. The *heir*, as the term is here used, is always appointed by the law; for all persons appointed by a tenant in fee-simple as his successors are technically not heirs, but assigns, whether the appointment be by deed or by will, in which respect the common differs from the civil law, it being a maxim of the feudal law, that *solus Deus potest facere hæredem, non homo*.²

3. The title of an heir is called into existence by the *death* of the ancestor, for *nemo est hæres viventis*; although, in popular phrase, certain persons are regarded as the heirs of persons still alive, under the names of heirs apparent and heirs presumptive. Thus, an heir presumptive is a person who, if the ancestor were then to die, would be his heir; as, for instance, in England, a daughter, if an only child, would be heir presumptive of her father; but if he were subsequently to have a son, she would cease to be such heir. An heir apparent is one who is certain to be the heir of an ancestor if he survive him, as is the case in England with the oldest son; since, by the canons of descent there, he is sure to be his father's heir if he outlive him.³

4. An heir-at-law is the only person who, by the common law, becomes the owner of land without his own agency or assent. A title by deed or devise requires the assent of the grantee or devisee before it can take effect. But in the case of descent, the law casts the title upon the heir, without any regard to his wishes or election. He cannot disclaim it if he would.⁴ Where an heir takes undeviseed property, he never takes it by act or intention of the testator. His right is paramount to and independent of the will.⁵ An heir is entitled to rents of undeviseed lands until sold for the payment of debts, even though the ancestor die insolvent.⁶ And where a rail-

¹ Bac. Law Tracts, 128.

² Co. Lit. 191 a, note 77, § v. i. For what are “assigns,” see *Metcalf v. Westaway*, 17 C. B. n. s. 668.

³ 2 Bl. Com. 208.

⁴ Wms. Real Prop. 75; 2 Bl. Com. 201

⁵ *Augustus v. Seabolt*, 3 Met. (Ky.) 161.

⁶ *Loddell v. Hayes*, 12 Gray, 238; *Gibson v. Farley*, 16 Mass. 280; *Newcomb v. Stebbins*, 9 Met. 540. *Kimball v. Sumner*, 62 Me. 305.

road was laid across the land of an ancestor after his decease, his heir was held entitled to the damages, though the land was subsequently sold for payment of debts.¹

5. In tracing the history of the law of descent of lands in a former part of this work,² it was stated that “children, at * first, succeeded to a feud in the place of [*403] the father, and grandchildren in the place of children.”

In a treatise called “The Laws of Hen. I.,” the doctrine of excluding females is promulgated; and it is declared that the capital fief should go to the oldest son. And this is said to have been the first notice of the English doctrine of primogeniture in the law of descent.³ The rest of the ancestor’s lands were to the younger son or sons.⁴

6. In the time of Henry II., however, the oldest son had become sole heir to all lands held by military tenure; nor could his right be defeated by an alienation of the ancestor, though socage lands, unless there was some custom to the contrary, descended to sons equally. If the ancestor left no sons, both military and socage lands descended to daughters in equal shares, the oldest having the capital messuage, upon making compensation to the other daughters, but all taking as coparceners.⁵

7. In the time of Henry III., or soon after, both socage and military lands descended according to the rules of *primogeniture*.⁶ But it is not known when collaterals first took in succession, though the usage prevailed in the time of Henry II., that brothers and sisters should take if there were no lineal descendants; or, if they were dead, their children were to take in their stead. After these, the uncles and their children came in; and, last, aunts and their children; the males always being preferred to females.⁷ The approach to this system of rules, however, was gradual and by degrees only, though it is difficult to trace the stages of the progress.⁸ In the time of Henry III., the rule *jus descendit ad primogenitum* was estab-

¹ Boynton v. Peterborough, &c. R. R. 4 Cush. 467. ² Ante, vol. 1, p. *67.

³ 1 Spence, Eq. Jur. 175.

⁴ Reeve, Hist. Eng. Law, 30, 1st ed.

⁵ Reeve, Hist. Eng. Law, 30; 1 Spence, Eq. Jur. 176; Dalrymp. Feud. Ten. 205.

⁶ 1 Spence, Eq. Jur. 176.

⁷ Reeve, Hist. Eng. Law, 32

⁸ Dalrymp. Feud. Ten. 216–221.

lished, and all descendants, *in infinitum*, from any person who would have been heir if living, inherited *jure* [*404] *representationis*. Thus * the oldest son dying in the lifetime of the father, and leaving issue, that issue was to be preferred in inheritancy to the grandfather before any younger brother of the father.¹ The father, it will be perceived, or any lineal ancestor, was never allowed to succeed as heir to a descendant, or, as Bracton says, "*nunquam reascendit ea via qua descendit, post mortem antecessorum.*"²

8. Lord C. J. Hale is said to have reduced the rules of descent to a series of canons, although these rules had then been in use for four hundred years; and no change was made in them until the act of 3 and 4 Wm. IV. c. 106, in 1833.³

9. It is hardly necessary to add, that whatever may be the rules of descent of property in any country, they must, of necessity, be more or less arbitrary and artificial; "the creatures of the civil polity and *juris positivi* merely," to quote the language of Blackstone. What these rules shall be, must therefore, in the nature of things, depend upon the condition and genius of the people among whom they prevail; and it could not be expected that the systems which different nations may have respectively adopted will be found to be in all respects the same.

10. It would accordingly be found that the system of rules developed under the feudal notions of the middle ages, though maintained for so many ages in the mother-country, were not in accordance with the genius and condition of her Colonies in this country; and that, at an early period in their history, important departures from these canons were made in the progress of their legislation. Massachusetts, in 1641, divided estates equally among children, except giving the oldest son a double share.⁴ When these Colonies became States, each had its own system of rules for the government of property within its limits, some of them varying essentially from those of the others, and all from the English common law. And these changes were followed in the end by that of England, in 1833, already mentioned, which introduced ma-

¹ Reeve, Hist. Eng. Law, 227; Bract. Lib. 2, pp. 64, 65.

² 2 Bl. Com. 211; Bract. Lib. 2, p. 62.

³ Wms. Real Prop. 76

⁴ Col. Laws, 205.

terial modifications in the ancient canons, and rendered the system in many * particulars more conform- [*405] able to the prevailing spirit of legislation upon the subject in this country. Under these circumstances, it would obviously be loading these pages with useless and obsolete learning to give in detail the former system of legal rules upon this subject which prevailed in England. And yet, in order that the reader may be able to understand enough of this system to apply the propositions and illustrations so often made by courts and legal writers when treating of kindred topics, and at the same time to see to what point the law has been carried by the changes which the recent legislation of England and of the several United States has effected in this respect, it seems necessary to state as briefly as may be the early canons of the English law of descent, together with the substance of the existing laws of these States upon the same subject, and such a reference to decided cases as may aid the reader to understand and apply the rules of law which may be found at present to prevail.

11. Before doing this, it seems proper to call the reader's attention to certain familiar rules of construction which are of constant reference in construing and applying the provisions of these several systems, and all of which have their origin in the common law. And first as to lineal and collateral descent, and the modes of computing the degrees of affinity between two persons related to each other, which have been applied under these various systems.

Consanguinity, or kindred by blood relationship, is the connection or relation of persons descended from the same stock or common ancestor. This common ancestor, to whom reference is made in computing the degrees of affinity to determine the nearness or remoteness of relationship of different persons akin to each other, is commonly spoken of as the *stirps* or *root*, sometimes the *stipes*, the trunk or common stock from which the line or lines of descent are traced. This consanguinity is either lineal or collateral. It is lineal when it exists between persons descended in a direct line one from the other, as father, grandfather, and the like, in an ascending line, and son, grandson, and the like, in the descending line.

It is collateral when they are descended from a common *stirps*, or stock, but not one * from the other. [*406]

Thus a man and his nephew are collaterally related, as each may trace his line of descent to the same common ancestor, the father of the one being also grandfather of the other. And at the distance of twenty generations, as illustrated by Blackstone, a man has above a million of ancestors; while if one's ancestors had left upon an average two children apiece, and each of those children two, and so on through fifteen generations, every man would have, of collateral kindred now subsisting in the fifteenth degree, almost two hundred and seventy millions.¹

12. By the canon and common law, which concur in this respect, the degrees of kindred between two persons are reckoned by counting from a common ancestor to the most remote descendant of the two from him. The relation of two brothers is in the first degree, because there is but one step from their father to either of them. But the relation of uncle and nephew is in the second degree; there being two degrees from the nephew to his grandfather, the father of the uncle. By the civil law, which is, in this respect, generally adopted in this country,² these degrees are computed by adding together the number of degrees there are between each of the two persons whose relationship is to be ascertained and the common ancestor. Thus the relation between brothers is in the second degree, each being one degree removed from the father; but between uncle and nephew it is the third, and between cousins the fourth, degree of kindred.³

13. The first of the English canons of descent was, that the inheritance should lineally descend to the issue of the person who *last died actually seised, in infinitum*, but never lineally ascend. The seisin here meant must have been an actual, or what was equivalent to an actual, corporal seisin.⁴ The English law is now so changed, that the heir must be of the last person entitled to the estate as a purchaser. So [*407] that, if * one has an estate as heir from one who purchased it, and dies, his heir does not inherit the estate

¹ 2 Bl. Com. 202, 206.

² *McDowell v. Addams*, 4f Penn. St. 430.

³ 2 Bl. Com. 206, 207.

⁴ 2 Bl. Com. 208, 209.

unless he is also heir to the purchaser from whom his immediate ancestor inherited.¹ If there is a failure of lineal descendants of the last purchaser entitled to the estate, it goes to the nearest lineal ancestor, the father, and all paternal ancestors and their descendants being preferred before females.²

14. The second canon is still the English law, that male issue are admitted as heirs before females.³

15. The third canon provides, that where there are several males kindred in equal degree, the oldest is the heir. But if there are several females, they all, together, constitute what is called the *heir*; and this rule remains unchanged.⁴

16. By the fourth canon, the lineal descendants *in infinitum* of any person deceased represent the ancestor; that is, stand in the same place as the ancestor would himself have done had he been living. This taking by representation is called a succession *per stirpes*, or according to the roots; all the branches of each root taking the share which the root it represents would have taken, and is used in distinction from taking *per capita*, where each takes as next of kin to the deceased in his own direct right.⁵

17. Under the fifth canon, upon failure of lineal descendants or issue of the person last seised, the inheritance descends to his collateral relations of the blood of the first purchaser, subject to the three last previous rules. This is now altered so that the estate passes to lineal ancestors, if any, in preference to collateral kindred.⁶

18. By the sixth canon, the heir in the collateral line of the person last seised must be his next collateral kinsman of the * whole blood. By kinsman of the whole [*408] blood is meant one who has descended not only from the same ancestor, but from the same couple of ancestors. If two are descended from the same father, but have different mothers, or from the same mother by different fathers, they will be as of the half-blood to each other. And by the appli-

¹ Wms. Real Prop. 78-80.

² Wms. Real Prop. 83, 85. Mr. Coleridge, in his note to 2 Bl. Com. 211, says, in the case above supposed, "The inheritance is equally divided between the two ascending lines."

³ 2 Bl. Com. 213.

⁴ 2 Bl. Com. 214.

⁵ 2 Bl. Com. 217, 218

⁶ 2 Bl. Com. 220; Wms. Real Prop. 83.

cation of this canon, a sister of the whole blood of one who is deceased is preferred to a brother of the half-blood, under the maxim that *possessio fratris facit sororem esse hæredem*.¹ This canon is now altered so that a kinsman of half-blood is made capable of being heir, and to inherit next after a kinsman in the same degree, of the whole blood.²

19. The seventh canon respects collateral inheritances, and prefers male stocks to female, unless the lands shall have actually descended from the female. This means, that kindred derived from the blood of the male ancestor, however remote, shall be admitted before those from the blood of the female, however near, with the exception above stated; the relations on the father's side being admitted, *in infinitum*, before those of the mother's side are admitted at all.³

20. The word *land*, as used in the present English statute of descent to denote that to which a person must be entitled in order to be a purchaser, and therefore an ancestor from whom a descent might be traced, embraces all estates, possibilities, rights, titles, and interests in all lands, whether in possession, reversion, remainder, or contingency. Nor is it necessary, in order to make one entitled to land, that he should have obtained possession, or the rents and profits thereof.⁴

21. When the rules of descent in this country are examined, it will be found that the American law has borrowed much more from the civil than the common law in respect to the distribution of estates. The one hundred and eighteenth

Novel of Justinian has a striking resemblance to the [*409] American law, in * giving the succession of estates to all legitimate children without distinction, and disregarding all considerations of primogeniture.⁵

22. There is one particular in which the American law differs from that of Justinian, that while generally, in this country, lineal descendants, if they stand in an equal degree from the common ancestor, share equally *per capita*, under the Roman law regard was had to the right of representation,

¹ 2 Bl. Com. 224, 227.

² 2 Bl. Com. 234.

³ Coop. Justin. 543; 4 Kent, Com. 378.

² Wms. Real Prop. 86.

⁴ Burt. Real Prop. § 301, note.

each lineal branch of descendants taking only the portion which their parent would have taken had he been living, the division being *per stirpes*, and not *per capita*.¹ But it will be found that in some of the United States the rule of the Roman law in this respect has been adopted and retained. Among them are Rhode Island, New Jersey, North and South Carolina, Alabama, and Louisiana.²

23. In one marked respect, the Roman was unlike either the English or American law, since, by that, one was an heir who took by will as much as he who took by descent, and, by a fiction, was, in all respects, the person whom he represented.³

24. By the English law, no one could be a *stirps* from whom a descent could be derived, unless he had been actually seised. The possession of a tenant for years was, however, deemed to be the possession of him who was entitled to the freehold, whether a reversioner or a remainder-man.⁴ And the seisin or possession of one tenant in common or coparcener is a seisin or possession of all.⁵

25. As there can be no actual seisin and possession of a remainder or reversion dependent upon a particular estate of freehold, although the same will descend through a line of successive heirs until the estate vests in some one in possession, the rule of the common law seems to be this: If such remainder * or reversion comes by descent from [*410] the donor of the particular estate who created the same, the person who claims it when it vests in possession must trace his descent from the donor who was last actually seised, irrespective of all who, in the mean time, may have been entitled to the same as heirs; the donor or creator of the particular estate being the *stirps* from which the descent of the one who is to take is to be traced. But it would have been competent for any one to whom such right had descended to have sold or devised it, whereby the grantee or

¹ Coop. Justin. 544; 4 Kent, Com. 379, 391, 408.

² 4 Kent, Com. 391. In Massachusetts, if one leave no issue, nor parents, nor brother, nor sister, his nephews and nieces take *per capita*, and not *per stirpes* Snow v. Snow, 111 Mass. 389.

³ Co. Lit. a, Butler's note, 77, §§ 2, 3.

⁴ Co. Lit. 15 a.

⁵ 4 Kent, Com. 386.

devisee as purchaser would have constituted a new *stirps*, and he would take the estate when it vested in possession who could trace the descent to himself from such new *stirps*. And the same would be the effect if the donor of the particular estate, or the remainder-man subject to it, had himself conveyed or devised the reversion or remainder.¹

26. But the law, in this respect, is changed in several if not all of the United States, and the heirs of a reversioner or remainder-man take as absolutely as if their ancestor were actually seised as of a freehold in possession; the word "seised," when applied to such an interest, being equivalent to owning, and "seisin" to ownership. A remainder-man or reversioner, therefore, becomes a proper stock of descent, and the remainder or reversion of one dying intestate is to be distributed among his heirs in the same manner as estates in possession. The heir here takes all the real estate *owned* by the ancestor at the time of his death; and the maxim of the common law, that *seisina facit stipitem, non jus*, is practically abolished, it is believed, in the States mentioned below, if not in all the States in this country.²

[*411] * 27. By referring to the statutes, an abstract of which is given at the close of this chapter, it will appear that an estate of inheritance pretty uniformly ascends to lineal ancestors where lineal descendants fail, they being preferred to collateral branches. Thus, in New Hampshire, a maternal grandmother rather than a paternal uncle is heir to a person dying under age, leaving neither father, brother, sister, nor mother.³ But the law is less uniform in respect to collateral heirs, and the degrees beyond which such heirs may

¹ Cook v. Hammond, 4 Mason, 484; Miller v. Miller, 10 Met. 393; 4 Kent, Com. 385; *ante*, pp. *391, *392; Vanderheyden v. Crandall, 2 Denio, 9; 4 Kent, Com. 386, 387.

² Cook v. Hammond, 4 Mason, 484; Miller v. Miller, 10 Met. 393, 401; Russell v. Hoar, 3 Met. 187; Whitney v. Whitney, 14 Mass. 88; Vanderheyden v. Crandall, 2 Denio, 9; Moore v. Rake, 2 Dutch. 574; Hillhouse v. Chester, 3 Day, 106. So in Virginia, North Carolina, Tennessee, Rhode Island, Pennsylvania, Delaware, South Carolina, Georgia, and Ohio. 4 Kent, Com. 388; Walk. Am. Law, 333; Hartley v. The State, 3 Ga. 238. But see Chirac v. Reinecker, 2 Pet. 625, as to the law of Maryland. See also Lawrence v. Pitt, 1 Jones (N. C.), 344.

³ Kelsey v. Hardy, 20 N. H. 479.

not claim to inherit by right of representation. In some States, the rule will be found to exclude all beyond the children of brothers and sisters. In others, the right extends to their grandchildren. Thus, for instance, in Maine, if an intestate have no issue, nor father nor mother, the right of representation does not extend beyond a brother's and sister's children.¹ In Maryland, an intestate left uncles and aunts, and children of a deceased uncle; but the latter were excluded as heirs, as the right of representation extended no further than to uncles and aunts.²

28. There will also be found a great difference in the laws of the several States in respect to inheritance by those of the whole and half blood. In some States, no distinction is made between the whole and half blood; though, in a majority of them, a distinction more or less extensive exists in that respect, by which the half-blood are postponed, but in none are they wholly excluded. In another respect the laws of the several States essentially differ; namely, as to inheritances which come to the ancestor by descent, and are called *ancestral*, by contrast with those which are acquired by him by purchase. In several of the States, these descend to the kindred who are of the blood of the ancestor from whom the inheritance comes, whether in the paternal or maternal line, excluding the relations in the opposite line until the first shall have been exhausted. And in tracing out this ancestral line, it always stops at the last purchaser. The one hundred and eighteenth Novel of Justinian * changed the [*412] Roman law so as to restrict the half-blood from inheriting only in case of failure of the whole blood; while before that time no difference between them had been recognized.³ In New Jersey, it has been held that brothers and sisters of the half-blood on the mother's side of A, who had died intestate, inherit, with a sister of the half-blood on the father's side, lands acquired by the deceased by deed of gift from the father of the intestate.⁴ Half-blood inherit equally with those of the whole blood in North Carolina, Tennessee,

Quinby v. Higgins, 14 Me. 309.

² Levering v. Heighe, 2 Md. Ch. Dec. 81; Ellicott v. Ellicott, Id. 468.

³ Coop. Justin. 545; 4 Kent, Com. 406.

⁴ Arnold v. Den, 2 South. 862.

and Maryland, where they are in the line of inheritance.¹ Brothers and sisters of the half-blood, under the provincial statutes of Massachusetts, were heirs to each other, on failure of issue if the father was dead. And in applying this law, it was held that where A died, leaving a wife and one child, and the child died under age without issue, his estate descended to his mother and her other children by a former husband.² In Pennsylvania, a brother or sister of the whole blood of the deceased is preferred to one of the half-blood. But where an intestate dies, leaving lands which he inherited from his father, and his heirs on his father's side are uncles and aunts, they take without distinction of blood.³

29. When reference is made, in the language of a statute, regulating descent to such as are of the blood of the person from whom the estate came, a father is accounted to be of the blood of his daughter.⁴

30. Posthumous children inherit in the same manner as if they had been born in the lifetime of the father, and were surviving heirs; and this doctrine is universally adopted in the United States.⁵ And this relates back to the conception of the child, if it is born alive.⁶

[*413] *31. By the common law, illegitimate children can neither be heirs to any one, nor ancestors to any one, except their own issue, for purposes of descent. But the laws of many of the States will be found to have modified this rule, especially as between mothers and their illegitimate children, making them heirs to each other.⁷

32. It should be borne in mind, that the *lex loci rei sitæ* regulates the descent of lands, irrespective of the domicile of the person of the intestate, or the claimants as heirs.⁸ And

¹ Doe v. Sheppard, 3 Murph. 333; Doe v. Turner, 2 Hawks, 435; Nichol v. Dupree, 7 Yerg. 415; Lowe v. Maccubben, 1 Harr. & J. 550; Osborne v. Widenhouse, 3 Jones (N. C.), Eq. 238.

² Sheffield v. Lovering, 12 Mass. 490. ³ Danner v. Shissler, 31 Penn. St. 289.

⁴ Cole v. Batley, 2 Curt. C. C. 562.

⁵ 4 Kent, Com. 412; Den v. Flora, 8 Ired. 374; Morrow v. Scott, 7 Ga. 535.

⁶ Harper v. Archer, 4 Smedes & M. 99.

⁷ Wms. Real Prop. 102, 103, and Rawle's note. The common law prevails in the States of South Carolina, New Jersey, and Delaware, but in none other, in this respect.

⁸ Story, Conf. Laws, § 484; Potter v. Titcomb, 22 Me. 300; Jones v. Marable, 6 Humph. 116; Smith v. Kelley, 23 Miss. 167.

those laws must be the same which are in force at the death of the ancestor, the rights of heirs being considered as arising at that time.¹

33. Where an alien is, by law, authorized to hold real estate, it will descend as that of a citizen to whoever is his lawful heir, if he has any, and will not escheat; and where one was authorized by special statute to hold lands, and he died intestate, leaving a father an alien, a brother authorized to hold land, and other brothers aliens, it was held, that his estate descended directly to his brother, who had capacity to take lands, as his heir.²

34. In some of the United States, the issue of a deceased child take the share of their parent, in the estate of the parent of their parent. But in these cases it is necessary that the child, their parent, should have died in the lifetime of their grandparent, in order to have his issue become heirs of their grandparent by way of representation. Where, therefore, there was a devise of an estate first to A B for life, who was a son and one of the heirs of the testator, remainder to the legal heirs of the testator, it was held that, if the remainder was a vested one, A B might convey his share of it in his lifetime, and so cut off * his heirs from any part of [*414] it. If the remainder did not vest till the decease of A B, still his children could not take as heirs of the testator; for to constitute them such heirs, their father, A B, must have died in the testator's lifetime; and in this case they were not born till after the testator's death, by which, of course, the father must have survived the testator.³

35. An heir-at-law cannot be disinherited except by express devise, or a necessary implication in a will. No wish, however strong, expressed in a will that the heir should not inherit, will have any effect, unless the testator actually devise the same estate to some other person.⁴

36. And, independent of legislation, as a title by descent is deemed by law to be worthier than that by devise, if an an-

¹ *Marshall v. King*, 24 Miss. 85; *McGaughey v. Henry*, 15 B. Mon. 383; *Miller v. Miller*, 10 Met. 398, 401.

² *Parish v. Ward*, 28 Barb. 328.

³ *Brown v. Lawrence*, 3 Cush. 390-399.

⁴ *Doe v. Lanis*, 3 Ind. 441; *McIntire v. Cross*, Id. 444

cestor devises to his heir just the estate in quantity and quality which he would take by descent, the latter will be considered as holding by descent, and not by devise.¹ But if one devises an estate to his wife, she will take as a purchaser, and not by descent.²

37. Upon the death of an ancestor, the real estate he may leave undevise vests at once in his heir, subject to be divested if required for the payment of the intestate's debts.³ And if the estate of the deceased was a fee, the law presumes that it descended to the heirs-at-law of the deceased, unless a devise thereof is affirmatively shown.⁴ And in trying the title of an heir, it is not necessary for him to show that his ancestor died intestate. The intestacy is presumed till the contrary is proved.⁵

38. To prove heirship in a collateral line, a party must show the descent of himself and of the person last seised from some common ancestor, and the exhaustion of all the lines of descent which would have a right to claim before him.⁶

39. The term "ancestor," as used in a statute of [*415] descents, * means any one from whom the estate is inherited. In this sense an infant brother may be the ancestor of an adult brother, the former having died, and his estate having come to the latter as his heir.⁷ A question arose in Massachusetts, under the provision whereby, in certain cases, grandfathers and grandmothers are heirs of an intestate, in a case where the deceased left a paternal grandmother, and a maternal grandfather who had a wife living, the question being whether the estate was to be divided into two or into three parts. It was held, that, for the purposes of inheritance, the husband and wife did not constitute one person in law, and that each of the three took an equal share.⁸

¹ *Gilpin v. Hollingsworth*, 3 Md. 190; *Philips v. Dashiell*, 1 H. & J. 478; *Hoover v. Gregory*, 10 Yerg. 444; *Buckley v. Buckley*, 11 Barb. 48; *Ellis v. Page*, 7 Cush. 161; *Posey v. Budd*, 21 Md. 480. The law is altered in England in this respect, by the statute 3 & 4 Wm. IV. c. 106, § 3.

² *Culbertson v. Duly*, 7 W. & S. 195.

³ *Chubb v. Johnson*, 11 Tex. 469; *Wilson v. Wilson*, 13 Barb. 252.

⁴ *Baxter v. Bradbury*, 20 Me. 260.

⁵ *Lyon v. Kain*, 36 Ill. 368.

⁶ *Emerson v. White*, 9 Fost. 482.

⁷ *Prickett v. Parker*, 3 Ohio St. 394; *Wheeler v. Clutterbuck*, 52 N. Y. 70

⁸ *Knapp v. Windsor*, 6 Cush. 156.

40. It sometimes happens that a testator, by accident or intention, omits the name of a child or grandchild in the provisions of his will; and questions arise as to what are the rights of such child or grandchild in respect to the testator's property. It seems to depend entirely upon the intention of the devisor, the child being without remedy if his parent or grandparent deliberately determines to disinherit him. But if the child or grandchild is not named in the will, the law will presume it is an accidental omission, and therefore lets him in to claim the share of the estate of the testator to which he would have been entitled had he died intestate. This, of course, applies only to grandchildren where the child is dead, and they come in in his place.¹ And, in Massachusetts, this was held to extend to children born after the making of the will.² What shall be considered such an omission of the child as to allow him to come in as heir, depends, of course, upon the construction of the will showing that the testator did or did not have the child in view in making the devise in his will. Thus, where the testator left the disposal of his property "as well with reference to our child or children as A B," it was held to be such a reference to a child as not to leave the estate intestate as to him.³

* 41. It has already been stated that every heir [*416] takes his land by descent, subject to the debts of the intestate, provided it be necessary for that purpose, and the requisite proceedings are had within the period of limitation within which lands, in the hands of heirs, are, by statute, made liable for such debts. And in order to determine the respective rights and liabilities, in this respect, of persons inheriting portions of an intestate's estate, there are rules in several of the States for "marshalling the assets," as it is called, or determining the order in which the estate, real and personal, shall be applied in the payment of the intestate's debts.⁴

42. It is not always easy to determine whether claims to or interests in lands are or are not inheritable, and pass by

¹ *Gage v. Gage*, 9 Fost. 533.

² *Bancroft v. Ives*, 3 Gray, 367; *Mass. Gen. Stat. c. 92, § 26*.

³ *Beck v. Metz*, 25 Mo. 70.

⁴ See *Hays v. Jackson*, 6 Mass. 149.

descent. Among some of these which have come under the consideration of courts are the claims to lands which had been "located" under the laws respecting public lands, and surveyed, but not actually patented, by the ancestor during his life. In one case, the patent issued to the heirs after the ancestor's death; and it was held that they took by descent, and not as purchasers.¹ So where A devised lands to B, upon a condition subsequent, and made C his residuary devisee, C died, and then B committed a breach of the condition under which he held his estate; and it was held, that the possibility of regaining the estate by making an entry for condition broken, which passed to C by the devise, descended to his heirs at his death.² Where lands were sold for taxes, but the purchaser died before a deed had been delivered, although a certificate of sale had been delivered to him, it was held that the interest in the lands descended to his heirs.³

43. Where the owner of the land leased it in fee, reserving rent, and died, it was held, that rents accruing due after the death of the lessor descend and pass to his heirs, as a part of his inheritance.⁴

[*417] * 44. In distributing estates among heirs and distributees of intestates, a principle is adopted in most, and it is believed all, the States, whereby, if any heir or distributee has received any part of his share of his father's estate during his lifetime, the same will be deducted from his share of what the intestate shall have left at his death, provided such share shall exceed the amount in value which he shall have received in the lifetime of his father. The sum thus advanced is called an *advancement*, and may consist of real and personal estate. But in order to its being allowed in estimating the several shares to be received by the heirs or distributees, it must be shown to have been intended as an advancement, by certain forms of proof which the law has prescribed. These rules of evidence are not uniform, each State generally prescribing its own rules by statute.⁵ But as

¹ Bond v. Swearingen, 1 Ohio, 182; Frizzle v. Veach, 1 Dana, 211; Shanks v. Lucas, 4 Blackf. 476.

² Clapp v. Stoughton, 10 Pick. 463.

³ Rice v. White, 8 Ohio, 216.

⁴ Green v. Massie, 18 Ill. 363; Hasloge v. Krugh, 25 Penn. St. 97.

⁵ 4 Kent, Com. 418, 419.

much of what has been said of the laws of descent is designed rather to indicate the subjects of legislation upon the general doctrine, than as an attempt to give accurate details of these laws, it only remains to refer the reader to the accompanying outline of the systems of the different States, so far as they can be gathered in a general statement of the present state of legislation, as it appears in the volumes cited in the following pages.

NOTE.

STATUTE RULES OF DESCENT.

The rules of descent, prescribed by the statutes of the several United States, are as follows :—

In *Alabama*, the real estate of an intestate descends, —

I. To the children and their descendants equally.

II. To the brothers and sisters, or their descendants.

III. If none of these, to the father, if living ; if not, to the mother.

IV. If there be neither of these, then to the next of kin in equal degree.

* V. If there be none of the above-mentioned kindred, then to the [*418] husband or wife ; and in default of these, it escheats to the State.

VI. There is no representation among collaterals except with the descendants of brothers and sisters of the intestate.

VII. There is no distinction between the whole and half blood, except that, in case the inheritance was ancestral, those not of the blood of the ancestor are excluded as against those of the same degree. Ala. Code, 1867, §§ 1888-1892.

In *Arkansas*, real estate of inheritance descends, —

I. To the children or their descendants in equal parts.

II. To the father, then to the mother.

III. To the brothers and sisters, or their descendants.

IV. To the grandfather, grandmother, uncles, and aunts, and their descendants, in equal parts ; and so on, passing to the nearest lineal ancestor and his descendants.

V. If there be no such kindred, then to the husband or wife ; and in default of these, it escheats to the State.

VI. The descendants of the intestate, in all cases, take by right of representation, where they are in different degrees.

VII. If the estate come from the father, and the intestate die without descendants, it goes to the father and his heirs ; and if the estate be maternal, then to the mother and her heirs. But if the estate be an acquired one, it goes to the father for life, remainder to the collateral kindred ; and in default of father, then to mother for life, and remainder to collateral heirs.

VIII. In default of father and mother, then first to the brothers and sisters and their descendants of the father ; then to those of the mother. This applies only where there is no near kindred, lineal or collateral.

IX. The half-blood inherits equally with the whole blood in the same degree; but if the estate be ancestral, it goes to those of the blood of the ancestor from whom it was derived.

X. In all cases not provided for by the statute, the inheritance descends according to the course of the common law. Dig. Ark. Stat. 1858, c. 56.

In *California*, —

I. If there be a surviving husband or wife, and only one child, or the issue of one child, in equal shares to the surviving husband or wife, and child, or issue of such child. If there be more than one child, or one and the issue of one or more, then one-third to the surviving husband or wife, and the remainder to the children or issue of such by right of representation. If there be no child living, then to lineal descendants equally, if they are in the same degree; otherwise by right of representation.

II. If there be no issue, then in equal shares to the surviving husband or wife, and to the intestate's father. If there be no father, then one-half in equal shares to the brothers and sisters of the intestate, and the issue of such by right of representation; provided, if there be a mother, she shall take an equal share with the brothers and sisters. If there be no surviving issue, husband or wife, the estate goes to the father.

III. If there be no issue, nor husband, nor wife, nor father, then in equal shares to the brothers and sisters of the intestate, and to children of such by right of representation; provided there be a mother also, she takes equally with the brothers and sisters.

[*419] *IV. If there be none of these except the mother, she takes the estate to the exclusion of the issue of deceased brothers and sisters.

V. If there be a surviving husband or wife, and no issue, father, mother, brother, or sister, the whole goes to the surviving husband or wife.

VI. If none of these, to the next of kin in equal degree; those claiming through the nearest ancestor to be preferred to those claiming through one more remote.

VII. If there be several children, or one child and the issue of one or more, and any such surviving child die under age, and unmarried, the estate of such child which came from such deceased parent passes to the other children of the same parent and the issue of such by right of representation.

VIII. If all the other children be dead, in such case, and any of them have left issue, then the estate descends to such issue equally if in the same degree, otherwise by right of representation.

IX. If the intestate leave no husband or wife, nor kindred, the estate escheats to the State for the use of the common schools.

X. The degree of kindred is established by the number of generations, and each generation is called a degree. The series of degrees forms the line: the series of degrees between persons who descend from one another is called direct or lineal consanguinity; and the series of degrees between persons who do not descend from one another, but spring from a common ancestor, is called the collateral line, or collateral consanguinity. The direct line is divided into a direct line descending and ascending. The first is that which connects a person with those from whom he descends. In the direct line, there are as many degrees as there are generations. In the collateral line, the degrees are counted by generations from one of the relations up to the common ancestor, and from the common

ancestor to the other relations. In such computation, the decedent is excluded, the relations included, and the ancestor counted but once. And kindred of the half-blood inherit equally with those of the whole blood in the same degree, unless the estate come from an ancestor; in which case, those not of the blood of such ancestor are excluded. Wood, Dig. Cal. Laws, 1858, p. 423; Stats. 1862, c. 447; Civil Code, 1872, §§ 1386-1394.

In Colorado, —

I. If there be a surviving husband or wife and children, or their descendants, then one-half to such survivor, and the other half to children or descendants. If there be a surviving husband or wife, and no children nor descendants of children, then the whole estate to such survivor. If there be no surviving husband or wife, then the whole estate descends to children or their descendants; the descendants of children, in each case, taking collectively the share which their parent would have had.

II. To father, mother, brothers, and sisters, or to the descendants of brothers and sisters.

III. To grandfather, grandmother, uncles, aunts, and their descendants.

IV. To nearest lineal ancestors, and their descendants.

V. Children and descendants of children of the half-blood inherit the same as children and descendants of the whole blood; but collateral relations of the half-blood inherit only half as much as those of the whole blood, if there be any of the last named living. Rev. Stat. 1868, c. 23, §§ 1-3.

In Connecticut, —

I. To the children of the intestate, and their legal representatives.

II. To brothers and sisters of the intestate of the whole blood, and their representatives.

III. To the parent or parents of the intestate.

IV. To the brothers and sisters of the half-blood, and their representatives.

V. To the next of kin in equal degree, kindred of the whole blood to take in preference to kindred of the half-blood in equal degree, and no representatives to be admitted among collaterals after the representatives of brothers and sisters.

VI. Estates which came to the intestate from his parent ancestor, or other kindred, go, —

1. To the brothers and sisters of the intestate of the blood of the person or ancestor from whom such estate came or descended.

2. To the children of such person or ancestor, and their representatives.

3. To the brothers and sisters of such person or ancestor, and their representatives.

4. If there be none such, then it is divided as other real estate. When such intestate shall be a minor, and shall not have any lineal descendants, or brother or sister, or any parent, such estate shall be distributed equally to the next of kin to the intestate of the blood of the person or ancestor from whom such estate came or descended; and if there be no such kindred, then to the next of kin of the intestate generally. And in ascertaining the next of kin in all cases, the rule of the civil law shall be adopted. Conn. Gen. Stat. 1866, p. 414, § 57; Gen. Stat. 1875, p. 374, § 8.

In *Darotah*, —

- I. To husband.
- II. One-third to widow, and two-thirds to next lineal descendants and the successors of those deceased.
- III. If no children, to the widow, to the value of two thousand dollars; all over to the father or mother, or brothers and sisters, and their successors.
- IV. To widow, if no children, parent's brothers or sisters.
- V. To nearest lineal descendants.
- VI. To next of kin. Civil Code, 1866.

In *Delaware*, when any person having title or right, legal or equitable, [*420] to any *lands, tenements, or hereditaments, in fee-simple, dies intestate, such estate descends, —

- I. To the children of the intestate, and their issue, by right of representation.
- II. If there be no issue, then to his brothers and sisters of the whole blood and their issue, by right of representation.
- III. Estates to which the intestate has title, by descent or devise, from his parent or ancestor, go, in default of issue, to his brothers and sisters and their issue, by right of representation, provided that brothers and sisters of the whole blood and their issue shall be preferred to brothers and sisters of the half-blood and their issue.
- IV. If there be not any of these, then to the father.
- V. If there be no father, then to the mother.
- VI. If there be no kindred above mentioned, then to the next of kin in equal degree and their issue, by representation; provided that collateral kindred, claiming through a nearer common ancestor, shall be preferred to those claiming through one more remote. Del. Rev. Code, 1853, c. 85, p. 276; Amended Code, 1874, c. 85, p. 514.

In *Florida*, the rules of descent are the same as in Virginia. Thomp. Dig. Flor. Laws, pp. 138, 139.

In *Georgia*, real estate descends, —

- I. To the widow and children in equal shares, and to the representatives of the children *per stirpes*.
- II. If there be a widow and no issue, then half to the widow, and the other half to the next of kin. If the intestate dies without children or the descendants of children, leaving a wife, the wife is the sole heir; but if there be issue, and no widow, the whole goes to the issue.
- III. If there be neither widow nor issue, then to the next of kin in equal degree, and their representatives. But no representation is admitted among collaterals further than the children of nephews and nieces.
- IV. If the father and mother be alive, and a child dies intestate and without issue, such father or mother, in case the father be dead, come in on the same footing as a brother or sister would do. Provided, that, if the mother has married again, she shall take no part of the estate of such child, unless it shall be the last or only child.
- V. If there be no issue but brothers and sisters of the whole and half blood, then those in the paternal line only inherit equally; but if there be none of

these nor their issue, then those of the half-blood and their issue in the maternal line inherit.

VI. The next of kin are to be investigated by the following rules of consanguinity: namely, children to be nearest; parents, brothers, and sisters to be equal in respect to distribution; and cousins to be next to them. Cobb, New Dig. Ga. Laws, 1851, vol. 1, p. 297; Laws, 1859, p. 38, no. 31; Code, 1873, p. 428, § 2484.

In *Illinois*, real estate descends, —

I. To children and their descendants by right of representation.

II. If no children or their descendants, nor widow, then to the parents, brothers, and sisters of the deceased, in equal parts; allowing to each of the parents, if living, a child's part, or to the survivor of them, if one be dead, a double portion; *and if there be no parent, then the whole to [*421] the brothers and sisters and their descendants.

III. Where there is a widow, and no children or their descendants, then one-half of the real estate goes to the widow as her exclusive estate for ever.

IV. If there be none of the above-mentioned persons, then the estate descends in equal parts to the next of kin in equal degree, computing by the rules of the civil law; and there is no representation among collaterals, except with the descendants of the brothers and sisters of the intestate; and there is no distinction between the kindred of the whole and the half blood.

V. When a *feme covert* dies intestate, leaving no children or their descendants, then the one-half of the real estate of the decedent goes to the husband for ever. If an intestate leaves a widow or surviving husband, and no kindred, his or her estate shall descend to such widow or surviving husband. 2 Ill. Comp. Stat. 1858, p. 1199; Rev. Stat. 1874, c. 39, § 1.

In *Indiana*, real property descends, —

I. To the children and their descendants equally, if in the same degree; if not, *per stirpes*.

II. If no descendants, then half to the father and mother as joint-tenants, or to the survivor; and the other half to the brothers and sisters, and their issue.

III. If there be no father and mother, the brothers and sisters of the intestate take the whole. If there be no brothers nor sisters descendants of them, it goes to the father and mother as joint-tenants; and if either be dead, to the other.

IV. If there be none of these, if the inheritance came from the paternal line, then it goes, —

1. To the paternal grandfather and grandmother as joint-tenants, or the survivor of them.

2. To the uncles and aunts and their issue.

3. To the next of kin in equal degree among the paternal kindred.

4. If none of these, then to the maternal kindred in the same order.

V. Maternal inheritances go to the maternal kindred in the same manner.

VI. Estates not ancestral descend, —

1. In two equal parts to the paternal and to the maternal kindred; and on failure of either line, the other takes the whole.

VII. Kindred of the half-blood inherit equally with those of the whole blood, except that ancestral estates go only to those of the blood of the ancestor; provided that, on failure of such kindred, other kindred of the half-blood inherit as if they were of the whole blood.

VIII. When the estate came to the intestate by gift or by conveyance, in consideration of love and affection, and he dies without issue, it reverts to the donor, if he be still living, saving to the widow or widower his or her rights therein; provided that the husband or wife of the intestate shall have a lien thereon for the value of their lasting improvements.

IX. In default of heirs, it escheats to the State for the use of the common schools.

X. Tenancies by the curtesy and in dower are abolished, and the widow takes one-third of the estate in fee-simple, free from all demands of creditors; [*422] * provided that, when the estate exceeds in value \$10,000, she takes one-fourth only; and when it exceeds \$20,000, one-fifth only.

XI. When the widow marries again, she cannot alienate the estate; and if during such marriage she die, the estate goes to her children by the former marriage, if any there be.

XII. When the estate, real and personal, does not exceed \$300, the whole goes to the widow.

XIII. A surviving husband inherits one-third of the real estate of the wife.

XIV. If a husband die, leaving a widow and only one child, the real estate descends one-half to each.

XV. When a husband or wife dies, leaving no child, but a father or mother, or either of them, then three-fourths of the estate goes to the widow or widower, and one-fourth to the father and mother jointly, or the survivor of them; but if it does not exceed \$1,000, the whole to the widow or widower.

XVI. If there be no child or parent, the whole goes to the surviving husband or wife. 1 Ind. Rev. Stat. 1852, c. 27; Stat. 1862, vol. 1, c. 46.

In Iowa, —

I. To children and their issue, by right of representation.

II. If no issue, one-half to the parents of the intestate, and the other half to his wife; if he leaves no wife, the portion which would have gone to her goes to his parents. Laws of 1858, c. 63, p. 96.

III. If one of the parents be dead, the surviving parent takes the share of both, including that which would have belonged to the intestate's wife if she had been living. *Ibid.*

IV. If both parents be dead, their portion goes, in the same manner as if they or either of them had outlived the intestate, to their heirs. *Ibid.*

V. If heirs are not thus found, the portion uninherited shall go to the wife of the intestate, or to her heirs if dead, according to like rules; and if he has had more than one wife, who either died or survived in lawful wedlock, it shall be equally divided between the one who is living and the heirs of those who are dead, or between the heirs of all, if all are dead, such heirs taking by right of representation.

VI. If there be no heirs, the estate escheats to the State. Iowa, Code, 1851, §§ 1408-1415; Iowa, Laws, 1858, c. 63, p. 96; Revision, 1860, §§ 2436-2498; Code, 1873, p. 423, §§ 2453-2460.

In *Kansas*,—

I. To children in equal shares, and to the issue of such by right of representation.

II. To the wife; and if no wife, to the parents.

III. If one of the parents be dead, the whole of the estate shall go to the surviving parent; and if both parents be dead, it shall be disposed of in the same manner as if they or either of them had outlived the intestate, and died in the possession and ownership of the portion thus falling to their share, or to either of them; and so on through ascending ancestors and their issue.

IV. Children of the half-blood inherit equally with those of the whole blood. Gen. Laws, 1862, c. 80, §§ 16, 22, 30; Gen. Stat. 1868, c. 33, §§ 18-21, 29.

In *Kentucky*,—

I. To children and their descendants.

II. If no descendants, to father and mother, if both are living, one moiety each; if father be dead, then to mother, if living, one moiety, and the other moiety to brothers and sisters and their descendants; if the mother be dead, then the whole estate to the father; if no father nor mother, then,—

III. To brothers and sisters, and their descendants.

IV. If none, one moiety of estate to the paternal and the other to the maternal kindred, in the following order: first, to grandfather and grandmother equally, if both be living; but if one be dead, then the entire moiety to survivor; if no grandfather or grandmother, then,—

V. To uncles and aunts, and their descendants.

VI. If none, to great-grandfathers and great-grandmothers, in the same manner as prescribed for grandfather and grandmother.

VII. If none, to brothers and sisters of grandfathers and grandmothers, and their descendants.

VIII. If there is no kindred of one parent, the whole estate to the kindred of the other. If neither paternal nor maternal kindred, the whole estate descends to the husband or wife of the intestate; or, if dead, to his or her kindred.

IX. When any or all of a class first entitled to inherit are dead, leaving descendants, such descendants take *per stirpes*.

X. Collaterals of the half-blood shall inherit only half so much as those of the whole blood, or as ascending kindred, when they take with either. Gen. Stat. 1873, c. 31, §§ 1-3.

In *Louisiana*,—

I. To the children and their issue; if in equal degree, then *per capita*; otherwise *per stirpes*.

II. To the parents of the intestate, one moiety; and the other moiety to his brothers and sisters and their issue. If one parent be dead, his or her share goes to the brothers and sisters of the deceased, who then have three-fourths. If both parents be dead, the whole goes to the brothers and sisters and their issue.

III. If the brothers and sisters are all of the same marriage, they share equally. If they are of different marriages, the portion is divided equally between the *paternal and maternal lines of the intestate, the german [*423] brothers and sisters taking a part in each line. If the brothers and sisters are on one side only, they take the whole, to the exclusion of all relations of the other line.

IV. If there be no issue, nor parent, nor brothers, nor sisters, nor their issue, then the inheritance goes to the *ascendants* in the paternal and maternal lines, one moiety to each, those in each line taking *per capita*. If there is in the nearest degree but one ascendant in the two lines, he excludes all others of a remoter degree, and takes the whole.

V. If there be none of the heirs above mentioned, then the inheritance goes to the collateral relations of the intestate, those in the nearest degree excluding all others. If there are several persons in the same degree, they take *per capita*.

VI. Representation takes place *ad infinitum* in the direct descending line, but does not take place in favor of ascendants; the nearest in degree always excluding those of a degree superior or more remote.

VII. In the collateral line, representation is admitted in favor of the issue of the brothers and sisters of the intestate, whether they succeed in concurrence with the uncles and aunts; or whether, the brothers and sisters being dead, their issue succeed in equal or unequal degrees.

VIII. When representation is admitted, the partition is made *per stirpes*; and if one root has produced several branches, the subdivision is also made by roots in each branch, and the members of the branch take between themselves *per capita*. La. Civ. Code, Art. 882-910; Rev. Civ. Code, 1870, Art. 895-914.

In *Maine*. — The law of descents in Maine was originally derived from that of Massachusetts, and is now the same. In default of kindred, the estate shall descend to the widow or to the husband. The statute of Maine regulates the descent of the *real estate* of the intestate without further specification. Me. Rev. Stat. 1847, c. 75, §§ 1, 2; 1871, c. 75, §§ 1, 2.

In *Maryland*, when any person dies seised of an estate in any lands, tenements, or hereditaments, in fee-simple or in fee-simple conditional, or of an estate in fee-tail, such estate descends, —

I. To children and their descendants.

II. If no issue, and the estate descended on the part of the father, then to the father.

III. If no father, to the brothers and sisters of the intestate of the blood of the father and their descendants.

IV. If none of these, then to the grandfather on the part of the father, if living, otherwise to his descendants in equal degree; and if there be none such, then to the father of such grandfather and his descendants; and so on to the next lineal male paternal ancestor and his descendants, without end. And if there be no paternal ancestor, nor descendants of any, then to the mother and the kindred on her side in the same manner as above directed.

V. If there be no issue, and the estate descended on the part of the [*424] mother, * then to the mother; and if no mother living, then to the brothers and sisters of her blood and their descendants; and if there be none of these, to her kindred in the same order as above; and in default of maternal kindred, then to the paternal kindred in the same manner as above directed.

VI. If the estate was acquired by purchase, and there be no issue, then it descends, —

1. To the brothers and sisters of the whole blood, and their descendants in equal degree.

2. Then to the brothers and sisters of the half-blood.

3. If none of these, to the father.

4. If no father, to the mother.

5. If neither of the above kindred, then to the paternal grandfather and his descendants in equal degree; then to the maternal grandfather and his descendants in equal degree; then to the paternal great-grandfather and his descendants in the same manner; and so on, alternating and giving preference to the paternal ancestor.

VII. If there be no kindred, then the estate goes to the surviving wife or husband, and their kindred, as an estate by purchase; and if the intestate has had more husbands or wives than one, all of whom are dead, then to their kindred in equal degree, equally.

VIII. No distinction is made between brothers and sisters of the whole and half blood, all being descendants of the same father, where the estate descended on the part of the father; nor where all are descendants of the same mother, the estate descending on her part.

IX. Children take by representation; but no representation is admitted among collaterals after brothers' and sisters' children. I Dorsey, Md. Laws, 745; Code, 1860, pp. 330-333.

In *Massachusetts*, when a person dies seised of lands, tenements, or hereditaments, or of any right thereto, or entitled to any interest therein, in fee-simple or for the life of another, they descend, subject to his debts, —

I. In equal shares to his children and the issue of any deceased child, by right of representation; and if there is no child of the intestate living at his death, then to all his other lineal descendants; equally, if they are all in the same degree of kindred to the intestate; otherwise, according to the right of representation.

II. If he leaves no issue, then to his father.

III. If he leaves no issue nor father, then in equal shares to his mother, brothers, and sisters, and to the children of any deceased brother or sister, by right of representation.

IV. If he leaves no issue nor father, and no brothers or sisters, then to his mother, to the exclusion of the issue of any deceased brother or sister.

V. If he leaves no issue, and no father, mother, brother, nor sister, then to his next of kin in equal degree; those claiming through the nearest ancestor to be preferred to those claiming through one more remote.

VI. If a person dies, leaving several children, or leaving one child and the issue of one or more others, and any such surviving child dies under age, and *not having been married, all the estate that came to the de- [*425] ceased child by inheritance from such deceased parent descends in equal shares to the other children of the same parent, and to the issue of any such other children who have died, by right of representation.

VII. If, at the death of such child, all the other children of such deceased parent are also dead, and any of them have left issue, the estate that came to such child by inheritance from such parent descends to all the issue of the other children of the same parent; equally, if they are in the same degree of kindred to the child; otherwise, according to the right of representation.

VIII. If the intestate leaves a widow and no kindred, his estate descends to his widow; and if the intestate is a married woman, and leaves no kindred, her estate descends to her husband.

IX. In default of kindred, the estate escheats to the Commonwealth.

It is provided that the degrees of kindred shall be computed according to the rules of the civil law, and that the kindred of the half-blood shall inherit equally with those of the whole blood in the same degree. Mass. Gen. Stat. c. 91, §§ 1-5.

In *Michigan*, the statute of descent is the same as in Wisconsin. 2 Mich. Comp. Laws, 1857, c. 91, p. 858; 1871, c. 153, §§ 1-5.

In *Minnesota*, the same is true as in Michigan. Minn. Stat. 1853, c. 37, p. 411; Stat. at Large, 1873, vol. 1, c. 33, §§ 1, 4.

In *Mississippi*, when any person dies seised of any estate of inheritance in lands, tenements, and hereditaments, it descends, —

I. To his children and their descendants in equal parts, by right of representation.

II. To brothers and sisters and their descendants in the same manner.

III. If there be none of these, then to the father, if living; if not, to the mother; if both be living, then to each in equal portions.

IV. To the next of kin in equal degree, computing by the rules of the civil law.

V. There is no representation among collaterals except with the descendants of the brothers and sisters, and uncles and aunts, of the intestate.

VI. There is no distinction between the half and the whole blood, except that the whole blood is preferred to the half-blood, in the same degree. Miss. Rev. Code, 1857, p. 452; 1871, p. 420, §§ 1948, 1949.

In *Missouri*, real estate of inheritance descends, —

I. To children or their descendants in equal parts.

II. If none of these, to the father, mother, brothers, and sisters, and their descendants, in equal parts.

III. If none of these, then to the husband or wife.

IV. If no husband or wife, then to the grandfather, grandmother, uncles, and aunts, and their descendants, in equal parts.

V. If none of these, then to the great-grandfathers, great-grandmothers, and their descendants, in equal parts; and so on, passing to the nearest lineal ancestors, and their children and their descendants, in equal parts.

[*426] * VI. If there be no kindred above named, nor any husband or wife, capable of inheriting, then the estate goes to the kindred of the wife or husband of the intestate, in the like course as if such wife or husband had survived the intestate, and then died entitled to the estate.

VII. When some of the collaterals are of the half-blood, and some of the whole blood, those of the half-blood inherit only half as much as those of the whole blood; but if all such collaterals be of the half-blood, they have whole portions, only giving to the ascendants double portions.

VIII. When all are of equal degree of consanguinity to the intestate, they take *per capita*; if of different degrees, *per stirpes*. 1 Mo. Gen. Stat. c. 129, § 14; Stat. 1872, vol. 1, c. 45, §§ 1-5.

In *New Hampshire*, the real estate of every intestate descends in equal shares, —

I. To the children of the deceased, and the legal representatives of such of them as are dead.

II. If there be no issue, to the father, if he is living.

III. If there be no issue nor father, in equal shares to the mother, and to the brothers and sisters, or their representatives.

IV. To the next of kin, in equal shares.

V. If the intestate be a minor and unmarried, his estate, derived by descent or devise from his father or mother, goes to his brothers or sisters, or their representatives, to the exclusion of the other parent.

VI. No representation is admitted among collaterals beyond the degree of brothers' and sisters' children.

VII. In default of heirs, it escheats to the State. N. H. Gen. Stat. 1867 c. 184, §§ 1-7; 1867, c. 184, §§ 1-7.

In *Nebraska*, real estate of inheritance descends as in Michigan and Minnesota. Gen. Stat. 1873, c. 17, §§ 30, 33.

Nevada. — 1. If there be a surviving husband or wife, and only one child, or the lawful issue of one child, in equal shares to the survivor and child, or issue of such child; if there be a surviving husband or wife, and more than one child living, or one child living and the lawful issue of one or more deceased children, one-third to survivor, and remainder in equal shares to children or issue of deceased children, by right of representation; if there be no child living, the remainder to lineal descendants; equally, if in same degree; otherwise, by right of representation.

2. If no issue, in equal shares to survivor and intestate's father; if no issue, nor surviving husband or wife, the whole estate to intestate's father.

3. If no issue nor survivor nor father, then in equal shares to brothers and sisters, and to children of any deceased brother or sister, by right of representation; *provided*, that, if intestate leave a mother, she takes an equal share with brothers and sisters.

4. If no issue, nor survivor, nor father, nor brother or sister, living, the estate shall go to the mother, to exclusion of issue, if any, of deceased brothers and sisters.

5. If intestate leave a surviving husband or wife, and no issue, and no father, mother, brother, or sister, the whole estate goes to such survivor.

6. If no issue, nor husband, nor wife, and no father, mother, brother, nor sister, then to next of kin in equal degree, those claiming through a nearer ancestor to be preferred to those claiming through an ancestor more remote; *provided*, however, that if any person shall die leaving several children, or leaving one child and the issue of one or more other children, and any such surviving child shall die under age, and not having been married, all the estate that came to the deceased child by inheritance from such deceased parent shall descend in equal shares to the other children of the same parent, and to the issue of any such other children who shall have died, by right of representation.

7. If, at the death of such child who shall die under age, and not having been married, all the other children of his said parent shall also be dead, and any of them shall have left issue, the estate that came to such child by inheritance from his said parent shall descend to all the issue of other children of the same parent; equally, if all said issue are of the same degree of kindred; otherwise, by right of representation.

8. If no husband, nor wife, nor kindred, then to the State for support of common schools.

9. The degrees of kindred shall be computed according to rules of civil law; and kindred of half-blood shall inherit equally with those of the whole blood in the same degree, unless the inheritance came to intestate from an ancestor; in which case, all not of the blood of such ancestor are excluded. *Comp. Laws of Nevada, 1878, vol. 1, §§ 794, 797.*

In *New York*, the real estate of an intestate descends, —

I. To his lineal descendants.

II. To his father.

III. To his mother.

IV. To his collateral relatives.

Subject, however, to these rules: —

1. Lineal descendants, being in equal degree, take in equal parts.

2. If any of the children of the intestate are living, and others are dead, leaving issue, such issue takes by representation.

3. The preceding rule applies to all descendants of unequal degrees; [*427] so * that those who are in the nearest degree of consanguinity take the share which would have descended to them had all the descendants in the same degree been living, and the children in each degree take the share of their parent.

4. If there be no descendants, but the father be living, he takes the whole, unless the inheritance came to the intestate on the part of his mother, and the mother be living. But if she be dead, then the inheritance descending on her part goes to the father for life, and the reversion to the brothers and sisters of the intestate, and their descendants; but if there be none living, then to the father in fee.

V. If there be no descendants and no father, or a father not entitled to take as above, then the inheritance descends to the mother for life, and the reversion to the brothers and sisters of the intestate, and their descendants, by representation; but if there be none such, then to the mother in fee.

VI. If there be no father or mother capable of inheriting the estate, it descends, in the cases hereafter specified, to the collateral relatives; in equal parts if they are of equal degree, however remote from the intestate.

VII. If all the brothers and sisters of the intestate be living, the inheritance descends to them; but if some be dead, leaving issue, the issue take by right of representation; and the same rule applies to all the direct lineal descendants of brothers and sisters, to the remotest degree.

VIII. If there be no heirs entitled to take under either of the preceding sections, the inheritance, if the same shall have come to the intestate on the part of his father, shall descend, —

1. To the brothers and sisters of the father of the intestate in equal shares, if all be living.

2. If some be living, and others dead, leaving issue, then according to the right of representation.

3. If all the brothers and sisters are dead, then to their descendants.

In all cases, the inheritance is to descend in the same manner as if all such brothers and sisters had been brothers and sisters of the intestate.

IX. If there be no brothers and sisters, nor descendants of such, of the father's

side, then the inheritance goes to the brothers and sisters of the mother and their descendants, in the same manner.

X. Where the inheritance has come to the intestate on the part of his mother, the same descends to the brothers and sisters of the mother and to their descendants; and if there be no such, to those of the father, as before prescribed.

XI. If the inheritance has not come to the intestate on the part of either father or mother, it descends to collaterals on both sides, in equal shares.

XII. Relatives of the half-blood inherit equally with the whole blood, unless the inheritance came to the intestate by descent, devise, or gift of some one of his ancestors; in which case, none inherit who are not of the blood of that ancestor.

XIII. In all cases not otherwise provided for, the inheritance descends according to the course of the common law.

*XIV. Real estate held in trust for any other person, if not devised [*428] by the person for whose use it is held, descends to his heirs, according to the preceding rules. 2 N. Y. Rev. Stat. 4th ed. pp. 157-161; Stat. at Large, vol. 1, pp. 702-705.

In *New Jersey*, when a person dies seised of any lands, tenements, or hereditaments, in his or her own right in fee-simple, they descend, —

I. To the children of the intestate and their issue, by right of representation, to the remotest degree.

II. To brothers and sisters of the whole blood, and their issue in the same manner.

III. To the father, unless the inheritance came from the part of the mother; in which case, it descends as if the father had previously died.

IV. To the mother for life; and, after her death, to go as if the mother had previously died.

V. If there be no such kindred, then to brothers and sisters of the half-blood and their issue, by right of representation; but if the estate came from an ancestor, then only to those of the blood of such ancestor, if any be living.

VI. If there be none of these, then to the next of kin in equal degree, subject to the restriction aforementioned as to ancestral estates. Nixon, Dig. N. J. Laws, 1855, pp. 194-196; 1868, pp. 235, 236.

In *North Carolina*, when any person dies seised of any inheritance, or of any right thereto, or entitled to any interest therein, it descends according to the following rules: —

I. Inheritances lineally descend to the issue of the person who died last seised; but do not lineally ascend, except as hereinafter stated.

II. Females inherit equally with males, and younger with older children.

III. Lineal descendants represent their ancestor.

IV. On failure of lineal descendants, where the inheritance has been transmitted by descent or otherwise from an ancestor to whom the intestate was an heir, it goes to the next collateral relations of the blood of that ancestor, subject to the two preceding rules.

V. When the inheritance is not so derived, or the blood of such ancestor is extinct, then it goes to the next collateral relation of the person last seised, whether of the paternal or maternal line, subject to the same rules.

VI. Collateral relations of the half-blood inherit equally with those of the whole blood, and the degrees of relationship are computed according to the rules

which prevail in descents at common law. Provided, that if there be no issue, nor brother, nor sister, nor issue of such, the inheritance vests in the father, if living; and if not, then in the mother, if living.

VII. If there be no heirs, the widow is deemed such, and inherits.

VIII. An estate for the life of another is deemed an inheritance; and a person is deemed to have been seised, if he had any right, title, or interest in the inheritance. N. Car. Rev. Code, 1854, c. 38, p. 248; Battle's Revisal, 1873, c. 36.

[*429] * In *Ohio*, when any person dies intestate, having title or right to real estate of inheritance which came to him by devise or deed of gift from any ancestor, such estate descends, —

I. To the children, or their representatives.

II. To the husband or wife, relict of the intestate, during his or her natural life.

III. To the brothers and sisters of the intestate of the blood of the ancestor, whether of the whole or half blood, or their representatives.

IV. To the ancestor from whom the estate came by deed or gift, if living.

V. To the children of the ancestor from whom the estate came, or their representatives; if none, then to the husband or wife, relict of such ancestor; or, if there be none such, to the brothers and sisters of such ancestor, or their representatives. If none, then to the brothers and sisters of the intestate of the half-blood, though such brothers and sisters be not of the blood of the ancestor from whom the estate came.

VI. To the next of kin to the intestate, of the blood of the ancestor from whom the estate came.

VII. If the estate came not by descent, devise, or deed of gift, it descends as follows: —

1. To the children of the intestate, and their representatives.

2. To the husband or wife of the intestate.

3. To the brothers and sisters of the whole blood, and their representatives.

4. To brothers and sisters of the half-blood, and their legal representatives.

5. To the father; or, if the father be dead, to the mother.

6. To the next of kin to and of the blood of the intestate.

VIII. If there be no kindred, then to the surviving husband or wife as an estate of inheritance; and if there be no such relict, it escheats to the State. R. S. 1860, c. 36, §§ 1-3; Supplement, 1868, pp. 304, 306.

In *Oregon*, the rules of descent are the same as in *Massachusetts*, except that in *Oregon* it is provided, that if the intestate leave no issue, nor father, and no brother nor sister, living at his death, the estate shall descend to his mother, to the exclusion of the issue of his deceased brothers or sisters; and the wife of the intestate takes on failure of lineal descendants, and before the father, mother, brothers, and sisters. *Oreg. Stat. c. 11, p. 379; Gen. Laws, 1872, pp. 547-549.*

In *Pennsylvania*, real estate descends, —

I. To children and their descendants; equally, if they are all in the same degree; if not, then by representation, the issue in every case taking only such share as would have descended to the parent, if living.

II. In default of issue, then to the father and mother during their joint lives and the life of the survivor of them; and after them to the brothers and sisters of the intestate of the whole blood, and their children by representation.

III. If there be none of these, then to the next of kin, being the descendants of brothers and sisters of the whole blood.

IV. If none of these, to the father and mother if living, or the survivor of them in fee.

V. In default of these, to the brothers and sisters of the half-blood and their children by representation.

* VI. In default of all persons above described, then to the next of kin [*430] of the intestate.

VII. Before the act of 27th April, 1855, no representation among collaterals was allowed after brothers' and sisters' children; but by that act it was permitted to the grandchildren of brothers and sisters, and the children of uncles and aunts.

VIII. No person can inherit an estate unless he is of the blood of the ancestor from whom it descended, or by whom it was given or devised to the intestate.

IX. In default of known heirs or kindred, the estate is vested in the surviving husband or wife.

X. In default of these, it escheats to the State. Purdon, Dig. Penn. Law, ed. 1857, pp. 452, 1129; and 9th ed. 1861, p. 562; 1872, vol. i. pp. 806-808.

In *Rhode Island*, when any person having title to any real estate of inheritance dies intestate, such estate descends in equal portions, —

I. To his children or their descendants.

II. To the father.

III. To the mother, brothers, and sisters, and their descendants.

IV. If there be none of these, the inheritance goes in equal moieties to the paternal and maternal kindred, each in the following course: —

1. To the grandfather, if there be any.

2. To the grandmother, uncles, and aunts, on the same side, and their descendants.

3. To the great-grandfathers, or great-grandfather.

4. To the great-grandmothers, or great-grandmother, and the brothers and sisters of the grandfathers and grandmothers, and their descendants; and so on without end; passing first to the nearest lineal male ancestors, and, for want of them, to the lineal female ancestors in the same degree, and the descendants of such male and female lineal ancestors.

V. No right in the inheritance accrues to any persons whatsoever, other than to the children of the intestate, unless such persons be in being, and capable, in law, to take as heirs at the time of the intestate's death.

VI. When the inheritance is directed to go by moieties, as above, to the paternal and maternal kindred, if there be no such kindred on the one part, the whole goes to the other part; and if there be none of either part, the whole goes to the husband or wife of the intestate; and if the wife or husband be dead, it goes to his or her kindred in the like course as if such husband or wife had survived the intestate, and then died, entitled to the estate.

VII. The descendants of any person deceased inherit the estate which such person would have inherited had such person survived the intestate.

VIII. If the estate came by descent, gift, or devise, from the parent or other kindred of the intestate, and such intestate die without children, it goes to the next of kin to the intestate, of the blood of the person from whom such estate came or descended, if any there be. R. I. Rev. Stat. 1857, c 159, §§ 1-6.

[*431] *In default of heirs, the estate is taken possession of by the town where it may be. R. I. Rev. Stat. 1857, c. 160; 1872, c. 176, 177.

In *South Carolina*, when any person possessed of, interested in, or entitled to any real estate in his own right, in fee-simple, dies intestate, it descends, —

I. One-third to the widow in fee; the remainder to the children.

II. Lineal descendants represent their parents.

III. If no issue or lineal descendants, then one-half to wife; and the other half is equally divided between father, or, if he be dead, the mother and brothers and sisters of whole blood; children of deceased brother or sister to take the share which their parent would have had; provided that there be no representations admitted among collaterals after brothers' and sisters' children.

IV. If no wife, issue, nor lineal descendants, then the whole estate shall be divided equally between father; or, if he be dead, the mother and brothers and sisters of whole blood.

V. If intestate leaves no lineal descendants, father, mother, brother, or sister, of the whole blood, but a widow and brother or sister of half-blood, and a child or children of brother or sister of whole blood, widow shall take one-half, and other half shall be divided equally between brothers or sisters of half-blood, and children of brothers and sisters of whole blood; the children of every deceased brother or sister of whole blood taking among them a share equal to the share of a brother or sister of half-blood. If there be no brother or sister of half-blood, then half the estate shall descend to child or children of deceased brother or sister; and if there be no children of deceased brother or sister of whole blood, then said half shall go to brothers and sisters of half-blood.

VI. If none of these, then widow shall take one-half, and other half to lineal ancestors.

VII. If none of these, then widow takes two-thirds, and residue goes to next of kin.

VIII. On the decease of the wife, the husband takes the same share in his wife's estate that she would have taken in his had she survived him; and the remainder goes in the same manner as above described in case of the intestacy of a man.

IX. If there be no widow nor issue, but a surviving parent and brothers and sisters, then it goes in equal shares to the father; or, if he be dead, to the mother, and to the brothers and sisters and their issue, by representation.

X. If there be no issue, parent, nor brother nor sister of the whole blood, nor their children, nor brother nor sister of the half-blood, nor lineal ancestor, nor next of kin, the whole goes to the surviving husband or wife. 5 S. Car. Stat. at Large, 162, 163, 305; 6 Id. 284, 285; Rev. Stat. 1873, pp. 438, 439

In *Tennessee*, the land of an intestate descends, —

I. Without reference to the source of his title, —

1. To all the sons and daughters equally, and to their descendants by right of representation.

[*432] *2. If there be none of these, and either parent be living, then to such parent.

II. If the estate was acquired by the intestate, and he died without issue, —

1. To his brothers and sisters of the whole and half blood born before or after his death, and to their issue by representation.

2. In default of these, to the father and mother as tenants in common.

3. If both be dead, then in equal moieties to the heirs of the father and mother in equal degree, or representing those in equal degree, of relationship to the intestate; but if these are not in equal degree, then to the heirs nearest in blood, or representing those nearest in blood, to the intestate, in preference to others more remote.

III. When the land came by gift, devise, or descent, from a parent, or the ancestor of a parent, and he died without issue, —

1. If there be brothers and sisters of the paternal line of the half-blood, and such also of the maternal line, then it descends to the brothers and sisters on the part of the parent from whom the estate came, in the same manner as to brothers and sisters of the whole blood, until the line of such parent is exhausted of the half-blood, to the exclusion of the other line.

2. If no brothers or sisters, then to the parent, if living, from whom or whose ancestors it came, in preference to the other parent.

3. If both be dead, then to the heirs of the parent from whom or whose ancestor it came.

IV. The same rules of descent are observed in lineal descendants and collaterals respectively, when the lineal descendants are further removed from their ancestor than grandchildren, and when the collaterals are further removed than children of brothers and sisters.

V. If there be no heirs, then to the husband or wife in fee-simple.

VI. A child of color cannot inherit the estate of its mother's husband, unless the mother or husband was a person of color. Tenn. Code, 1858, p. 476, §§ 2420-2425.

In *Texas*, real estate of inheritance descends, —

I. To children and their descendants.

II To father and mother in equal portions; but if one be dead, then one-half to the survivor, and the other to brothers and sisters and their descendants; but if there be none of these, then the whole goes to the surviving father or mother.

III. If there be neither father nor mother, then the whole to the brothers and sisters of the intestate, and their descendants.

IV. If there be no kindred aforesaid, then the estate descends in two moieties, one to the paternal and the other to the maternal kindred, in the following course: —

1. To the grandfather and grandmother equally.

2. If only one of these be living, then one-half to such survivor, and the other to the descendants of the other.

3. * If there be no such descendants, then the whole to the surviving [*433] grandparent.

4. If there be no such, then to the descendants of the grandfather or grandmother, passing to the nearest lineal ancestors.

V. There is no distinction between ancestral and acquired estates.

VI. If there be a surviving husband or wife, and a child or children or their issue, such survivor takes one-third of the estate for life, with remainder to children or their descendants.

VII. If no issue or descendants, then the surviving husband or wife takes half the land, without remainder over; and the other half passes according to the preceding rules.

VIII. Among collaterals, those of the half-blood inherit only half as much as those of the whole blood; but if all be of the half-blood, they have whole portions

IX. If all relations are in the same degree, they take *per capita*; otherwise, *per stirpes*. Oldham & White, Dig. Tex. Laws, 1859, p. 99; Paschal's Dig. 1866, §§ 3419-3422, p. 558.

In *Vermont*, when any person dies seized of any lands, tenements, or hereditaments within the State, or any right thereto, or is entitled to any interest therein, the estate descends, —

I. In equal shares to his children, or their representatives.

II. If he leave no issue, his widow is entitled to the whole for ever, if the estate does not exceed the sum of one thousand dollars. If it exceeds this sum, then the widow is entitled to such sum, and one-half of the remainder of the estate; and the remainder descends as the whole would if no widow had survived; and if there be no kindred, the widow is entitled to the whole.

III. If there be no issue nor widow, the father takes the whole.

IV. If there be neither of these, it goes to the brothers and sisters equally, and their representatives; and if his mother be living, she takes the same share as a brother or sister.

V. If none of the relatives above named survive, then it descends in equal shares to the next of kin, in equal degree; but no person is entitled by right of representation.

VI. The degrees of kindred are computed according to the rules of the civil law, and the half-blood inherits equally with the whole blood.

VII. If there be no kindred, it escheats to the town for the use of the schools Vt. Comp. Stat. 1850, c. 55; and Gen. Stats. 1863, c. 56, §§ 1-3.

In *Virginia*, when a person having title to any real estate of inheritance dies intestate as to such estate, it descends, —

I. To his children and their descendants.

II. If there be none such, to the father.

III. If no father, to the mother and brothers and sisters, and their descendants.

[*434] * IV. If there be none of these, then one-half goes to the paternal, the other to the maternal kindred, as follows: —

1. To the grandfather.

2. To the grandmother, uncles, and aunts on the same side, and their descendants.

3. To the great-grandfathers or great-grandfather.

4. To the great-grandmothers or great-grandmother, and the brothers and sisters of the grandfathers and grandmothers, and their descendants; and so on, passing to the nearest lineal male ancestors, and, for want of these, to the nearest lineal female ancestors in the same degree, and their descendants.

V. If there be no paternal kindred, the whole estate goes to the maternal kindred; and *vice versa*.

VI. If there be neither paternal nor maternal kindred, the whole goes to the husband or wife of the intestate; and if the husband or wife be dead, then kindred take the estate, in the same manner as though they had survived the intestate and died.

VII. Collaterals of the half-blood inherit only half as much as those of the whole blood; but if all the collaterals be of the half-blood, the ascending kindred (if any) have double portions.

VIII. When the estate goes to children, or to the mother, brothers, and sisters, or to the grandmothers, uncles, and aunts, or to any of his female lineal ancestors, with the children of his deceased lineal ancestors, male and female, in the same degree, they take *per capita*; but if the degrees are unequal, they take *per stirpes*. Va. Code, 1849, c. 123, p. 522; 1873, c. 119, §§ 1-3.

In *Wisconsin*, when any person dies seized of any lands, tenements, or hereditaments, or of any right thereto, or entitled to any interest therein, in fee-simple or for the life of another, not having lawfully devised the same, they descend, —

I. In equal shares to children, and the issue of any deceased child by right of representation; and if there be no child, then to his other lineal descendants, equally, if they are all in the same degree of kindred to the intestate; otherwise, according to the right of representation.

II. If there be no issue, then to the widow for her life, and after her decease to his father; and if there be no issue or widow, then to his father.

III. If there be no issue nor father, then to the widow for life, and, after her decease, in equal shares to his brothers and sisters, and the children of such by right of representation; provided that, if he leave a mother, she takes an equal share with his brothers and sisters.

IV. If there be no issue, nor widow nor father, then in equal shares to brothers and sisters, and to the children of such by right of representation; provided, if he leave a mother also, she takes an equal share with his brothers and sisters.

V. If there be no issue, nor widow nor father, and no brother nor sister, * then to his mother, to the exclusion of the issue, if any, of de- [*485] ceased brothers and sisters.

VI. If there be none of these, then to the next of kin in equal degree, but those claiming through the nearest ancestor to be preferred to those claiming through an ancestor more remote; provided, however, that if any person die, leaving several children, or leaving one child and the issue of one or more other children, and any such surviving child shall die under age, and not having been married, all the estate that came to the deceased child by inheritance from such deceased parent descends in equal shares to the other children of the same parent, and to their issue by right of representation.

VII. If, at the death of such child under age, all the other children of such deceased parent are also dead, and any of them have left issue, the estate that came to such child by inheritance from such parent descends to all the issue of other children of the same parent equally, if they are in the same degree of kindred to said child; otherwise, according to the right of representation.

VIII. If the intestate leave a widow, and no kindred, his estate descends to such widow.

IX. If there be no widow or kindred, the estate escheats to the people of the State for the use of the primary-school fund.

X. The degrees of kindred are computed according to the rules of the civil law; and kindred of the half-blood inherit equally with those of the whole blood, in the same degree, unless the inheritance be ancestral; in which case, those who are not of the blood of such ancestor are excluded. Wis. Rev. Stat. 1858, c. 92, p. 554.

The rules of descent in *West Virginia* are the same as in Virginia, except that, on failure of children and their descendants, the estate goes to the husband or wife of the intestate, and then to the father, &c. Code, 1870, c. 78, §§ 1-3.

ADVANCEMENTS.

In *Maine, Massachusetts, Vermont, California, Oregon, Wisconsin, Michigan, and Minnesota*, it is provided that any estate given to a child or other lineal descendant shall be taken by such child or other descendant towards his share of the intestate's estate; but he shall not be required to refund any part thereof, although it exceeds his share. When such advancement is made in real estate, it is to be considered as part of the real estate to be divided; when in personal estate, as part of the personal estate. If it exceeds his share of the real or personal, he receives so much less of the other as will make his whole share equal. All gifts and grants are deemed to have been made in advancement, if they are so expressed therein, or charged as such by the intestate, or acknowledged in writing as such by the child or other descendant; and in *Vermont*, if expressed to be for consideration of love and affection. If the value of the estate so advanced is expressed in the conveyance or charge, or in the acknowledgment, this is to be allowed in the distribution; otherwise, the value is to be estimated at the time when given. If such child or other descendant dies before the intestate, leaving issue, the advancement made to him is to be regarded as made to such issue, and distribution is to be made accordingly. Me. Rev. Stat. 1857, c. 75, §§ 5-7; 1871, c. 75; Mass. Gen. Stat. c. 91, §§ 6-10; Vt. Comp. Stat. c. 55, §§ 8-12; Gen. Stats. 1863, c. 56, §§ 12-17; Wood, Dig. Cal. Laws, 1858, [*486] p. 424; Code, 1872, §§ 1395-1399; Oreg. * Stat. 1855, p. 380; Gen. Laws, 1872, pp. 549, 550; Wis. Rev. Stat. 1858, c. 92, §§ 5-10; 2 Mich. Comp. Laws, p. 860, c. 91, §§ 6-11; 1871, vol. 2, c. 153, §§ 6-11; Minn. Comp. Stat. 1858, p. 413; Stat. at Large, 1873, vol. 1, c. 33, §§ 5-10.

The statutes of *Nevada* are the same as *Maine* and *Massachusetts*. Comp. Laws, 1873, vol. 1, §§ 798-802.

In *New Hampshire*, it is provided that an advancement shall be accounted for according to its value in the division of the estate; but that no deed of real estate shall be deemed an advancement, unless the same is expressed to be made for love or affection, or unless it be proved to be an advancement by some acknowledgment signed by the party receiving the same. N. H. Gen. Stat. 1867, c. 184, §§ 10-12.

In *New York*, if an advancement has been made to the child of an intestate, and this be equal or superior to the share of such child of the real and personal property of the deceased, he shall be excluded from any further share; but if such advancement be not equal to such share, such child and his descendants shall be entitled to receive so much only of the personal estate and to inherit so much only of the real estate of the intestate as shall be sufficient to make all the shares of the children in such real and personal estate and advancement equal. The value of the advancement is to be deemed to be that, if any, which has been acknowledged by the child in writing; otherwise, it is to be estimated according to the worth of the property when given. The maintaining or educating or the giving of money to a child, without a view to a portion or settlement in life, is not to be deemed an advancement. 2 N. Y. Rev. Stat. 4th ed. p. 160, §§ 23-26; and 5th ed. 1859, vol. 3, p. 43; Stat. at Large, vol. 1, p. 705, §§ 23-25.

In *Alabama* and in *Arkansas*, the rule is the same. Ala. Code, 1867, §§ 1898-1903; Dig. Ark. Stat. c. 56, § 15. In *Dacotah*, advancements are reckoned, if expressly made part of the portion. Civ. Code, 1866.

In *Ohio*, the statute respecting advancements is similar to the above, except that there is no clause specifying what shall not be considered an advancement. *Ohio Rev. Stat.* 1860, c. 36, §§ 10-13.

In other States it is provided, in general terms, that advancements shall be taken into account in the distribution of estates; as in *Rhode Island*, *Rev. Stat.* 1857, c. 159; 1872, c. 176, § 18; *Connecticut*, *Gen. Stat.* 1866, p. 413; 1875, p. 373; *New Jersey*, *Nixon, Dig.* 1855, p. 195; *Pennsylvania*, *Purdon, Dig.* 1857, p. 454; 1872, vol. 1, p. 810, § 35; *Virginia*, *Code*, 1849, p. 525; 1873, c. 119, § 14; *North Carolina*, *Rev. Code*, 1854, p. 248; *Battle's Revis.* c. 119, § 14; *Georgia*, *Cobb, New Dig.* 1851, vol. 1, p. 293; 1873, § 2582; *Stats. Geo.* 1854, p. 41, No. 30; *Mississippi*, *Rev. Code*, 1857, p. 453; *Code*, 1871, § 1953; *Texas*, *Oldham and White, Dig.* 1859, p. 100; *Paschal, Dig.* 1866, p. 560; *Iowa*, *Code*, 1857, §§ 1419, 1420; *Code*, 1873, p. 423, § 2459; *Revision*, 1860, §§ 2445, 2446; *Florida*, *Thompson, Dig.* p. 190; *Bush, Dig.* 1872, p. 285; *Illinois*, 2 *Comp. Stat.* 1858, § 1200; *Rev. Stat.* 1874, c. 39, §§ 4-8; *Kansas*, *Gen. Laws*, 1862, c. 80, §§ 27, 28; *Gen. Stat.* 1868, c. 33, §§ 26, 27.

And so in *Kentucky*, *Missouri*, and *Indiana*, where it is also declared that the maintaining, educating, and giving money to a child or grandchild, without a view to a portion or settlement, shall not be considered an advancement; and also that the advancement shall be estimated according to the value of the property when given. 1 *Ky. Rev. Stat.* *Stant. ed.* 1860, 426; *Gen. Stat.* 1873, c. 31, § 15; *Ind. Rev. Stat.* 280; *Stat.* 1862, pp. 293, 294; *Gen. Stat.* *Mo.* 1866, c. 129, § 7; 1872, c. 45.

In *Tennessee*, besides the general provision respecting advancements, it is provided that property settled on a child, under a power of trust, shall be collated and brought into contribution. *Tenn. Code*, 1858, §§ 2431-2435.

In *Maryland*, any child, or issue of such, having received any real estate by way of advancement, may elect to come into partition with the other parceners, on bringing such advancement, or the value thereof, into hotchpot with the estate descended; but not otherwise, if there be another child or children unprovided for. *Code*, 1860, p. 334, § 31.

In *West Virginia*, advancements of either real or personal estate shall be brought into hotchpot with the rest of the estate. *Code*, 1870, c. 78, § 13.

In *Colorado*, advancements are to be accounted for generally. *Rev. Stat.* 1868, c. 23.

In *Nebraska*, the law of advancements is the same as in *Maine* and *Massachusetts*. *Gen. Stat.* 1873, c. 17, §§ 34-39.

* ILLEGITIMATE CHILDREN.

[*437]

An illegitimate child is heir to his mother and any maternal ancestor; and the lawful issue of an illegitimate person represents such person, and takes, by descent, any estate which the parent would have taken; in *Massachusetts*, *Gen. Stat.* 1860, c. 91, § 2; *Indiana*, 1 *Rev. Stat.* 1852, p. 249; 1862, p. 293; *Mississippi*, *Rev. Code*, 1857, p. 453; 1871, § 1955; *Texas*, *Oldham and White, Dig.* 1859, p. 101; *Pasch. Dig.* 1866, p. 561, § 3425; *Vermont*, *Gen. Stat.* 1863, c. 56, § 4; *Alabama*, *Code*, 1867, § 1894.

If an illegitimate child dies intestate, without lawful issue, his estate descends to his mother, in *Massachusetts*, *Gen. Stat.* c. 91, § 3; *Vermont*, *Gen. Stat.* 1863, c. 56, § 4. In order that the mother may inherit, the child must have neither

issue nor widow or surviving husband. Appendix, 1870, p. 961; *Indiana*, 1 Rev. Stat. 1852, 249; 1862, p. 293; *Alabama*, Code, 1867, § 1894.

An illegitimate child, whose parents have intermarried, and whose father has acknowledged him as his child, is considered legitimate in *Colorado*, Rev. Stat. 1868, c. 23, § 7; *West Virginia*, Code, 1870, c. 78, § 6; *Massachusetts*, Gen. Stat. c. 91, § 4; *Vermont*, Gen. Stat. 1863, c. 56, § 5; *Maryland*, Code, 1860, p. 333; *Virginia*, Code, 1849, p. 523; 1873, c. 119, § 6; *Kentucky*, 1 Rev. Stat. Stant. ed. 1860, 421; Gen. Stat. 1873, c. 31, § 6; *Mississippi*, Rev. Code, 1857, p. 459; 1871, § 1955; *Texas*, Oldham and White, Dig. 1849, p. 101; Paschal's Dig. p. 561, § 3427; *Oregon*, Stat. 1855, p. 380; 1872, p. 549; *Indiana*, 1 Rev. Stat. 1852 p. 249; *Oregon*, Stat. 1862, p. 293; *Arkansas*, Dig. 1858, c. 56, § 4; *Ohio*, Rev. Stat. 1860, c. 36, § 16; *Missouri*, 1 Gen. Stat. c. 129, § 10; 1872, c. 45, § 10 *Illinois*, 2 Comp. Stat. 1858, p. 1200; Gen. Stat. 1874, c. 39, § 3.

In *Iowa*, illegitimate children may inherit from their mother, and mothers from children. They shall inherit from the father whenever the paternity is proved during the life of the father, or they have been recognized by him as his children; but such recognition must have been general and notorious, or else in writing. Under such circumstances, if recognition of relationship has been mutual, the father may inherit from his illegitimate children; but in thus inheriting from an illegitimate child, the established rule must be inverted, so that the mother and her heirs take preference of the father and his heirs, the father having the same right of inheritance in regard to an illegitimate child that the mother has to one that is legitimate. Code, 1873, p. 424, §§ 2465-2468.

In *Vermont*, the father may also adopt such child by an instrument under seal, attested by three witnesses and acknowledged. Gen. Stat. 1863, c. 56, § 6.

In *New Hampshire*, it is declared that the heirs of a bastard, in the ascending and collateral lines, are the mother and her heirs, and that bastards and their issue are the heirs of the mother. When the mother of a bastard has deceased, her real estate descends in equal shares to her legitimate and illegitimate children and their issue. Gen. Stat. 1867, c. 184, §§ 4, 5; and if parents intermarry, and recognize as their own, children born before marriage, such children inherit equally with others, and are legitimate. Gen. Stat. 1867, c. 161, § 15.

In *Illinois*, illegitimate children inherit the estate of their mother; and if there be no such children, the estate descends according to the general rule of descents. 2 Comp. Stat. 1858, p. 1200; Rev. Stat. 1874, c. 39, § 2.

Bastards are capable of inheriting or transmitting inheritance on the part of their mother, in like manner as if they had been lawfully begotten of such mother, in *Rhode Island*, Rev. Stat. 1857, c. 159, § 7; 1872, c. 176; *Pennsylvania*, Purd. Dig. 1857, p. 1129; 1872, vol. 1, p. 810; *Virginia*, Code, 1849, p. 523; 1873, c. 119; *Kentucky*, 1 Rev. Stat. Stant. ed. 1860, p. 421; 1873, c. 31, § 5; *Florida*, Thomps. Dig. p. 190; Bush, Dig. 1872, p. 285; *Arkansas*, Dig. Stat. 1858, c. 56, § 3; *Iowa*, Revision, 1860, § 2441; *Missouri*, 1 Rev. Stat. c. 54, § 9; 1872, c. 45, § 9; *West Virginia*, Code, 1870, c. 78; *Kansas*, Gen. Stat. 1868, c. 33, §§ 22-25.

Ohio. — Bastards shall be capable of inheriting or transmitting inheritance from and to the mother, and from and to those from whom she might inherit, or to whom she might transmit inheritance, in like manner as if born in lawful wedlock. Sup. Rev. Stat. 1816, p. 308.

In *New York*, in case of the death, without descendants, of an intestate who shall have been illegitimate, the inheritance descends to his mother; if she be dead, to the relatives on the part of the mother, as if the intestate had been legiti

mate. But children and relatives who are illegitimate cannot inherit. 2 Rev. Stat. 4th ed. pp. 159, 160, §§ 14, 19; 5th ed. 1859, vol. 3, p. 48; 1 Stat. at Large, p. 704.

In *Maryland*, illegitimate children and the issue of such inherit from their mother or from each other, or from the descendants of each other, in like manner as if born in wedlock. Code, 1860, p. 334.

In *Kansas*, illegitimate children inherit from the mother, and the mother from the children. They also inherit from the father whenever they have been recognized by him as his children; but such recognition must have been general and notorious, or else in writing. Under such circumstances, if the recognition of relationship has been mutual, the father may inherit from his illegitimate child; but the mother and her heirs take precedence of the father and his heirs. Gen. Laws, 1862, c. 80, §§ 23-26.

In *Ohio*, bastards are capable of inheriting or transmitting inheritance on the part of their mother, in like manner as if they had been born in lawful wedlock; and if the mother be dead, the estate descends to the relatives on the *part of the mother, as if the intestate had been legitimate. Rev. [*438] Stat. 1854, c. 36, § 15.

In *North Carolina* and in *Oregon*, it is provided that illegitimate children shall inherit from their mother; but such child or descendant is not allowed to claim, as representing such mother, any part of the estate of her kindred, either lineal or collateral. Illegitimate children may inherit from each other; but when any such child dies without issue, his inheritance vests in the mother. N. Car. Rev. Code, 1854, p. 249; Battle's Revis. 1873, c. 36, §§ 10, 11; *Oreg. Stat.* 1855, p. 380; Gen. Law, 1872, p. 549.

In *Tennessee*, the estate of an illegitimate child dying intestate without issue, husband or wife, goes to his mother; and if there be no mother, then to his brothers and sisters by his mother, or their descendants. Code, 1858, § 2423.

In *Georgia*, illegitimate children may inherit from their mother and from each other; and if the mother have legitimate and illegitimate children, they shall inherit alike the estate of the mother. If an illegitimate person dies intestate, leaving no widow or descendants, but leaving brothers or sisters of like illegitimate birth, and born of the same mother, or descendants of such, they are entitled to inherit of such intestate as if they were all legitimate. If such intestate leaves no widow or descendants, and no brother or sister of illegitimate birth, or descendants of such, but shall leave brothers and sisters born of the mother of such intestate in lawful wedlock, or descendants of such, then such last-mentioned brothers and sisters and their descendants inherit the estate of such intestate, under the same rules and regulations as if they were in law the next of kin of such intestate. Furthermore, the widow and children of an illegitimate person inherit in the same manner as if such intestate were legitimate; and if there be no such widow or children, then the property descends to such persons of the maternal blood as would be entitled to the same had such illegitimate person been legitimate. Stat. 1856, p. 227, No. 174; Laws, 1859, p. 36, No. 33; 1 Cobb, New Dig. p. 293; Code, 1873, §§ 1800, 1801.

In *Maine*, an illegitimate child is an heir of his mother, and of a person, who, in a writing signed in the presence of and attested by a competent witness, acknowledges himself to be his father, and inherits as if born in lawful wedlock. But he does not inherit, as representing his father or mother, any part of the estate of their kindred, either lineal or collateral, unless, before his death, his

parents intermarry and have other children, or his father acknowledges him as aforesaid, or adopts him into his family; and then he is deemed legitimate, and as such inherits from others, and they from him. If an illegitimate child dies intestate without lawful issue, his estate descends to his mother; and if she has deceased, to her heirs-at-law, unless such child leaves a husband or widow, who then inherits an equal share with the mother or with her children. Rev. Stat. 1857, c. 75, §§ 3, 4.

The statute now provides that illegitimate children are legitimized by the subsequent intermarriage of the parents. Acts, 1864; 1871, c. 75, §§ 3, 4.

In *Nebraska*, the law is now the same as in *Maine*, except that no provision is made for husband or widow of an illegitimate child, except that a subsequent marriage of the parents does not legitimize children. If a marriage be annulled by a previous marriage, and the second marriage was in good faith, children begotten before judgment succeed as legitimate offspring. Rev. Stat. 1866, pp. 62, 133; Gen. Stat. 1873, c. 17.

So in *Dacotah*, where the mother and her kindred succeed to the child's property; and if the mother leave no husband or lawful children, her illegitimate children may succeed. Civil Code, 1866.

There are statutes quite similar to this in *California*, Wood, Dig. 1858, p. 424; Code, 1872, §§ 1387, 1388; *Wisconsin*, Rev. Stat. c. 92, §§ 2-4; *Michigan*, 2 Comp. Laws, 1857, p. 860, c. 91, §§ 2-4; 1871, c. 153, §§ 2-4; *Minnesota*, Comp. Stat. 1858, p. 412; Stat. at Large, 1873, vol. 1, c. 33, §§ 2, 3.

In *Nevada*, the rules as to illegitimate children are the same as in *California*. Comp. L. 1873, vol. 1, §§ 795, 796.

In *Colorado*, the property of a bastard descends to wife and children: if no children, then all goes to wife; if no wife or children, then to the mother and her heirs. Rev. Stat. 1868, c. 23, § 10.

POSTHUMOUS CHILDREN.

Posthumous children are considered as living at the death of the parent, in *Massachusetts*, Gen. Stat. c. 81, § 12; *New York*, 2 Rev. Stat. 160, § 18; 5th ed. vol. 3, p. 43; 1 Stat. at Large, p. 705; *New Jersey*, Nix. Dig. 1855, p. 196; 1868, p. 237; *Delaware*, Rev. Code, 1852, c. 85, § 2; *Dacotah*, Civ. Code, 1866; *Maryland*, 1 Dors. Laws, p. 747; Code, 1860, p. 332; *Pennsylvania*, Purd. Dig. 1857, p. 454; 1872, vol. 1, p. 809; *Kentucky*, Rev. Stat. 1852, p. 280; 1873, c. 31, § 7; *Ohio*, Rev. Stat. 1860, c. 36, § 19; *Virginia*, Code, 1849, p. 523; 1873, c. 119, § 8; *North Carolina*, Rev. Code, 1854, p. 249; Battle's Revisal, 1873, c. 36, § 7; *Tennessee*, Code, 1858, p. 478, § 2424; *Indiana*, 1 Rev. Stat. c. 52, p. 248; Rev. Stat. 1862, vol. 1, p. 293; *Wisconsin*, Rev. Stat. 1858, c. 92, § 12; *Illinois*, 2 Comp. Stat. 1858, p. 1200; Rev. Stat. 1874, c. 39, § 9; *Minnesota*, Comp. Stat. 1858, p. 413; Stat. at Large, 1873, vol. 1, c. 33; *Nebraska*, Rev. Stat. 1867, p. 64; Gen. Stat. 1873, c. 17; *Vermont*, Gen. Stat. 1863, c. 49, § 25; *Oregon*, Gen. Laws, 1872, p. 549, § 14; *Nevada*, Comp. L. 1873, vol. 1, § 804; *Michigan*, Comp. L. 1871, vol. 2, c. 153, § 13; *West Virginia*, Code, 1870, c. 78, § 8; *Kansas*, Gen. Stat. 1868, c. 33, § 30; *Colorado*, Rev. Stat. 1868, c. 23, § 2; *California*, Code, 1872, § 1403.

This provision is limited to the children of the intestate, in *Alabama*, Code, 1867, § 1898; *Arkansas*, Dig. Stat. 1858, c. 56, § 2; *Texas*, Oldham & White, Dig. 1858, p. 99; Paschal's Dig. 1866, p. 560, § 8423; *Missouri*, 1 Gen. Stat. 1866, c. 129, § 2; Stat. 1872, c. 45, § 2; *Florida*, Bush, Dig. 1872, p. 234.

The issue of marriages deemed null in law, or dissolved by a court, are nevertheless declared legitimate in *Virginia*, Code, 1849, p. 523; 1873, c. 119, § 7; *Arkansas*, Dig. * Stat. 1858, c. 56, § 5; *California*, Wood, Dig. 1858, [*439] p. 424; Code, 1872, § 1387; *Ohio*, Rev. Stat. 1854, c. 36, § 16; 1860, c. 36, § 16; *Missouri*, 1 Gen. Stat. 1866, c. 129, § 11; 1872, vol. 1, c. 45; *Nevada*, Comp. L. 1873, vol. 1, § 795; *Texas*, Paschal's Dig. 1866, p. 561, § 3427.

ALIENAGE.

Alienage of an ancestor is no bar to a party's deriving title by descent through him from the intestate, in *Virginia*, Code, 1849, p. 523, § 4; 1873, c. 119; in *Kentucky*, 1 Rev. Stat. Stant. ed. 1860, 421; Gen. Stat. 1873, c. 31, § 4; *Florida*, Thomps. Dig. p. 190; Bush, Dig. 1872, p. 284; *Arkansas*, Dig. Stat. 1858, c. 56, § 6; *Texas*, Oldham & White, Dig. 1859, p. 100; Paschal's Dig. 1866, p. 561; *Missouri*, 1 Gen. Stat. 1866, c. 129, § 8; 1872, vol. 1, c. 45, § 8; *Massachusetts*, Gen. Stat. c. 91, § 58; *West Virginia*, Code, 1870, c. 78, § 4.

In *Tennessee*, if the person entitled to the inheritance is an alien, and resident of the United States at the time of the intestate's death, and has declared, or shall, within one year of such time, declare, his intention of becoming a citizen, he may succeed to the estate. Where there are kindred of equal degree, citizens of the United States are to be preferred to the exclusion of those who are not. Code, 1858, §§ 2427, 2428.

In *Alabama*, when the heir is alien, the next heir who is a citizen inherits. Code, 1867, § 1896.

In *North Carolina*, the same rule applies as in *Alabama*, given above Battle's Revisal, 1873, c. 36, § 9.

CHAPTER II.

TITLE OTHER THAN BY GRANT.

- SECT. 1. Escheat.
- SECT. 2. Occupancy.
- SECT. 3. Prescription.
- SECT. 4. Accretion.
- SECT. 5. Abandonment.
- SECT. 6. Estoppel.
- SECT. 7. Possession and Limitation.

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* SECTION I.

ESCHEAT.

1. What is escheat, and how far it prevails.
2. Forfeiture for crime does not apply in this country.
3. How escheats are established and enforced.
4. When escheated lands vest in the State.
5. Of conveying escheated lands by a State.
6. When a State is estopped to claim land as an escheat.
7. How far escheats affect equitable estates.
8. Remainders may escheat.
9. State takes only estate of the deceased by escheat.

1. AMONG the sources of title to lands mentioned by the English writers are Escheat,¹ Forfeiture, Occupation, and Prescription, which, for reasons which will be obvious, need only be referred to in general terms in a treatise upon American law. Escheat, in a feudal sense, prevailed in Maryland, and perhaps a few other of the Colonies, in their early history, but never since the Revolution. From being an incident of tenure under the feudal law, whereby, upon failure

¹ " *Eschaeta* cometh of the French *escheoir cadere, excidere*, and signifieth in a legal sense any lands or other profits that fall to a lord within his manor by way of forfeiture or the death of his tenant dying without heir." Cowel, Interpret.

of heirs on the part of a tenant, so that the duties belonging to the estate were not performed, it fell back into the hands of the lord, it has come to be a falling of the estate into the general property of the State, either because the tenant is an alien, or because he has died intestate, without lawful heirs to take his estate by succession.¹*

* 2. It was shown in a former volume of this work, [*444] that, by the legislation of most of the States, alienage has ceased to be a disability for holding lands,² so that the dying intestate without heirs is now practically the only ground of escheat which is worth considering; for relations succeed, however distant, provided only they give evidence of their propinquity.³ In this case, as above stated, the property comes to the State. The English doctrine of forfeiture of lands to the State for crime, or corruption of blood, is generally, if not universally, done away with in this country,⁴ and will therefore be no further noticed in this work.

3. Considered in this light, escheat of lands may be regarded as merely falling back into the common ownership of the State, from which they were, theoretically, originally derived, because the tenant did not see fit to dispose of them in his lifetime, and left no one who, in the eye of the law, has any claim to inherit them. But even in such a case, in most of the States, as well as at common law, there must be a process like a recovery of the lands by suit gone through with before the land can properly be considered as belonging to the State. This process is called in general terms an "inquest of office," sometimes "office found," being a course of legal proceedings carried on in the name of the State, under a claim that the land has escheated for want of heirs. The

* NOTE.—Mr. Dane says escheat, upon feudal principles, never existed in the Colonies. He seems to have been in an error, at least in respect to Maryland. See 3 Dane, Abr. 140.

¹ Ante, vol. 1, pp. *24, *27; *Matthews v. Ward*, 10 Gill & J. 443; *Sewall v. Lee*, 9 Mass. 363; 3 Cruise, Dig. 397.

² Ante, vol. 1, pp. *49, *50.

³ *Kaimes*, Tracts, 110.

⁴ 3 Greenl. Cruise, Dig. 398, note; 4 Kent, Com. 426, 428; U. S. Const. art 3, § 3.

form of this varies in different States, being regulated by statute.¹

4. In some States it would seem, that if, upon the death of the tenant without heirs, the lands are left vacant, they are considered as vesting at once in the State.² In others, [*445] such is *deemed to be the case if there shall have been a judgment in favor of the State, though no writ of possession shall have been executed.³ But if the lands are in possession of a tenant, the proceedings must be carried on upon the same principle as between other demandants and tenants, and possession taken by service of a legal precept; and if the State fail to show that the owner died without heirs, it will fail to establish a claim, although the tenant does not claim under the deceased owner, or set up any title beyond possession.⁴ The same rule prevailed in Maryland before the Revolution, in case of the lord proprietary who had the benefit of escheats. He could only reinvest himself with an estate so as to convey it by first making entry upon the land.⁵ And in the *People v. Folsom*, cited above, the principle is laid down as one of universal application, that neither by the civil nor common law could the king take upon himself the possession of an estate as having escheated until the fact is judicially ascertained by a proceeding in the nature of an inquest of office.⁶ And in such a proceeding it has been held that the State must negative the presumption that the party dying left heirs in order to prevail.⁷

5. Still, by the general power which the State has as sovereign, it is no objection to its making a legislative grant of escheated land for want of heirs that this is done before proceedings actually had in office found.⁸

¹ See *Sadler's case*, 4 Rep. 56; *Page's case*, 5 Rep. 52; *The People v. Cutting*, 3 Johns. 1; *Commonwealth v. Hite*, 6 Leigh, 588; *The People v. Folsom*, 5 Cal. 373; *Puckett v. The State*, 1 Sneed, 355; 4 Kent, Com. 424, 425, note.

² *Den v. O'Hanlon*, 1 N. J. 582; *O'Hanlon v. Den*, 1 Spencer, 31; 4 Kent, Com. 424; *Montgomery v. Dorion*, 7 N. H. 475; *White v. White*, 2 Met. (Ky.) 185; *Crane v. Reeder*, 21 Mich. 80.

³ *Commonwealth v. Hite*, 6 Leigh, 588.

⁴ *Commonwealth v. Hite*, 6 Leigh, 588; *People v. Cutting*, 3 Johns. 1; *Catham v. State*, 2 Head, 553.

⁵ *Kelly v. Greenfield*, 2 Harr. & M'H. 121.

⁶ *The People v. Folsom*, 5 Cal. 373; *Puckett v. The State*, 1 Sneed, 355.

⁷ *Hammond v. Inloes*, 4 Md. 138.

⁸ *Colgan v. McKeon*, 4 N. J. 566

6. But a State may be estopped by its own grant and warranty, like an individual, even from claiming land as having escheated where the claim is made on the ground of alienage. Thus, where the commonwealth granted lands to an alien who died leaving heirs, citizens and residents of France, to an inquest of office for recovering the lands, it was held, that the deed and warranty of the commonwealth was a bar, and that it could *not take advantage of the [*446] alienage of the heirs.¹ This right of escheat, where an owner died without heirs, was claimed by the Colonies of Massachusetts and Plymouth as incident to the sovereignty which they exercised over the lands within their patents.²

7. While escheat was regarded as an incident of feudal tenure, it did not extend to the equitable estates of *cestui que trust*. And, by analogy, it is generally understood that if a *cestui que trust* dies intestate, without heirs, the trust fails, and the trustee holds an absolute estate in the property, free from the claim of any one.³ But it is settled by the courts of Maryland, and intimated by Judge Kent, in respect to New York, that such would not be the case under the statute of these States, and that, if a *cestui que trust* should die without heirs, his equitable estate would escheat to the State.⁴

8. A vested remainder in fee, dependent on an estate for life, may escheat before the death of the tenant for life.⁵

9. The principle seems to be a universal one, that, if land escheats to the State, the latter takes the title which the party dying had, and none other. It takes it, moreover, in the plight, and acquires it to the extent, to which the proprietor held it; ⁶ and an "escheat grant," as it is called, passes the estate just as the original grantee held it, with all privileges and appurtenances, and subject to all liens and incumbrances.⁷

¹ Commonwealth v. André, 3 Pick. 224.

² 3 Dane, Abr. 140.

³ Hill, Trust. 270; Matthews v. Ward, 10 Gill & J. 443; 4 Kent, Com. 426; ante, p. *185.

⁴ Matthews v. Ward, 10 Gill & J. 443; 4 Kent, Com. 426; Hill, Trust. 270, Whart. note; Wood v. Mather, 38 Barb. 479.

⁵ The People v. Conklin, 2 Hill, 67.

⁶ 4 Kent, Com. 427.

⁷ Casey v. Inloes, 1 Gill, 430.

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*SECTION II.

OCCUPANCY.

1. Of eminent domain.
2. In what cases estate by occupancy existed.

1. As the object of this chapter is to treat of the mode in which title to real property may be acquired by individuals, and of such titles as one may part with to another, rather than of the relations of the State to individuals in respect to the power which the former may exercise over the property and possession of the latter, it is not proposed to consider the right of eminent domain as a means of appropriating the lands of the citizen for public uses, such as highways and the like. Nor is it proposed to add to what has already been said of acquiring an involuntary easement by one citizen in the lands of another, under what are called the Mill Acts, or statutes authorizing a mill-owner, under certain circumstances, to occupy the land of another for the purposes of raising a pond of water to work a water-mill.

2. Passing over these, the mode of acquiring title which was once common, and which was nearest to the idea of deriving the right under which title was claimed from an original state of nature, was that by Occupancy. This word is here used in a technical sense, and does not extend to titles gained by possession or prescription. It was applied only to cases where one was tenant *per autre vie*, and the *cestui que vie* outlived him. The estate here was a freehold, and therefore did not go, like a term of years, to his personal representatives. But not being one of inheritance, it did not go to his heirs; nor had the grantor or lessor any right to enter until the *cestui que vie* died. And the consequence was, that no one had any legal right to the remnant of the estate; and whoever first occupied it acquired such a title by possession that no one might displace or dispossess him. This was called a title by occupancy. It took two forms, one called a general, the other a special occupancy, according to the circum-

stances under which the tenant entered and took possession. But the learning on this *subject has [*448] now become obsolete through legislation, both in England and in this country, whereby such an interest as the tenant *per autre vie* leaves by dying before him, by whose life his estate is measured, descends or is distributed as real estate, or as a chattel interest, like his other property.¹

SECTION III.

PRESCRIPTION AND LIMITATION.

1. Distinction between prescription and limitation.
2. How limitation operates on a title to an estate.
3. Changes in the period of prescription.
4. Prescription presumes a grant.
5. Effect on title of establishing a prescription.

1. ANOTHER mode, source, or evidence of title, familiarly known to the law, is *Prescription*. Technically and properly, the term applies only to incorporeal hereditaments, and does not extend to land or corporeal property,² although Mr. Cruise has devoted an entire chapter to titles to land acquired by possession, under the head of Prescription. This he was led to do from the analogy between the rules as to limitation of time during which the enjoyment of either furnishes conclusive evidence of title, independent of any formal evidence of an original deed or grant. The difference, however, between them consists in this, that the common law fixes what length of enjoyment of an incorporeal hereditament, like a way, a watercourse, and the like, shall be deemed sufficient evidence of an ownership of the right; while, as to the land, the period is fixed by statute, and is called a Limitation, beyond which no man may set up a title adverse to the presumed title of him who has been permitted for that length of time to enjoy uninterrupted possession of the same. The

¹ See *ante*, vol. 1, pp. *93, *94; 2 Bl. Com. 258.

² Crabb, Real Prop. 1089; Ferris v. Brown, 3 Barb. 105

theory of prescription was, that the right claimed must have been enjoyed beyond the period of the memory of man, which, for a long time in England, went back to the time of Richard I. But, to obviate the necessity of such an impossible proof, it became customary to rely upon the *presumption of* [*449] *a deed having been given*, and of its having * been lost, after showing an enjoyment for a sufficient length of time.¹ The matter is regulated in England now by statute 3 and 4 William IV. c. 71. And, in the United States, grants of incorporeal hereditaments are presumed, upon proof of an adverse enjoyment which has been exclusive and uninterrupted for twenty years, or the period of time fixed by the respective statutes of the several States as the limitation in respect to lands themselves.² And in order to be adverse, the possession must be under a claim of title.³

2. The statute of limitation, in respect to lands, operates as an extinguishment of the remedy of the one, though not as a gift of the estate to the other.⁴ Whereas the enjoyment of an incorporeal hereditament in the manner above mentioned, for the requisite period of time, raises a conclusive presumption of a grant or a right, as the case may be, which is to be applied as a *presumptio juris et de jure*, wherever a right may be acquired, in any manner known to the law.⁵ But, in order that the enjoyment of an incorporeal hereditament should be the ground of any thing more than a presumption of fact, as distinguished from a presumption *juris et de jure*, it must appear that all the requisites of a *prescription* apply to the particular case in question; namely, it must have been continued a sufficient length of time, adverse, under a claim of right, exclusive, continuous, and uninterrupted, and with the

¹ 2 Greenl. Ev. §§ 538, 539; Burt. Real Prop. § 1039; Coolidge v. Learned, 8 Pick. 503.

² 2 Greenl. Ev. § 539; 3 Kent, Com. 442; Arnold v. Foot, 12 Wend. 330 Ford v. Whitlock, 27 Vt. 265; Hart v. Vose, 19 Wend. 365.

³ Adams v. Guice, 30 Miss. 397; Harvey v. Tyler, 2 Wall. U. S. 349; Kinchloe v. Tracewells, 11 Gratt. 605; Wallace v. Fletcher, 10 Fost. 446; Hale v. McLeod, 2 Met. (Ky.) 98; Parker v. Foote, 19 Wend. 309, 315; Washburn Easements, 114, 3d ed.

⁴ Davenport v. Tyrrel, 1 W. Bl. 975.

⁵ 2 Greenl. Ev. § 539; Tyler v. Wilkinson, 4 Mason, 402.

knowledge and acquiescence of the owner of the estate, in or over which, it is claimed, and while such owner was able, in law, to resist such enjoyment if not well founded.¹

3. This subject is examined and discussed by Wilde, J., in *Coolidge v. Learned*.² The limit of prescription was originally fixed to conform to the limitation of a writ of right. This period was fixed at sixty years by the act of 32 Henry VIII. A corresponding change, however, in the period of prescription, was not adopted by the English courts. But the necessity of some limitation was supplied, by allowing a jury to presume a grant after a long period of enjoyment of an incorporeal right affecting the lands of another; and twenty years was the time fixed, in analogy with the rule of law as to the limitation of a possessory action to recover the land itself.³ The term of time requisite to raise a right by prescription, therefore, becomes *unimportant in the [*450] practical working of the modern rule of presumption as to a grant. But still there is in respect to incorporeal hereditaments a title by prescription. In Massachusetts, when *Coolidge v. Learned* was decided, sixty years seems to have been assumed as the period of such prescription. But since that time, it has been reduced to twenty years, in analogy with the limitation of all real actions.⁴ It had, in the mean time, been reduced from sixty to forty years, by applying the same analogy, in the cases of *Melvin v. Whiting*,⁵ and *Kent v. Waite*.⁶ In Vermont, the period of prescription for an incorporeal hereditament is fifteen years, in analogy to the statute of limitation.⁷ In Alabama, the time of prescription is twenty years.⁸ In Pennsylvania, it is twenty-one years.⁹

4. So far as the several States have regulated the period of prescription by statute, the reader is referred to an abstract

¹ Washburn, Easements, 111, 130, 131, 3d ed.

² *Coolidge v. Learned*, 8 Pick. 508.

³ *Stoddard v. Powell*, 1 Stew. (Ala.) 287; *Sims v. Meacham*, 2 Bail. 101; *Bolivar Mg. Co. v. Neponset Mg. Co.*, 16 Pick. 247; *Pue v. Pue*, 4 Md. Ch. Dec. 386; *Watkins v. Peck*, 13 N. H. 360.

⁴ *Dana v. Valentine*, 5 Met. 14; *Luther v. Winnisimmet Co.*, 9 Cush. 171.

⁵ *Melvin v. Whiting*, 10 Pick. 295.

⁶ *Kent v. Waite*, 10 Pick. 135, 142.

⁷ *Shumway v. Simons*, 1 Vt. 53; *Arbuckle v. Ward*, 29 Vt. 43.

⁸ *Stein v. Burden*, 24 Ala. 130.

⁹ *Okeson v. Patterson*, 29 Penn. St. 27

of these at the close of the present chapter.¹ It is, therefore, only necessary to add, that the theory upon which a title by prescription vests is that it presupposes a *grant*, without requiring any further evidence of its having been made than the requisite term of enjoyment, and where the extent of the use is the evidence of the extent of the grant.² The doctrine of presuming grants was originally adopted for the purpose of quieting titles, and giving effect to long-continued possessions. Until a comparatively recent period, no deed could be pleaded without a *profert*; but when grants came to be presumed from long-continued possession and enjoyment, it was held that *profert* might be dispensed with, on suggestion that the deed was lost by time and accident.³

5. When established by the requisite proof, prescription seems to form a good and valid title in itself, and does not simply raise a presumption in favor of the party in enjoyment of the incorporeal right thereby claimed.⁴ For the nature of easements, and the mode of acquiring and losing them, [*451] the * reader is referred to what is said in the previous volume⁵ upon that subject, as it seemed unnecessary to pursue the subject of prescription in this connection further than to explain it as one of the modes of acquiring or establishing title to interests in lands.

¹ For the extent to which different States apply the rules of statute limitations to prescriptions, especially where the estate against which it is claimed is, during a part of the time, in the hands of a minor heir, reference may be had to the cases collected on p. *45, ante, *et seq.*

² *Charles River Bridge Co. v. Warren Bridge Co.*, by Morton, J., 7 Pick. 344, 449.

³ *Valentine v. Piper*, 22 Pick. 93; *Melvin v. Locks, &c.*, 17 Pick. 255; *Emans v. Turnbull*, 2 Johns. 322; *Edson v. Munsell*, 10 Allen, 568; *Webb v. Bird*, 13 C. B. n. s. 843; *Wash. Ease*, 110, 3d ed.

⁴ *Tyler v. Wilkinson*, 4 Mason, 397; 3 Kent, Com. 445; *Melvin v. Whiting*, 10 Pick. 295, 298; *Okeson v. Patterson*, 29 Penn. St. 26. But see *Watkins v. Peck*, 13 N. H. 377, where Parker, Ch. J., says, "No grant can be presumed from the adverse use of an easement in the land of another for the term of twenty years, where the owner of the land was, at the expiration of the twenty years, and long before, incapable of making a grant, whether from infancy or insanity *Maine, Anc. L.* 286, 287.

⁵ *Ante*, vol. 2, p. *27 *et seq.*

SECTION IV.

ACCRETION.

1. In what cases the doctrine of accretion arises.
- 1a. Same subject.
2. Of avulsion as distinguished from alluvion.
3. Alluvion considered as an appurtenant of land.

1. ANOTHER mode of acquiring title to realty is where portions of the soil of real estate are added by gradual deposition, through the operation of natural causes, to that already in possession of the owner.¹ And this is called title by *accretion*. Thus kelp and other marine plants, when detached from the bottom of the sea and thrown on the shore, or beach, become vested in the owner of the soil. But, to become so, they must be cast upon the shore, and rest there, so as to become attached to the soil.² Such is the case where land has been formed upon and united with the shore of the sea or of a river, by the gradual formation of what is called *alluvion*, through the action of the water in washing it against the land forming such shore, and depositing it thereon. The doctrine of alluvion does not apply to any structure within the water, or filling in of earth in front of land bordering upon the water, done by some other than the owner of the land.³ Alluvion implies soil, earth of a substantial character, which makes a permanent addition to the land by imperceptible accretion. Kelp thrown upon the shore is not, in itself, alluvion, though it is the property of the land-owner as first occupant of it. It may become alluvion by receiving and retaining the suspended particles of the abraded shore.⁴ Sometimes the operation of streams of water flowing between lands of adjacent owners is to wash away the soil on one side, and deposit it upon the other. Sometimes, by the ordinary

¹ Bracton, 9, Coxe's ed.; Güterbock, Bract. 104.

² Anthony v. Gifford, 2 Allen, 550; Emans v. Turnbull, 2 Johns. 322; Mathet v. Chapman, 40 Conn. 382, 385; *post*, p. *634; Bagott v. Orr, 2 B. & P. 472.

³ Austin v. Rutland R. R., 45 Vt. 246.

⁴ Church v. Meeker, 34 Conn. 432, 433; Phillips v. Rhodes, 7 Met. 323

operation of natural laws, islands are formed in the sea, which become capable of occupation. It takes the character of an island if the water of the stream flows around it at the ordinary stage of the water.¹ In other cases they are formed in rivers between the adjacent banks thereof. And questions of considerable nicety have thereby been raised as to the respective rights of individuals and the public to the occupation of such formations. The rules which ordinarily govern such cases seem to be these: If islands are formed in the sea, or, as a general proposition, in *navigable* rivers, they belong to the sovereign or the State. But alluvion becomes, as fast as formed, the property of the owner of the land upon which it forms; and the same rule applies to islands formed in unnavigable streams, or those in which the tide does not ebb and flow. If one owns a narrow strip along a river cut off from the body of the original tract, the alluvion belongs to such narrow strip to which it is attached.² In [*452] respect to lands thus situated, *the thread or centre line of the stream forms the dividing-line between the different owners upon the one side and the other of such stream; and whether islands formed in such streams belong to one or the other proprietor, or in part to one and in part to the other, depends upon their situation in relation to this line. If it forms upon both sides of such line, what would have been the original *filum aquæ* of such stream will divide to each owner his several share of such island. It often happens, by the gradual wearing away of the land upon one side, and a deposition of the soil upon the other, that this thread of the stream undergoes a constant process of change in one direction or the other, since it is the thread, for the time being, and not the one existing at the time at which the adjacent owners acquire their titles, which forms the boundary-line between their estates. But, in such cases, the owner of the land bordering upon a river may *rubble* his bank, so as to prevent the water from washing off his soil; but he cannot

¹ *Stover v. Jack*, 60 Penn. St. 342.

² *Saulet v. Shepherd*, 4 Wall. U. S. 508; *Banks v. Ogden*, 2 Wall. U. S. 57, 69; *Granger v. Swart*, 1 Woolworth R. 88; *Warren v. Chambers*, 25 Ark. 120, where the doctrine was applied to the border of a lake not navigable.

build any thing into the stream which shall change the current of it in order to protect his own land.¹ If, however, by some sudden convulsion of nature, or by some unusual change in the course of a stream by an extraordinary flood, the effect is to leave a body of the land of one annexed to that of the other without any intervening current of water, this rule, as to the thread of the stream forming the boundary between them, ceases to apply, and the former dividing-line continues, although one of the proprietors may thereby include the whole stream within his own limits.²

1 *a.* The doctrine above stated was applied to the accretion which formed along the *quai* at New Orleans, upon the bank of the Mississippi, which had been dedicated to public use. The alluvion was held to have become a part of the public quay.³ But if land of a private owner runs down to a river, without any intervening public way along the shore, such owner will have the accretion to the bank as an incident to the ownership of the bank or shore.⁴ But the case of *Trustees, &c. v. Dickinson*, presents questions of more difficulty, and some of which can hardly be said yet to be settled. It was the case of a parcel of land which had formed in what was once the bed of Connecticut River, in consequence of a change in the current of the stream. The plaintiffs owned land on the east side of the river, across which the stream gradually formed a channel so as to cut off a point of their land, forming it into an island, which, as far as it extended, formed the west bank of the stream. In the mean time, land formed at points in the old bed of the stream between this island and the former west bank of the stream. The

¹ *Gerrish v. Clough*, 48 N. H. 9; *Menzies v. Breadalbin*, 3 Bligh, n. s. 414, 422.

² 2 Sharsw. Bl. Com. 261 n.; *Walk. Am. Law*, 319; *Ingraham v. Wilkinson*, 4 Pick. 268; 3 Kent, Com. 428; *Deerfield v. Arms*, 17 Pick. 41, where the whole subject is learnedly examined, and a rule prescribed for dividing alluvion between adjacent riparian proprietors; *Woodbury v. Short*, 17 Vt. 387; *Hargr. Law Tracts*, 5; *Woolrych, Laws of Water*, 26, 37; *Vinnius, Comm. lib. 2, tit. 1, § 20, "De Alluvione;"* *King v. Yarborough*, 3 B. & C. 91, 107; *Hale, de Jure Maris*, as given in 6 Cow. 537; *Fleta*, B. 3, c. 2, § 6; *Spigener v. Cooner*, 8 Rich. Law, 301; *Erskine's Inst.* 175.

³ *New Orleans v. United States*, 10 Peters, 717.

⁴ *The Schools v. Risley*, 10 Wall. 91.

question was, whose was the land thus gradually formed in the old bed of the stream. It was held that each proprietor originally owned to the thread of the river, and, as such, became entitled to all accessions. If an island forms on one side of the thread of the stream, it will wholly belong to him who owns the land on which it formed. If it forms partly on each side of the original thread, that will divide its ownership. This thread may be changed towards one side or the other of the stream by gradual accretion upon the one shore or the other, forming a new shore-line; and if the opposite bank be also worn away, the thread will change accordingly. When an island forms in the bed of the stream, so that the water flows upon both sides of it, it becomes two streams in that place, each having a *filum aquæ*.¹ And it is suggested, that as this island acquires by occupation the properties of land, if another island were to form between it and the mainland, the question of ownership thereof would depend upon where the new *filum aquæ* would be in respect to it. If an island in a stream be wholly washed away, the *filum aquæ* may run along where there had been this solid ground. Where the stream in its change cuts off a part of the land upon one side of the river, and leaves it upon the opposite side of the stream, the original owner of that land retains the property in it; and if the old bed of the stream between that and its former opposite bank becomes dry land, it will belong to the respective owners as before by a division formed by the old *filum aquæ* of such bed. Above a line drawn across the stream at the head of this island, the original *filum aquæ* of the stream remains as it was before. And if alluvion forms upon the upper part of this island, in the up-stream direction, the ownership of that alluvion would be governed by the still existing *filum aquæ*. If upon both sides, each would own accordingly; if wholly upon one side or the other, the one or the other owner would be entitled to it in severalty. The *filum aquæ* is the middle line between the shores, irrespective of the depth of the channel, taking it in the natural and ordinary stage of water at its medium height, neither swollen by freshets, nor shrunk

¹ *Stolp v. Hoyt*, 44 Ill. 220.

by drought. In dividing the lands laid bare in the old bed, in the case supposed, among the several owners upon the original shore, on either side, each would have a line on the original *filum aquæ*, proportioned to the line of his land upon the shore before the river was filled up, as defined in the case of *Deerfield v. Arms*.¹ In respect to alluvion formed upon the seashore, the "shore," in the first place, is the space between high and low water marks occasioned by the ebb and flood of the tide. And the standard or test of this is "the line of the medium high tide between the spring and the neaps;" whereas, by the civil law, *est autem littus maris quatenus hybernus fluctus maximus excurrit.*"² In respect to land along the shore gained by gradual accretion, as distinguished from some sudden acquisition, it belongs to the owner of the land upon which it forms. When the sea retreats suddenly, and leaves a tract of land uncovered, the same belongs to the crown or the State.³ The test of what is gradual, as distinguished from what is sudden, seems to be, that though witnesses are able to perceive, from time to time, that the land has encroached upon the sea-line, it is enough if it was done so that they could not perceive the progress at the time it was being made. Nor does it make any difference in the rights of the land-owner that the accretion upon his land is the result of artificial causes, and not wholly from natural ones. The consequence is, the boundary-line of an owner's land bordering upon the sea varies with the gradual increase or diminution of quantity by the addition of alluvion, or by the wasting away before the action of the water in its encroachments upon the land, the line of the shore varying accordingly.⁴

¹ *Trustees, &c. v. Dickinson*, 9 Cush. 544; *Deerfield v. Arms*, 17 Pick. 41. See Dig. 41, 1; 56, 1; and 64, 3; *Primm v. Walker*, 38 Mo. 99; *Batchelder v. Keniston*, 51 N. H. 496, 498.

² *Attorney-General v. Chambers*, 4 De G., M. & G. 206, 216, 218; s. c. 4 De G. & J. 58; *Hargrave, Tracts*, 25; *Scratton v. Brown*, 4 B. & C. 495.

³ *Emans v. Turnbull*, 2 Johns. 322.

⁴ *Attorney-General v. Chambers*, 4 De G. & J. 55, 69, 70; *King v. Yarborough*, 1 Dow & C. 178, 186, 189; s. c. 3 B. & C. 91, 105, 106; *Scratton v. Brown*, 4 B. & C. 485, 498; *In re Hull & Selby Railway*, 5 M. & W. 323. The doctrine as to alluvion, stated in the foregoing page, is sustained and approved in *County of St Clair v. Lovington*, — Wall, — 11 Alb. L. Journ. 76; *New Orleans v. U. States*, 10 Peters, 662.

2. Cases sometimes occur where considerable quantities of soil are by the sudden action of water taken from the land of one, and deposited upon or annexed to the land of another. The difference between *avulsion*, as the latter process is called, and *alluvion*, consists in the one being done by imperceptible loss from the land of one, and increment to that of the other; and in the other, its being done suddenly to an extent which can be ascertained and measured. In the case of avulsion, the soil still belongs to the first owner, unless he shall [*453] have *suffered it to remain in its new position until it cements and coalesces with the soil of the second owner; in which case the property in the soil will be changed, and no right to reclaim it remain.¹

3. This right to alluvion is considered as an interest appurtenant to the principal land, and belonging, in the nature of an incident, to the ownership of that, rather than as something acquired by prescription or possession in the ordinary legal sense of those terms. And the right to land thus added to the former proprietorship is termed a title by accretion.² And this extends to land gained by the gradual receding of the water of a lake or pond, whereby the land becomes dry: it belongs to the owner of the land to which it is adjacent.³

¹ Woodbry v. Short, 17 Vt. 387; Woolrych, Law of Waters, 28, 37; Ang. Wat. Cour. § 60; Institute, B. 2, tit. 1, § 21, and Vinnius, Comm. on the same; Fleta, B. 3, c. 2, § 6. The test given by the Institute and Fleta of what would be a sufficient annexation to the land of another, to deprive the first land-owner of his property in the soil, is the suffering trees to take root and spring up in the soil in its new locality. But Vinnius does not consider this the only test, but to the claim of the original owner, "*objici tamen ei posse, quod partem avulsam, cum posset, non vindicaverit, sed tamdiu passus sit eam hæere fundo alieno, ut tandem cum eo coaluerit et unum facta sit, ut ipse quodammodo eam alienasse videatur,*" which is substantially the same as the above text. See Bracton, 9 a; also Dikes v. Miller, 24 Tex. 424, 425; Hawkins v. Barney, 5 Peters, 467.

² Municipality v. Orleans Cotton Press, 18 La. 122; Banks v. Ogden, 2 Wall. U. S. 69; Saulet v. Shepherd, 4 Wall. U. S. 508; County of St. Clair v. Lovingston, *sup.*; Patterson v. Gelston, 23 Md. 447.

³ Warren v. Chambers, 25 Ark. 120.

SECTION V.

ABANDONMENT.

1. Doctrine of loss of title by abandonment stated.
2. Instances where the doctrine applies.
- 2 a. Effect of abandoning adverse possession on title.
3. No title abandoned by parol agreement.
4. No abandonment of title except by effect of limitation.
5. Abandonment by act operating as an estoppel.
6. Confirmation, effect of.

1. IN connection with the subject of acquiring title by prescription is to be considered the loss of title by *abandonment*. This implies some act done, and does not depend upon any presumption of the execution of an instrument of release having been made, which, from lapse of time, has been lost. The doctrine of abandonment is usually applied to incorporeal hereditaments, though the dicta of judges, in a few instances, have indicated an opinion that abandonment might be effectual in parting with or losing title to land itself. In *Holmes v. Railroad, &c.*, a case in the Ohio circuit of the United States Court, McLean, J., used language, which, though not called for by the facts in the case, in the broad sense of the terms employed, * might lead one [*454] to suppose that title to land might be lost by mere abandonment, independent of any adverse possession continued till the claim of the original owner was barred by the statute of limitations: "It is a well-known principle of law, that every owner of property, whether personal or real, may abandon it. In *Corning v. Gould*,¹ it is observed, that a man shall be held to intend what necessarily results from his own acts. Consequently, when property is abandoned under such circumstances as to leave no doubt of the fact, no one who has taken possession of it can be required to relinquish it. Whether there be an abandonment is a question of fact to be determined by the circumstances of the case. And when

¹ *Corning v. Gould*, 16 Wend 543.

this is done, the right is extinguished.”¹ He cites several cases in connection with these propositions in his text, which, so far as they bear upon the subject, seem to fall short of sustaining the doctrine he maintains, so far as it applies to land itself, and only extend to equitable rights and easements or servitudes. A few of these will be noticed, as they serve to illustrate the doctrine of abandonment when applied to easements or servitudes and equitable interests in lands. Of the latter character was *Picket v. Dowdall*, where one Crap had taken a warrant of land and had it surveyed, and thereby had acquired a right to demand a deed of it upon entering into certain agreements as to rents, &c. He neglected to take this step for several years, and the proprietors of the land sold and conveyed it to a stranger. The language of the judge upon the subject was: “I think the *abandonment* of Crap is fully proved. *It is true, that legal rights once vested must be legally divested*; but equitable rights may be lost by dereliction.”²

2. In the case of *Taylor v. Hampton*, the right was that of one man to flow the land of another for the working a mill, where the owner of the mill had taken it down, opened the gates, and drawn down the water, and rebuilt the mill farther up stream, leaving the land between the two sites [*455] unflowed. * He afterwards, in about nine years, undertook to rebuild on the original site, and it was held he had abandoned the right by what he had done. The court speaks of the loss of such an easement “by abandonment of that part of the estate which owes the servitude,” and as illustrations of what are such acts of abandonment as operate to discharge the servitude, without the necessity of any formal release, mentions a removal of the gates, and a ceasing to flow a pond of water for a mill; the erection by the owner of a wall, so as to obstruct the light and air from his own window; or his building a house across a private way which leads from the street across his own land and over the land of another, whereby its original use was destroyed. Any of these or simi-

¹ *Holmes v. Railroad*, 8 Am. Law Reg. 716, 724.

² *Picket v. Dowdall*, 2 Wash. 107; *Dikes v. Miller*, 24 Tex. 424, and cases cited

lar acts may operate as an abandonment and total loss of the easement, or a suspension thereof, as the case may be, and a consequent loss for the time being of the right to enjoy it.¹ A mere non-user of a way for a certain length of time is not an abandonment of a right to enjoy it.² The case of *Corning v. Gould*, cited in a former part of this work, was that of a way for the use of two adjacent owners, and lying along the division-line between them. One party having built upon his half of the way, which was followed by an obstructing of the other half by the other owner, the court held that this was an abandonment of the easement, the act of the first having been assented to by the owner of the other portion of the way. In commenting upon the law of the case, the court say: "Even a rent raised by deed may be extinguished in this way by mutual consent. The lessor enters and expels the tenant: if he does not choose to re-enter, the rent is gone; though, if he return, it is suspended only during the expulsion."³ A similar doctrine of abandonment of an easement without deed, by the act of an owner exchanging one way, for instance, for another, is sustained in the case of *Pope v. Devereux*.⁴ In the case of *Kirk v. King*, there was an * abandonment of a beneficial use raised in favor [*456] of an unincorporated association, by their forbearing to exercise it for a period of years. The deed, in that case, was made to "the employees of a school," an association, but not an incorporated body. The school had been discontinued seven years when the owner entered and occupied the land. It was held, that the conveyance raised a use, but conveyed no legal title to the association for want of an ascertained grantee. It was held, also, that the non-user was an abandonment of this use on the part of the association. "This was certainly enough," say the court, "to raise a legal presumption of abandonment." "It would certainly have con-

¹ *Taylor v. Hampton*, 4 M'Cord, 96; *Owen v. Field*, 102 Mass. 90, was a case of abandonment of a right to draw water from a spring.

² *Ward v. Ward*, 14 Eng. L. & Eq. 414; *McKee v. Perchment*, 69 Penn. St. 349.

³ *Corning v. Gould*, 16 Wend. 531; *ante*, p. *59.

⁴ *Pope v. Devereux*, 5 Gray, 409. See this case considered *ante*, p. *57; *Smith v. Barnes*, 101 Mass. 278.

stituted an abandonment of a location under the land laws which this deed very much resembles.”¹

2 *a.* The doctrine of losing title by abandonment has been applied to cases of *prima facie* title by long-continued adverse possession. Thus, in Georgia, where seven years is the period of limitation, it has been held, that if, after a possession for that length of time, a tenant abandons the premises, it will be treated as an admission that he had not been holding adversely to the true owner, but in subordination to his title.² And this is in accordance with the doctrine of the court of Massachusetts, who held, that, where a party had occupied land up to a certain fence for more than thirty years, it was competent, in an action involving the title to the premises, to show the acts and declarations of the tenant, made after thirty years, in order to show the motives and views of the tenant as to the holding during the thirty years.³ But it is not easy wholly to reconcile this with the opinion of the court in Maine, where it was held that “an open, notorious, exclusive, adverse possession for twenty years would operate to convey a complete title to the plaintiffs, as much so as any written conveyance. And such title is not only an interest in the land, but it is one of the highest character: the absolute dominion over it and the appropriate mode of conveying it is by deed. No doubt a disseisor may abandon the land or surrender his possession by parol to the disseisee *at any time before his disseisin has ripened into a title*, and thus put an entire end to his claim. His declarations are admissible in evidence to show the character of his seisin, whether he holds adversely or in subordination to the legal title. But the title obtained by disseisin, so long continued as to take away the right of entry and bar an action for the land by limitation, cannot be conveyed by a parol abandonment or relinquishment; it must be transferred by deed.”⁴ The only way of reconciling the former with the latter case, which seems to be in accordance with the modern notion of the effect of the statute of limita-

¹ *Kirk v. King*, 3 Penn. St. 441.

² *Vickery v. Benson*, 26 Ga. 589.

³ *Church v. Burghardt*, 8 Pick. 327.

⁴ *School District, &c. v. Benson*, 31 Me. 381, 385. See *Brown v. Cockerell*, 23 Ala. 46.

tions, is to suppose the possession of the tenant was equivocal in its character, and his acts were merely evidence to fix what its true character had been, and to negative the presumption of its having been adverse. So that it does not go to sustain the doctrine, that a title once obtained, though by disseisin, can be lost by a mere act of abandonment, though accompanied by a declaration to that effect. In one other case, the court speak of a party *abandoning* land for so long a time as to preclude him from recovering it in ejectment.¹ And the same is cited with approbation in the Court of Errors in New York.² But the question in the case was one of boundary of adjoining lands which had been divided by a deed of partition; and it was admitted, that, if the land claimed did not belong to one, it did to the other; and that, if it was not in the possession of the one, it was in that of the other.

3. The law, as stated by Wilde, J., is undoubtedly sound, "that a parol agreement, not in writing, is valid so as to pass any title to lands, cannot be maintained under any circumstances."³ If this is to be qualified, it is in the manner stated in *Allen v. Parish*, that "parol evidence is not sufficient to create a title to real estate or to transfer a title, but it is sometimes proper and necessary to strengthen or explain transactions from which either the existence or the transfer of titles may be inferred."⁴ And Wilde, J., in the case above cited, adds: "It may, perhaps, under certain circumstances, operate as an estoppel according to some of the decisions in the New York cases."

4. So where there was an abandonment by one owner of land to another, as by a voluntary partition by parol, and each yielding possession of a part to the other, and the latter continuing to occupy long enough to give him a title by *limitation*, had his entry been tortious and his possession adverse, such abandonment and possession were held to be equivalent to a legal ouster by the tenant, and an adverse holding of possession as to the original owner.⁵ And the same has been

¹ *Jackson v. Bowen*, 1 Caines, 358, 362.

² *Adams v. Rockwell*, per Mason, senator, 16 Wend. 307.

³ *Tolman v. Sparhawk*, 5 Met. 476, 477.

⁴ *Allen v. Parish*, 3 Ohio, 107.

⁵ *Gregg v. Blackmore*, 10 Watts, 19'

held to be the effect where one sold another land by [*457] parol, and the bargainee * entered and occupied the same as his own, claiming title thereto for the period of time which operates as a bar by the statute of limitations, although the owner originally gave up possession to the tenant voluntarily.¹ But it was the length of possession as owner, and not the mere act of abandonment, or giving of the possession originally, that operated to give title to the tenant. And the doctrine, as applicable to title gained by disseisin, is thus stated by Wells, J., in *School District, &c. v. Benson*: “No doubt a disseisor may abandon the land, or surrender his possession by parol to the disseisee at any time before his disseisin has ripened into a title, and thus put an entire end to his claim.” “But the title gained by a disseisin, so long continued as to take away the right of entry and bar an action for the land by limitation, cannot be conveyed by parol abandonment or relinquishment; it must be transferred by deed. One having such title may go out of possession, declaring he abandons it to the former owner, and intending never again to make any claim to the land; and so may the person who holds an undisputed title by deed; but the law does not preclude them from reclaiming what they have abandoned in a manner not legally binding on them.”²

5. In one of the cases cited by McLean, J., in the case above referred to, the court say, by way of illustration: “If a man stands by and sees another build on his own premises, his right is gone.” This doctrine he classes under the head of estoppel *in pais*, and cites *Welland Canal v. Hathaway*.³ It is probably, therefore, not too strong a conclusion to assert, that in no case can a man lose his title to a freehold in land by any act or oral declaration of abandonment, unless it comes within the category of estoppel, or is followed by such a possession by the person claiming title thereto in his stead as brings the case within the statute of limitations. It was with a view to this conclusion that several of the cases above mentioned

¹ *Sumner v. Stevens*, 6 Met. 337; *Barker v. Salmon*, 2 Met. 32.

² *School District v. Benson*, 31 Me. 381.

³ *Welland Canal v. Hathaway*, 8 Wend. 480; *Corning v. Gould*, 16 Wend. 545.

have been cited to show that it was not the abandonment by the original owner * in favor of another that [*458] gave the title, but the possession by the latter being continued the requisite length of time to allow the statute of limitations to take effect. The doctrine of abandonment was considered by the court of California, in a case where one, who held a deed of land, orally bargained it to another, who entered and made improvements upon it, and then sold it to the tenant, who entered and occupied the premises. No title was traced from the United States, to whom it originally belonged. The court below held, that the party first above mentioned, by transferring his possession to another, had *abandoned* his interest in the premises, and could not claim them again. But the court above denied that there could be such a thing as an abandonment in favor of a particular individual, or for a consideration. Such an act would be a gift or sale ; whereas an abandonment is the relinquishment of a right, — the giving up of something to which one is entitled. And to constitute an act of abandonment, it must be done without an intention or desire that any other particular person should thereby acquire it. If, therefore, a tenant could abandon his title to the premises, he could not do it by bargaining it away to another.¹ In a case in Vermont, the court, as a court of equity, seem to be disposed to treat the act of a grantee as an abandonment of title, in a case where, by an agreement contemporaneous with the deed, but not embraced in it, the grantee was to carry on the estate for the grantor, but, instead of doing so, went away, and refused to execute the agreement.² Under the Spanish law, while it prevailed in some parts of what are now the United States, the doctrine of abandonment seems to have been recognized and acted upon. But to constitute it required that the owner should actually leave the land with an intention that it should no longer be his. If he do quit possession, but still retains the property in the premises in his mind, no one would have a right to enter upon them, and it would not amount to an abandonment.³

¹ Stephens v. Mansfield, 11 Cal. 363; Dikes v. Miller, 24 Tex. 423; Richardson v. McNulty, 24 Cal. 344.

² Tracy v. Hutchins, 36 Verm. 237.

³ Clark v. Hammerle, 36 Mo. 639

6. A single word may be added upon the subject of *confirmation*. *Qui confirmat, nihil dat*. It may make good a voidable or defeasible title, but cannot operate upon, or in aid of, an estate which is void in law, except only where it is the act of the sovereign.¹

¹ *Branham v. Mayor, &c.*, 24 Cal. 605; *Strother v. Lucas*, 12 Peters, 454; *Blessing v. House*, 3 G. & John. 290. See *Fenwick v. Gill*, 38 Mo. 526; *Con. Dig. Confirmation*, D. 1; *Choteau v. Eckhart*, 2 How. U. S. 344.

SECTION VI.

ESTOPPEL.

1. What a title by estoppel is.
2. Upon what estoppels are based.
3. How estoppels operate upon titles to estates.
4. Two classes of estoppels.
5. Estoppels *in pais* rare at law.
- 6, 7. Instances where the doctrine has been applied.
- 8, 9. Cases involving discussion of doctrine of estoppel.
- 9 a. In what cases and how far estoppels *in pais* are applied.
- 9 b. How far fraud is essential to an estoppel.
- 9 c. How far fixing lines and fences works an estoppel.
10. One entering under another may not dispute his title.
11. Estoppels by deed.
12. Indentures may always, and deed-poll often, work estoppels
13. Effect of accepting a deed as an estoppel.
14. What forms of conveyance work estoppels.
15. Deeds of release estop only as to present title.
16. Same rule prevails as to deeds of grant.
17. No title not *in esse* passes except by warranty.
18. No deeds under the statute of uses estop as to future titles.
19. Releases, &c., operate to estop as to existing titles.
20. Grantor estopped to deny that he had any interest.
21. Grantee not estopped to deny that grantor had title.
22. Plaintiff in ejectment estopped if defendant claims under his deed.
23. Distinction between estoppel as evidence and in point of estate.
24. Estoppels by recitals in deeds.
25. Grantor estopped to deny admissions in his deed.
26. One tracing title through a deed estopped by its recitals.
27. Party estopped by admission of a fact, made to influence another.
28. Illustrations of the applications of this doctrine.
29. A recital in a will estops those claiming under it.
30. *Douglas v. Scott*, illustrating estoppels.
31. Grantor estopped to deny that he had any title.
32. One estopped to impeach a title gained by his own assent.
- 33, 34. Recitals do not estop if the deed be inoperative.
35. Of estoppel as to title by deed with warranty.
36. Cases where releases do and do not work estoppel.
37. Deeds, with warranty, bind a future acquired title.
38. Such warranty may be general or special.
39. Covenants of warranty to work estoppels must run with the land.
- 39 a. Warrantor may disseise his covenantee.
40. Effect of covenants limited by the premises granted.
41. A deed must be good to give validity to its covenants.
42. Covenant by a guardian bars a personal title.
43. *Femes covert* estopped by conveyances with warranty.
- 43 a. Same subject.

44. Estoppels apply to leases for years.
45. If lessor has any estate, his warranty does not estop him.
46. Effect of warranty where grantor's conveyance is or is not rightful.
47. Lessee bound by accepting title from a stranger.
48. How far estoppels extend, and who are bound by them.
49. Who are bound as privy in estate by an estoppel.
50. A deed with warranty bars the second grantee's after-acquired title.
51. Any one claiming under another who is estopped is so himself.
52. Estoppel by arbitrament and award as to title.
53. How far estoppel is a common-law doctrine.

1. TITLE by estoppel is where equity, and in some cases the law, in order to accomplish the purposes of justice which cannot be otherwise reached, draws certain conclusions from the acts of one party in favor of another, in respect to the ownership of lands, which it does not allow the first to controvert or deny. Estoppels differ from evidence, in that the former are received as conclusive, and preclude all inquiry as to the true merits of the title; while the latter is merely the medium of establishing facts which do exist or have existed.¹ An estoppel against an estoppel sets the matter at large, so that a warranty opposed to a warranty leaves the matter as if none had been made.²

2. The learning of estoppels is founded, as a general principle, on the idea that a man shall not defeat his own act, or deny its validity to the prejudice of another. If a man of the name of John prepare and sign a deed as William, he shall not aver that his name is not William, in order to avoid it.³ So where a man in his deed recites particular facts, these facts become evidence against him, and he will not be at liberty to deny the truth of his statement. One who makes a feofment cannot aver that his feoffee has not a seisin, or set up a title acquired subsequent to the feofment.⁴

3. It is not, however, that an estoppel gives an estate, or divests another of an estate or interest in lands. It merely

¹ 1 Prest. Abst. 421; Crabb, Real Prop. 1046; Co. Lit. 352 a, and note 306; Welland Canal v. Hathaway, 8 Wend. 480; Shep. Touch. Prest. ed. 53. But estoppels are not entitled to any peculiar favor. Hanrahan v. O'Reilly, 102 Mass. 204.

² Kimball v. Schoff, 40 N. H. 197.

³ Post, c. 4, § 1, pl. 21.

⁴ 2 Prest. Abst. 407, 408; Sinclair v. Jackson, 8 Cow. 586, by Jones, Ch. Douglass v. Scott, 5 Ohio, 199.

binds the interest by a conclusion which precludes the parties, between whom it is made to operate, from asserting or denying *the state of the title.¹ Or, in the language of another, "a title is rather presumed than acquired by estoppel, inasmuch as a person is concluded by his own act from disputing the title of another."² But as estoppels must be mutual, they do not apply in favor of infants or *femes covert*,³ nor is there any estoppel *in pais* against *femes covert*.⁴ And the same is true of infants; for, to be binding on one part, it must bind the other also.⁵

4. Estoppels divide themselves into those by act, or *in pais*, and those by deed, and may be so considered in their bearing upon the question of title to lands.

5. The cases where a party is estopped in equity to assert his claim to equitable interests in lands by any thing short of a deed are not infrequent. But it is very rare that that is allowed at law, and, it is believed, in those cases only where one man has knowingly induced another to act by the expenditure of moneys in improvements upon lands, as if he had a rightful title to the same, and adequate justice cannot be done by compensation in money. Wilde, J., states the rule, hypothetically, in all cases, and concludes that it cannot be done even where improvements have been made, if the one making them can recover the value of the same from the owner of the land.⁶

6. Some of the strongest cases, it is believed, where it has been attempted, with more or less success, to establish a title by an estoppel *in pais* in law, are among the following. It is

¹ 1 Prest. Abst. 420; 2 Id. 205.

² Crabb, Real Prop. 1046. See 2 Smith, Lead. Cas. 5th Am. ed. 642, for American cases.

³ *Ante*, vol. 1, p. *300.

⁴ *Morrison v. Wilson*, 13 Cal. 494; *Lowell v. Daniels*, 2 Gray, 161; *Concord Bank v. Bellis*, 10 Cush. 276, 278. See, as to estoppel by deed, *post*, p. *477; *Glidden v. Strupler*, 52 Penn. St. 400, 406. But a married woman may estop herself *in pais* as to her claim of homestead in Illinois. *Brown v. Coon*, 36 Ill. 249; *Wales v. Coffin*, 13 Allen, 216, *post*, pl. 43.

⁵ *Lackman v. Wood*, 25 Cal. 153; *Brown v. McCune*, 5 Sandf. 224; *Todd v. Kerr*, 42 Barb. 317; *Williams v. Baker*, 71 Penn. St. 482.

⁶ *Tolman v. Sparhawk*, 5 Met. 475, 477; 2 Smith, Lead. Cas., 5th Am. ed. 643, 649; *Dezell v. Odell*, 3 Hill, 215.

stated, in general terms, that the law will not permit a man to say that what he has said and done as a solemn act, by which others have acquired rights, was not according to the truth; nor will it allow one who has, in like solemn manner, admitted a matter to be true, to allege it to be false.¹ But a parol estoppel cannot operate a transfer of the legal title to land.²

7. This is applied in the case of a dedication of the use of one's land to the public as a public common, landing-place, or highway, where private and individual rights have been acquired in reference to it.³ A dedication to pious and charitable uses may be effectual, though not distinctively a public one; and, if so made that the holder of the estate becomes a trustee for the purposes of a charity, no subsequent conveyance to one having notice could change the use. The grantee would himself become the trustee. But the mere erecting of a church for a religious society does not dedicate it. The owner may sell it if he pleases. To effect such a dedication, there must be a donation by the owner, or some unequivocal act united with an intent to divest himself, to some extent, of the ownership or power of control over the property, and to vest an independent and irrevocable interest in some other person or body.⁴ No one but the owner of land in fee can dedicate it, or the use of it, to the public. And it is, moreover, essential to a dedication that the owner should intend what he does as a dedication, and this must be found affirmatively by the jury to constitute it such.⁵ The law considers such a state of things in the nature of [*460] an estoppel *in pais*, which precludes the * original owner from revoking such dedication; for this would be a violation of good faith to the public, and to those who have acquired private property with a view to the enjoyment of the use thus publicly granted. But, in accepting the dedication of a way, the public take it as it is; and if defective or

¹ *Ham v. Ham*, 14 Me. 351; *Hicks v. Cram*, 17 Vt. 449.

² *Barker v. Bell*, 37 Ala. 359; *McPherson v. Walters*, 16 Ala. 714.

³ *Wash. Ease*. 3d ed. 185.

⁴ *Attorney-General v. Merrimack Co.*, 14 Gray, 586, 604.

⁵ *Baugan v. Mann*, 59 Ill. 492; *Harding v. Hale*, 61 Ill. 192; *McWilliams v. Morgan*, 61 Ill. 89.

dangerous, the public will be responsible.¹ If land has been dedicated and accepted as a public square, for instance, and individuals, upon the faith thereof, have built their houses in reference to it as such, the dedication cannot afterwards be rescinded and revoked.² And this applies as well to a dedication by a public body as to one by a private individual. Thus, where the commissioners of a county laid out a town for a county seat by a plot, on which certain squares were indicated as "public lots," and individuals built around one of these, it was held that they might enjoin the erection of buildings upon the land thus set apart.³ Nor does the estoppel depend on the length of time for which this use shall have been enjoyed.⁴

8. In discussing the matter of estoppel, the court, in *Welland Canal v. Hathaway*, thus speaks of acts *in pais*: "An estoppel is so called because a man is excluded from saying any thing, even the truth, against his own act or admission. The acts set up in this case, it is not pretended, constitute a technical estoppel which can only be by deed, or matter of record. But it is said they should operate by way of estoppel, — an estoppel *in pais*. Such estoppels cannot be pleaded, but are given in evidence to the court and jury, and may operate as effectually as a technical estoppel under the direction of the court. There are many acts which have been adjudged to be estoppels *in pais*, such as livery, entry, acceptance of rent, &c. ; but in many, and probably in most instances, whether the act or admission shall operate by way of estoppel or not, must depend upon the circumstances of the case. As a general rule, a party will be concluded from denying his own acts or admissions which were expressly designed to influence the conduct of another, and did so influence it, and when such denial will operate to the injury of the latter."⁵

¹ *Robbins v. Jones*, C. B. 26 L. Rep. 291. *Mercer v. Woodgate*, L. R. 5 Q. B. 26.

² *Livermore v. Maquokota*, 35 Iowa, 360.

³ *Rutherford v. Taylor*, 38 Mo. 315; *Abbott v. Mills*, 3 Vt. 521; *Wash. Ease*, 8d ed. 217.

⁴ *Cincinnati v. White*, 6 Pet. 438; *Hobbs v. Lowell*, 19 Pick. 405, 409; *Hunter v. Trustees, &c.*, 6 Hill, 41; *State v. Trask*, 6 Vt. 355.

⁵ *Welland Canal v. Hathaway*, 8 Wend. 483. See also *Corning v. Gould*, 16 Wend. 531; *Titus v. Morse*, 40 Me. 348.

“To establish an estoppel *in pais*, it must be shown, 1. That the person sought to be estopped has made an admission or done an act with the intention of influencing the conduct of another, or that he had reason to believe would influence his conduct inconsistent with the title he proposes to set up. 2. That the other party has acted upon or been influenced by such act or declaration. 3. That the party will be prejudiced by allowing the truth of the admission to be disproved.”¹ Thus, where A was about to purchase a lot of land which adjoined B’s, and was bounded by it, and, not knowing the boundary-line, applied to B to point it out to him, who did so, knowing that the inquiry was made with a view to purchasing it; A having purchased it, relying upon this statement of B, it was held that the latter was estopped to deny that the line thus pointed out by him was the true one.² So if a grantor point out to his grantee a wrong line, and he, not knowing the contrary, and confiding in that statement, goes on and incurs expenses in building a house within the line thus pointed out to him, the grantor would be estopped to deny that the line thus pointed out was the true one, so as to effect a title to the land on which the house had been erected.³ But the doctrine of estoppel does not apply where every thing is equally well known to both parties, or where the party sought to be estopped was ignorant of the facts out of which his rights arose, or where the party seeking to conclude him was not influenced by the acts or admissions which are set up as the grounds of estoppel.⁴ And to enable a man to set up a title by estoppel, the party must have been ignorant of the true state of the title at the time he took it, or been without means of ascertaining it by a reference to records.⁵ In Pennsylvania it has been held, that when a man has encouraged another to settle upon and improve land, and expend his money upon it, he will not be permitted afterwards to

¹ *Brown v. Bowen*, 30 N. Y. 541; *Harnahan v. O’Reilly*, 102 Mass. 201; *Anderson v. Coburn*, 27 Wis. 566; *Mulloney v. Horon*, 49 N. Y. 111, 115, 117.

² *Spiller v. Scribner*, 36 Vt. 247; *Halloran v. Whitcomb*, 43 Vt. 312.

³ *Rutherford v. Tracy*, 48 Mo. 325.

⁴ *Fletcher v. Holmes*, 25 Ind. 469; *Hill v. Epley*, 31 Penn. St. 334.

⁵ *Wood v. Griffin*, 46 N. H. 237; *Drew v. Kimball*, 43 N. H. 282; *Gove v. White*, 20 Wisc. 430; *Hill v. Epley*, *sup.*

take it from him, although he has an older and better title, and acted himself in ignorance of his own right.¹ But this doctrine applies only to a *bona fide* improver, who is led into a mistaken expenditure by the acts or connivance of another, supposing the property to be his own, and not where he knew the land to be in dispute between *two par- [*461] ties, and volunteered to originate a new claim.²

9. It was once held by the court of Pennsylvania, that if one, having a deed of land, were to stand by and see the land sold by a sheriff as that of another, and make no objection, he would be estopped to claim it, although the deed under which he held was then upon record. But this was afterwards overruled by the same court, and the doctrine therein assumed which had been borrowed from equity, "*Qui tacet, consentire videtur, qui potest et debet vetare, jubet,*" was not applicable to a sale where there was no element of fraudulent purpose on the part of one keeping silence, and where the purchaser, by the exercise of reasonable diligence, had the means of knowing the true state of the title.³ But where one made a deed on Sunday, dating it upon another day, and his grantee conveyed the estate to a stranger who was ignorant of this fact, it was held that the grantor was estopped to set up against the latter, that the original deed was made on Sunday.⁴ Among the cases where the doctrine of estoppel has been sought to be applied was one where the court held, that if one knowingly, though passively, or by looking on, suffers another to purchase and expend money on land under an erroneous opinion of title, without making known his own claim, he shall not exercise his right against such purchaser. The same doctrine is repeated in Maine, as being a principle in equity, that if a man will stand by and see another person make expensive erections on land claimed by him, and give no notice of his claim, he shall be enjoined from afterwards making claim to the same, to the injury of such other person.⁵

¹ *M'Kelvey v. Truby*, 4 Watts & S. 323.

² *M'Cormick v. M'Murtrie*, 4 Watts, 195.

³ *Hill v. Epley*, 31 Penn. St. 331, overruling *Epley v. Witherow*, 7 Watts, 168. See *Shapley v. Rangeley*, 1 Woodb. & M. 217; *Hill v. Meyers*, 43 Penn. St. 175.

⁴ *Love v. Wells*, 25 Ind. 503.

⁵ See 2 Smith, Lead. Cas., 5th Am. ed. 652; *Rangeley v. Spring*, 21 Me. 130; a. c. 28 Me. 127; *Crest v. Jack*, 3 Watts, 239.

And in another case it seems to have been adopted as a principle of law, that where one stands by and suffers another to purchase land to which he has a title, and expend money thereon under an erroneous impression that he has acquired a legal title thereto, and does not disclose his own, he shall be estopped to claim the land,¹ provided he is himself cognizant of his own legal rights.² Thus, where the defendants owning the lower of two wing dams in a river, by means of which they could flow back upon the upper one, and, having a right to do so, suffered the purchasers of the upper dam, who did not know of this right, to go on and make expensive improvements upon the works at the upper dam, without making known their claim of a right to obstruct these works, although they saw the upper owners making these expenditures, they were estopped to flow back and injure the upper works.³ The same principle was applied in New Hampshire, in respect to personal property which the owner suffered to be [*462] mortgaged in his * presence, to one ignorant of his title.⁴ But, in another case, the court suggest doubts whether this admitted doctrine of equity would apply as to the title of real estate at law;⁵ and in a case in Massachusetts, Wilde, J., denied that it applied at law in Massachusetts, or in any State but Pennsylvania, and assumed that the doctrine prevailed there only because of the mixed jurisdiction of law and equity in their courts.⁶ In a case in New York, where two adjacent owners had occupied for eleven years, on either side, up to a fence as a division-line, and one of them had gone on, with the acquiescence of the other, and made expensive improvements upon the land in his possession, it was held that the other was estopped from setting up the true line against the one who had thus expended his money; and the chancellor remarked, in giving

¹ Hatch v. Kimball, 16 Me. 146; Titus v. Morse, 40 Me. 348; Rangeley v. Spring, 28 Me. 127; Morrison v. Morrison, 2 Dana, 13; Pickard v. Sears, 6 A. & E. 469; Snodgrass v. Ricketts, 13 Cal. 359; Waters' Appeal, 35 Penn. St 526.

² Junction R. R. v. Harpold, 19 Ind. 350. ³ Brown v. Bowen, 30 N. Y. 541

⁴ Thompson v. Sanborn, 11 N. H. 201.

⁵ Marshall v. Pierce, 12 N. H. 128; but see Runlet v. Otis, 2 N. H. 167.

⁶ Heard v. Hall, 16 Pick. 457, 460.

the opinion, "Perhaps a grant might be presumed *within* twenty years."¹ In Massachusetts, if a party can be estopped to claim land by reason of standing by and even tacitly encouraging the sale thereof, it is only where he *conceals* an outstanding title.² And where adjacent owners, intending to establish the true line, agree upon one which is not such, and occupy under it, under a mistake as to the true line, neither is estopped to claim, in a real action, to the true line, especially if the tenant has not made improvements on the land of greater value than that of the land without such improvements, and for which he is entitled to recover of the demandant.³

9 a. The importance of fixing, as far as may be, by proper limits, the doctrine of *estoppel in pais*, in its application to titles of real estate, seems to require some additional illustration to what has already been said. And, in the first place, an estoppel *in pais*, where it applies, is as effectual as a deed, but no more so. So that, if the party doing the act could not have made a deed of the land in question, his act cannot create an estate by estoppel in the same.⁴ In the next place, a party who insists upon the act of another as working an estoppel must show that he acted upon the same, and that it formed the inducement which led him at the time to do what he did. Thus, where an infant, whose land had been irregularly sold during his minority, made declarations after he came of age, expressing his satisfaction with the sale, it was held not to be an estoppel to his claim to the estate, because, being made long after the sale, it could have formed no inducement to the party to make the purchase.⁵ But acts and declarations of a positive character are not the only grounds of estoppel. Under some circumstances, one may, by being silent or passive when he ought to speak or act, estop himself

¹ Adams v. Rockwell, 16 Wend. 285, 303; Laverty v. Moore, 32 Barb. 351.

² Parker v. Barker, 2 Met. 423; Copeland v. Copeland, 28 Me. 525; Stevens v. McNamara, 36 Me. 178; 2 Smith, Lead. Cas., 5th Am. ed. 650.

³ Tolman v. Sparhawk, 5 Met. 469; Titus v. Morse, 40 Me. 348, 355; Ormsby v. Ihmsen, 34 Penn. St. 462; Robinson v. Justice, 2 Penn. 22, 23.

⁴ Lowell v. Daniels, 2 Gray, 169; Beaupland v. McKeen, 28 Penn. St. 124 ante, p. *459.

⁵ Ackley v. Dygert, 33 Penn. St. 176, 193; Allen v. Allen, 45 Penn. St. 473

from claiming his rights. Questions of this kind have most frequently arisen in cases where one having a claim upon land has stood by or known of a sale of it being made as the property of another, without disclosing his claim. This notion has been carried, in some cases, to an absurd extent. In one, the court intimate, that, if a man were to see his estate advertised to be sold as that of another, he would be bound to publish notice of his title, unless he was openly in possession of the premises.¹ Amongst the variety of rulings of courts upon this subject, some of which may be found in the cases cited below, the better opinion now seems to be, that if a man holds a title to his lands by deed, which has been duly recorded, it is all the notice he is bound to give so long as he remains passive; ² and that it is only when he sees another purchasing land upon which he has some unrecorded lien or charge, of which the other is ignorant, that he is bound to give notice thereof. And, upon failing to do so, he is estopped to set up such claim against the purchaser.³ In one of these cases, one, having an equitable title to land which had not been recorded, attended an auction of the premises, and bid upon them, and they were bid off by a stranger: no notice having been given of this equitable claim, the one having it was estopped to set it up.⁴ In another, a man had erected a bowling-alley upon the land of another under a lease; and, during the term, the lessor offered the estate at auction, and the lessee bid upon it, but it was bid off by another. It was held that the owner of the bowling-alley was not estopped to claim and remove it as a fixture, nothing having been said of it at the time of the sale.⁵ In the words of one of the courts, "It is only when silence becomes a fraud that it postpones."⁶ The cases all

¹ *Keeler v. Vantnyle*, 6 Penn. St. 253; *Billington v. Welsh*, 5 Binn. 129; *Brown v. Bowen*, 30 N. Y. 519.

² *Goundie v. Northampton Water Co.*, 7 Penn. St. 233; *Knouff v. Thompson*, 16 Penn. St. 364; *Patterson v. Esterling*, 27 Ga. 207; *Fisher v. Mossman*, 11 Ohio St. 42, 47; *Tongue's Lessee v. Nutwell*, 17 Md. 212, 230; *Hill v. Epley*, 31 Penn. St. 332; *Odlin v. Gove*, 41 N. H. 477; *Brinckerhoff v. Lansing*, 4 Johns. Ch. 70; *Bigelow v. Topliff*, 25 Vt. 287; *Carter v. Champion*, 8 Conn. 554.

³ *Gray v. Bartlett*, 20 Pick. 193.

⁴ *Rice v. Bunce*, 49 Mo. 231.

⁵ *Harnahan v. O'Reilly*, 102 Mass. 201.

⁶ *Hill v. Epley*, 31 Penn. St. 331. See also *Pickard v. Sears*, 6 A. & E. 469;

concur in this, that no man can set up another's act or declaration as the ground of an estoppel, unless he has himself been misled or deceived by such act or declaration; nor can he set it up, where he knew, or had the same means of knowledge, as to the truth of the statement, as the other party.¹ Thus where one, having an estate over which A had a right of way, made a will, and appointed A his executor, with a power to sell the testator's lands. A did so, and B bid off the parcels over which A had the right of way. B afterwards refused to accept a deed unless A would give up his right of way across the premises; which he agreed orally to do, and B took the deed. It was held, that as A received no consideration for the promise, and as B was bound to accept the deed by virtue of his bid, the giving up the easement was not the inducement to do any thing which he was not already bound to do, and therefore A was not estopped to claim the easement.² The same rule has been applied where the owner of land has stood by and allowed another to go on and make improvements upon it, in the mistaken belief that he was the owner thereof. If the true owner not only knows of such expenditures being incurred, but also that the other party is doing it under a belief that he owns the land, it is regarded a fraud to suffer him to go on without notice; and he would thereby be estopped to claim the improvements, &c., and, in some cases, even the land itself.³ Thus, where A sold land to B by parol, without giving any deed, and represented to C that he had conveyed it to B, and thereupon C purchased the estate of B, and made improvements upon it, it was held that A was estopped to set up a title against C, on the ground that he had not made a

Wells v. Pierce, 7 Foster, 511; *Drew v. Rust*, 36 N. H. 342; *Gregg v. Wells*, 10 A. & E. 90; *Blackwood v. Jones*, 4 Jones (Eq.), 56; *Cochran v. Harrow*, 22 Ill. 345; *Watkins v. Peck*, 13 N. H. 373; *Brinckerhoff v. Lansing*, 4 Johns. Ch. 70; *Davis v. Davis*, 26 Cal. 42; *post*, pl. 9 b.

¹ *Ormsby v. Ihmsen*, 34 Penn. St. 472; *Gray v. Bartlett*, 20 Pick. 193; *McCune v. McMichael*, 29 Geo. 312; *Jewett v. Miller*, 10 N. Y. 406; *Hill v. Epley*, 31 Penn. St. 331; *Ferris v. Coover*, 10 Cal. 589.

² *Erb v. Brown*, 69 Penn. St. 216.

³ *McGarrity v. Byington*, 12 Cal. 431; *Knouff v. Thompson*, 16 Penn. St. 364; *Goundie v. Northampton Water Co.*, 7 Penn. St. 233; *Robinson v. Justice*, 2 Penn. 22; *Gatling v. Rodman*, 6 Ind. 289; *Odlin v. Gove*, 41 N. H. 477.

deed to B.¹ So where the heirs of A, under a mistaken supposition that his executor or one of the heirs was authorized to sell his lands, informed one who wished to purchase these that the executor or heir named was authorized to convey them, and he took a deed from the executor and heir, they were estopped to claim the land, whether these representatives were made fraudulently or innocently under a mistake, inasmuch as the purchaser had acted on the faith of their being true; and the court, in such a case, would compel the heirs to convey to the purchaser, and thereby relieve the estate from a cloud upon the title.²

9 *b*. It is difficult to draw the precise line, how far positive fraud must enter into the act or declaration of the party who is sought to be estopped. But that it must have the same effect upon the party who sets it up as an estoppel, as a fraud, is probably universally true. The cases upon the subject are numerous, and not easily reconciled. An able and elaborate opinion by Field, C. J., maintains the doctrine, that, to estop a man by his act or admission, it must be fraudulently done; and the same principle is sustained by the court of Pennsylvania, in *Hill v. Epley*. The language of the former is this: "It is undoubtedly true, that a party will, in many instances, be concluded by his declarations or conduct which have influenced the conduct of another to his injury. The party is said, in such cases, to be estopped from denying the truth of his admissions. But to the application of this principle with respect to the title to property, it must appear, first, that the party making the admission by his declarations or conduct was apprised of the true state of his own title; second, that he made the admission with the express intention to deceive, or with such careless and culpable negligence as to amount to constructive fraud; third, that the other party was not only destitute of all knowledge of the true state of the title, but of the means of acquiring such knowledge; and fourth, that he relied directly upon such admission, and will be injured by allowing its truth to be disproved."³ And the language of the court of Pennsylvania is in accordance with this: "The

¹ *Keys v. Test*, 33 Ill. 316.

² *Favil v. Roberts*, 50 N. Y. 222, 226.

³ *Boggs v. Merced Co.*, 14 Cal. 367; *Glidden v. Strupler*, 52 Penn. St. 405.

primary ground of the doctrine is, that it would be a fraud in a party to assert what his previous conduct had denied, when, on the faith of that denial, others have acted. The element of fraud is essential, either in the intention of the party estopped, or in the effect of the evidence which he attempts to set up."¹ The courts of Illinois use language equally strong: "The doctrine of estoppel *in pais*, or equitable estoppel, is based upon a fraudulent purpose and fraudulent result. If, therefore, the element of fraud be wanting, there is no estoppel."² There is a limitation, indeed, to this doctrine adopted by the United States Court, to the effect that there must be some intended deception in the conduct or declarations of the party to be estopped, *or* such gross carelessness on his part as to amount to *constructive* fraud.³ The portion of the foregoing propositions which is the most obnoxious to criticism, in the light of other decided cases, is the doctrine, that one would not be estopped by his acts or declaration, if done in ignorance of his rights, and without fraud, or that carelessness which amounts to constructive fraud. But the cases are not few where it has been held that a party may be estopped by his acts and declarations if designed to influence the conduct of another who relies upon the same, and acts accordingly, although both were ignorant that what is thereby represented is not true; and this upon the familiar principle, that, if one of two innocent parties must suffer, he through whose agency the loss occurred should sustain it. It may therefore be stated by way of illustration, as a legal proposition, that if one were induced to purchase an estate by the acts or representations of another, designed to influence his conduct, and creating a reasonable belief on his part, under which he acts, that he is thereby acquiring a valid title to the same, the party who should thus have influenced him would be estopped to set up his own title existing at the time of the

¹ Hill v. Epley, 31 Penn. St. 334. See also 1 Story, Eq. § 391; Adams, Eq. 151; Copeland v. Copeland, 28 Maine, 539; Whitaker v. Williams, 20 Conn. 104; Delaplaine v. Hitchcock, 6 Hill, 17; Tolman v. Sparhawk, 5 Met. 475; Brewer v. Boston & Worcester R. R., Id. 487; McCracken v. San Francisco, 16 Cal. 626 627.

² Davidson v. Young, 38 Ill. 152; Story's Eq., Redfield's ed. § 1543.

³ Henshaw v. Bissell, 18 Wall. 271.

purchase against that of the purchaser. It is enough that the latter has been misled by the acts or declarations of the former, if the same were intended to influence, and did influence, his conduct, although no fraud was designed.¹ And Field, J., in the above case of *Henshaw v. Bissell*, says, "There are cases, it is true, where declarations may be made under such peculiar circumstances, that the party will be estopped from denying any knowledge of his rights." Probably the language of Lord Campbell, in defining what would constitute an estoppel, would be found to furnish a broader and better rule than that which requires positive fraud as one of its essential elements. And the same is approved by the court of Massachusetts; viz., "If a party wilfully make a representation to another, meaning it to be acted upon, and it is so acted upon, that gives rise to what is called an estoppel." "The party setting up such a bar to the reception of the truth must show that there was a wilful intent to make him act on the faith of the representation, and that he did so act." And by "wilfully," as explained in *Freeman v. Cook*, "we must understand, if not that the party represents that to be true which he knows to be untrue, at least that he *means* his representation to be acted upon, and that it is acted upon accordingly."² But a disclaimer of title made to one who was not thereby influenced to rely upon it, and did not actually rely upon it in his acts, in such a manner that it would work a fraud upon him to have it denied or retracted, would not work an estoppel.³ But where one, about to purchase a parcel of land, inquired of B if he had any claim upon it, and he, by forgetfulness and honest mistake, informed the inquirer that he had not, when in fact he had, he was estopped to set

¹ *Beaupland v. McKeen*, 28 Penn. St. 124; *Robinson v. Justice*, 2 Penn. 22; *Morris Canal v. Lewis*, 1 Beasley, 332; *Knouff v. Thompson*, 16 Penn. St. 361; *Waters' Appeal*, 35 Penn. St. 526; *Freeman v. Cooke*, 2 Exch. 663; *Cornish v. Abington*, 4 Hurls. & N. 549; *Jewett v. Miller*, 10 N. Y. 406; *McCune v. McMichael*, 29 Ga. 312; *Tilton v. Nelson*, 27 Barb. 595; *Blackwood v. Jones*, 4 Jones, Eq. 56; *Newman v. Edwards*, 34 Penn. St. 34; *Snodgrass v. Ricketts*, 13 Cal. 362; *Barnes v. McKay*, 7 Ind. 301.

² *Howard v. Hudson*, 2 E. & Black. 10; *Andrews v. Lyons*, 11 Allen, 349; note to Am. ed. 2 E. & Black. 13.

³ *Mahoney v. Van Winkle*, 21 Cal. 580; *Carpentier v. Thirston*, 24 Cal. 283. See also *Davis v. Davis*, 26 Cal. 38-44.

it up against this purchaser who had acted upon the faith of his representation.¹ So if one holding a mortgage upon land actively induce a person to purchase it of the mortgagor, without disclosing his mortgage, he would be estopped to claim under it.² And where a husband and wife were tenants by entirety, and, after his death, the estate was sold, and the widow, ignorant of her rights as survivor, and in good faith, encouraged a purchaser to bid for and take a deed of it, she and her heirs were held to be estopped thereby to set up a claim to the estate.³ In order, however, to work an estoppel *in pais*, the acts and declarations relied on must have been accompanied with an intention and design that they should be acted upon by the party who sets up the estoppel, and he must have acted upon them accordingly.⁴ Silence alone would not have that effect, unless it were in itself fraudulent.⁵ As, for example, he, knowing his title, should wilfully conceal it, and allow an innocent party to go on and be misled by his silent acquiescence.⁶ But if the party purchasing, in such a case, were cognizant of the facts, he could not avail himself of his ignorance, or mistake in respect to their legal effect.⁷ As a general thing, courts of equity never grant relief upon the sole ground of a mistake in law.⁸ The principles applicable to cases of estoppel *in pais*, as affecting the title to real property, can, however, be better illustrated by a reference to some of the cases in which analogous questions have been raised, than by general rules and propositions. In that of *Tilton v. Nelson*, a husband and wife, having mortgaged an

¹ *Beardsley v. Foot*, 14 Ohio St. 416, and cases cited on p. 417.

² *Bigelow v. Foss*, 59 Me. 162.

³ *Maple v. Kussart*, 53 Penn. St. 352.

⁴ *Turner v. Coffin*, 12 Allen, 401; *Andrews v. Lyons*, 11 Allen, 350; *Plumer v. Lord*, 9 Allen, 457, 458; *Brown v. Bowen*, 30 N. Y. 541; *Plumb v. Cattaraugus Ins. Co.*, 18 N. Y. 392; *Russell v. Maloney*, 39 Vt. 584.

⁵ *Maple v. Kussart*, 53 Penn. St. 352.

⁶ *Odlin v. Gove*, 41 N. H. 473; *ante*, pl. 9 a

⁷ *Tilton v. Nelson*, 27 Barb. 595; *Storrs v. Barker*, 6 Johns. Ch. 166, 170; *Hobbs v. Norton*, 1 Vern. 136; *Hunsden v. Cheyney*, 2 Vern. 150; *Raw v. Pote*, 2 Vern. 239; *Wood v. Griffin*, 46 N. H. 237; *Drew v. Kimball*, 43 N. H. 282. See *Jordan v. Stevens*, 51 Me. 84, where one was allowed to avail herself of ignorance of her legal rights.

⁸ *Jacobs v. Moronge*, 47 N. Y. 57.

estate to loan commissioners, with a power of sale, the husband applied to them to make sale of the same, and induced the officers of a bank, who held a judgment against him, to purchase the mortgaged estate for the purpose of satisfying their debt, which they did, and the bank afterwards sold the estate in parcels. The sale was for some reason irregular on the part of the commissioners, and the title defective; and, after the husband's death, his heir-at-law attempted to recover the land on that ground. But it appearing that the father knew the facts, though not their legal effect, and had induced the bank to purchase the estate as if the title were a valid one, the court held that he and all privy in estate with him were estopped to set up an adverse title. In *Storrs v. Barker*, the plaintiff's daughter, whose heir he was, made a will while *covert*, devising her real estate to her husband. The husband offered the land for sale; and the father, supposing the will to be valid, advised the defendant to purchase it, stating at the same time that he had no claim to it. Soon after the purchase, the plaintiff ascertained that the devise, being that of a *feme covert*, was void, and claimed the estate. But the court held that he was estopped to set up a title against one whom he had thus misled as to the true state of the title. So where a mortgage was made conditioned to support the mortgagee and his wife during their lives. The mortgagee having died, the mortgagor offered the estate for sale as free of incumbrance. The widow of the mortgagee took part in the negotiation, and advised to the purchase, but said nothing of having any claim upon it. It was held to estop her and the administrator of the mortgagee from enforcing the mortgage.¹ In *Hunsden v. Cheyney*, a son settled upon his wife, at marriage, a term in the presence of his mother, stating to her that the same was to come to him at his mother's death. This, though done in his mother's presence and hearing, and she was witness to the deed, was not denied by her, and she did not then know that she had a claim to the term as a tenant in tail. And it was held that she was thereby estopped to set up any greater estate in the

¹ *Bigelow v. Foss*, 59 Me. 162.

term than one for her own life. In *Blackwood v. Jones*, one having a claim upon land was present at the sale, and, to an inquiry, stated that his claim had been settled. He was held to be estopped to set up the same against the purchaser. And in *Snodgrass v. Ricketts*, the true owner was held to be estopped, where a sale was made by another in his presence, and the purchaser was instigated by the one who had the title to buy the land. In *Beaupland v. McKeen*, one who had been employed to purchase land for another, who bought and paid for the same upon the faith that he had obtained thereby a good title, was estopped to set up a pre-existing adverse title, which he had purchased after the purchase made by the tenant.

9 c. Numerous questions have arisen between parties owning adjoining lands from fixing the dividing-lines between them, or constructing division-fences separating them, wherein it has been attempted to apply the doctrine of estoppel, excluding the right to change these, if afterwards found not to conform to the true division-lines. Many of these cases will be found collected in 2 *Smith's Leading Cases* (5th Am. edition, p. 649). But the decisions have been so variant, that a few of them ought properly to be mentioned before attempting to deduce any rule applicable to such cases. In *Commonwealth v. Pejepscut Proprietors*,¹ a resolve of the legislature, establishing the bounds of the lands of the State, estopped the latter from denying they were the true bounds. In *Lavery v. Moore*,² two adjoining owners of land covered with water, which they were about to fill, agreed upon a line between them, and one of them went on and filled his part up to the line agreed upon. The other having claimed beyond this line, the court held he was estopped to deny that the line agreed upon was the true one, it having been settled by the acts and acquiescence of the respective owners on each side. It will be remarked, that the act of filling, in this case, had greatly enhanced the original value of the land at the expense of him who made it. On the other hand, there is a class of cases, where, as in *Tolman v. Sparhawk*, above cited,

¹ 10 Mass. 155.

² 32 Barb. 347, 351.

it has been held that a line agreed upon, or a division-fence constructed by parties, if the same were done under a mistake, and the true line were afterwards to be ascertained, might be corrected.¹ But a different doctrine was held in Iowa, where the parties had, by mistake, occupied up to a dividing-fence, on each side, for the period of limitation. The mutual mistake would not affect the rights of the parties arising from adverse possession.² So, in *Brewer v. Boston and Worcester Railroad*,³ the parties, intending to establish the true division-line between them, fixed the bounds indicating this line, and occupied their lands accordingly for more than twenty years. When the tenant, who had purchased of the original owner upon one side of the line, was about to make the purchase, he inquired of the other owner as to the land, and was told by the latter that he did not own beyond the line above mentioned. The tenant thereupon purchased and entered upon the land, filled it up, erected fences and buildings upon it, in the presence of the other owner, who frequently pointed out the line, and never objected to the acts of the tenant, nor gave him any notice that he claimed the land. It was afterwards, by the decision of another case, ascertained that the line agreed upon and occupied was not the true line; and the party who had agreed to it brought an action against the tenant to recover the strip of land between the true and agreed line. And the court held that he was not estopped by these several transactions, because the line was agreed upon in good faith, under a mistake of facts, and it was now ascertained where the true line was. The party made no declaration contrary to his honest belief at the time, or with any intention to deceive the tenant. The court, moreover, state this broad proposition, which certainly is apparently at variance with more than one of the propositions contained in what has already been said: "A party is not to be estopped to prove a legal title to his estate by any misrepresentation of

¹ Prop. *Liverpool Wharf v. Prescott*, 7 Allen, 494; *Thayer v. Bacon*, 3 Allen, 163; *Coon v. Smith*, 29 N. Y. 392; *Baldwin v. Brown*, 16 N. Y. 359; *Russell v. Maloney*, 39 Verm. 580.

² *Burdick v. Heivley*, 23 Iowa, 515.

³ *Brewer v. Bos. & Wor. R. R.*, 5 Met. 478. See also *Cook v. Babcock*, 11 Cush. 210. But see *Blair v. Smith*, 16 Mo. 281.

its locality, made by mistake, without fraud or intentional deception, although another party may be induced thereby to purchase an adjoining lot, the title to which may prove defective." Whether the doctrine above stated can be reconciled to rules and dicta which are found in the cases before cited, or some of those hereafter mentioned, it is well to discriminate between cases like that of *Brewer v. Boston and Worcester Railroad*, and another class which have arisen in the same court, and might, at first thought, mislead the inquirer. If, for instance, the line between two adjacent owners be in dispute, and the parties refer to arbitrators to determine the same, who hear and award upon the subject, the several owners will be bound to conform to such award.¹ But while the award of arbitrators as to such line would be binding upon the parties to it, no award as to the *title* to any part of such lands would be binding.² A mere agreement, though a mutual one, to employ a common agent to run a line and set up the bounds between two proprietors, would not estop either party from showing an error or mistake in this line.³ So where the deeds of the parties called for certain monuments not then in existence, or a certain line which had not been run out on the surface of the earth, and the parties came together and fixed the monuments, or agreed upon where the line should run, they would, if it was followed by occupation, be bound by their agreement, and estopped from claiming another. The distinction between these classes of cases is, that, in the one, the parties, by mistake, agree upon a line where their mistake can be corrected, and the true line ascertained: in the other, they simply make that certain which had never before been determined. Thus, in *Kellogg v. Smith*, the deed referred to a certain line not ascertainable by existing bounds or known monuments. The adjoining owners agreed that certain existing marks or monuments should indi-

¹ *Goodridge v. Dustin*, 5 Met. 363. See *Whitney v. Holmes*, 15 Mass. 152; *Kellogg v. Smith*, 7 Cush. 381; *Davis v. Townshend*, 10 Barb. 333; *Vosburgh v. Teator*, 32 N. Y. 561.

² *Vosburgh v. Teator*, 32 N. Y. 567; *Jackson v. Dysling*, 2 Cain. R. 198; *Robertson v. McNiel*, 12 Wend. 578; *Terry v. Chandler*, 16 N. Y. 356.

³ *Thayer v. Bacon*, 3 Allen, 164; *Russell v. Maloney*, 39 Verm. 580; *Doe v. McCullough*, 1 Kerr (N. B.), 466; *Vosburgh v. Teator*, 32 N. Y. 561.

cate where the line was; and, after that, occupied each to that line for a considerable length of time. The court held the parties bound and estopped by this as the true line. Among the cases referred to by the court was a class where the parties, in fixing the *location* of their lands, agreed upon a certain line between them. This, if followed by an occupancy, was held to bind them by such agreement, if the line they had thus fixed had previously been ambiguous and uncertain.¹ Thus where two purchasers of a lot employed a surveyor to divide it and fix the line between the divisions, and one of them thereupon went on and erected a house, and, in so doing, occupied up to the line thus fixed, and continued to do so for a period less than that of limitation, it was held that the other owner was estopped to object that the line ought to be a few inches from the one run, and thereby to cut off that width from the house.² In another, the parties settled a disputed line by agreement, and occupied under it, and it was held to estop them.³ But this seems to imply that there is no satisfactory mode of determining what the true line is; and if, under such circumstances, the parties agree upon one, and mutually enter upon the occupancy of their lands in conformity to this, they thereby make that the line by which they are mutually to be bound as the true one.⁴ In Massachusetts, the court have held that a party who should agree upon a line by mistake would not be estopped to claim up to the true line, although the other party may, in the mean time, have erected buildings or incurred other expense upon the land which he claims;⁵ while in New York,

¹ *Adams v. Rockwell*, 16 Wend. 285; s. c. 7 Cow. 761; *Jackson v. Ogden*, 7 Johns. 238; *Dibble v. Rogers*, 18 Wend. 536; *Chew v. Morton*, 10 Watts, 321; *Gray v. Berry*, 9 N. H. 473; *Orr v. Hadley*, 36 N. H. 575, 578, 579; *Lindsay v. Springer*, 4 Harring. 547; *Rockwell v. Adams*, 6 Wend. 467. See *Jackson v. Van Corlaer*, 11 Johns. 123; *Jackson v. Murray*, 7 Johns. 5; *Terry v. Chandler*, 16 N. Y. 355; *Daggett v. Willey*, 6 Flor. 482, 507.

² *Joyce v. Williams*, 26 Mich. 332; *Smith v. Hamilton*, 20 Mich. 438.

³ *Kip v. Norton*, 12 Wend. 127; *Houston v. Sneed*, 15 Texas, 307; *Davis v. Townshend*, 10 Barb. 333; *Knowles v. Toothaker*, 58 Me. 174.

⁴ *Sneed v. Osborn*, 25 Cal. 624, 630; *Blair v. Smith*, 16 Mo. 279; *Russell v. Maloney*, *sup.*

⁵ *Proprietors, &c. v. Prescott*, 7 Allen, 496. See *Knowlton v. Smith*, 36 Mo. 507. *Terry v. Chandler*, 16 N. Y. 354; *Vosburgh v. Teator*, 32 N. Y. 561.

under like circumstances, it was held that it would work an estoppel, if the party making the improvements would otherwise lose the benefit of the same.¹ In another, such an agreement was held to be only *prima facie* evidence of what was the true line, but not conclusive.² The law, as stated in a later case in New York on this subject, is, if adjacent proprietors fix a boundary-line between them, in which they both acquiesce, and to which they occupy for a long period, "rarely less than twenty years," it is held to be of such a conclusive nature, that either party is precluded from offering any evidence to the contrary. "Unless their acquiescence has continued for a sufficient length of time to become thus conclusive, it is of no importance."³ And in another it was held, that if, after such agreement, one of the parties were to see a third party take a conveyance of the adjacent land for a valuable consideration according to the monuments agreed upon, he would be estopped to claim adversely to such monument.⁴ While, in another case, the court laid down the doctrine broadly, that "an admission by a party of a mistaken line for the true one has no legal effect upon his title."⁵ In the case of *Adams v. Rockwell*, above cited, an element of estoppel was recognized as applicable to cases where the line had been agreed upon by mistake, and could be ascertained, and that was in the words of the head-note: "If, during such acquiescence, expensive improvements, by the erection of buildings or otherwise, had been made by the occupant of the premises in dispute, the owner would have been estopped from setting up the true line." So that, if this be law, it is not the agreement of the parties, nor the occupying under it, nor the good faith with which this was done, but the amount of money, whether much or little, which the tenant may have expended upon the land.

10. If one enters upon land under an executory contract with another, he will be estopped to deny the title of the

¹ *Corkhill v. Landers*, 44 Barb. 228.

² *Gove v. Richardson*, 4 Me. 327.

³ *Reed v. Farr*, 35 N. Y. 117, affirming *Baldwin v. Brown*, 16 N. Y. 359. See *Doe v. McCullough*, 1 Kerr (N. B.), 460; *Sneed v. Osborn*, 25 Cal. 626; *Boyd v. Graves*, 4 Wheat. 517; *Prop. Liverpool Wharf v. Prescott*, 7 Allen, 496; *Reed v. McCourt*, 41 N. Y. 441.

⁴ *Colby v. Norton*, 19 Me. 412.

⁵ *Crowell v. Bebee*, 10 Verm. 33.

latter, as it would be a violation of good faith to obtain possession under such an agreement, and then to deny the right of the other party to reclaim the possession, or the fruits of the contract.¹

[*463] * These cases will serve to indicate the rules adopted by the courts in applying the doctrine of estoppel *in pais* to questions of title to lands, each case depending somewhat upon its own circumstances; whereas, in respect to estoppels by deed, it will be found that a system of rules, much more uniform and defined, have become the policy of the law in determining the titles of conflicting claimants to lands.

11. In treating of estoppels by deed, it will be necessary to consider the distinction between indentures and deeds-poll, and, further, the distinction between such deeds-poll as do, and such as do not, contain covenants of title in respect to the estate granted or released thereby. But it will not be attempted to discriminate between what is to be regarded as a rebutter and the more general doctrine of estoppel. It should be borne in mind, moreover, in treating of this subject, that, in creating estoppel by deed, the deed, unless thus aided, would be of no avail, by reason of the state of facts being other than what they are assumed to be by the instrument itself, and which, if true, would have given effect to the deed by its own intrinsic virtue. Thus, if, for a valuable consideration, A makes a deed to B, wherein he assumes to convey a specific parcel of land, he thereby asserts that he is the owner of it, and that a title to the same thereby passes to B. And yet, if he has no title, nothing in fact passes by the deed. But if he shall, soon after this, become the owner of this land, and the purchaser insists upon claiming it, it would not be open to him to deny such claim, after having thus taken the grantee's money, and having solemnly declared that he was and should be the owner of the land.² So one is estopped to claim that he owned a less interest than the deed he gives purports to convey.³ Again: it should be

¹ *Million v. Riley*, 1 Dana, 359; *Harle v. McCoy*, 7 J. J. Marsh. 318; *Winlock v. Hardy*, 4 Lit. 272; *Moore v. Farrow*, 3 A. K. Marsh. 41.

² *Clark v. Baker*, 14 Cal. 629; *post*, *477.

³ *Smitl v. Moodus Water Co.*, 35 Conn. 400.

remembered that an estoppel by deed is always applied in some action or proceeding based on the deed, in which the fact in question is recited. In a collateral action there can be no estoppel,¹ nor will estoppels by deed avail in favor of any but the parties and their privies.²

12. It is laid down generally, in Sheppard's Touchstone, that an indented deed works an estoppel, that is, "doth bar and conclude either party, his heirs, and all persons claiming under or through him, except heirs *in tail*, &c., to say or accept any thing against any thing contained in it." In case of a lease by indenture, "both parties are estopped to say the lessor had nothing in the land at the time of the lease made; so that, if the lessor happen to have the land thereafter by purchase or descent, the lessee may, during the term, enter upon him by way of conclusion." If the lease, however, pass any interest, it will not operate beyond that as an estoppel. On the other hand, a deed-poll binds only the feoffor, lessor, &c.; and it would seem that a lessor by a deed-poll would be as much bound on his part as if the instrument were an indenture.³ But if one is induced by fraud to accept an indenture of land, he may, as tenant, deny that the other party has any title.⁴ And though, if a man take a lease for years, by indenture, of his own land, he would, during the term, be estopped to deny the lessor's title; the estoppel would continue only during the term. It would determine with the lease.⁵ And whether the deed be indented or poll in form, if there are therein reciprocal obligations from one to another, and it is executed by both, it is binding on both parties.⁶

¹ Carter v. Carter, 3 Kay & J. 645.

² Carpenter v. Buller, 8 M. & W. 212; McFarland v. Goodman, 22 Am. L. Reg. 703. Nor can a deed create an estoppel unless it had been delivered. Nourse v. Nourse, 116 Mass. 104.

³ Shep. Touch. Prest. ed. 53, and note; Hermitage v. Tomkins, 1 Ld. Raym 729; 2 Prest. Abst. 210; Bac. Abr. Leases, O.; Com. Dig. Estoppel, E. 8; Jackson v. Murray, 12 Johns. 204; Jackson v. Bull, 1 Johns. Cas. 90; Rawle, Cov. 3d ed. 402; Co. Lit. 47 b; Webb v. Austin, 7 M. & G. 724; Beaupland v. McKeen, 28 Penn. St. 132; Cuthbertson v. Irving, 4 H. & N. 742, 754.

⁴ Alderson v. Miller, 15 Gratt. 279; Jackson v. Ayers, 14 Johns. 224.

⁵ Rawlins' case, 4 Rep. 54; Taylor, L. & Ten. §§ 88, 89, 3d ed.; Doe v. Seaton, 2 Crompt., M. & R. 730; Doe v. Barton, 11 A. & E. 307; ante, vol. 1, p. *367.

⁶ Shep. Touch. Prest. ed. 53.

Thus there is no estoppel upon a grantee to deny a [*464] grantor's title where the grant is of a fee, * as there would be in the case of a lease by indenture, which depends upon the obligation which the lessee is under to return the land and surrender the possession ;¹ though, if the lease be by deed-poll, the lessee might deny the lessor's title.² Wherever there is this obligation to restore possession to the lessor, the tenant is estopped to deny the title of him under whom he enters.³ But a grantor by deed-poll, as well as indenture, is estopped to deny the title of his grantee by setting up any claim which existed in his favor at the time of the grant.⁴ A man would be estopped by his deed to deny that he granted the estate thereby in terms conveyed, or that he had good title to the same ; but he would not be bound by the recital in his deed as to the amount paid for the consideration of the conveyance.⁵

13. It is laid down in a work of high authority, that in New York, and some other of the States, the acceptance of a grant is held to be a conclusive admission of the grantor's title ;⁶ but that there is no general or inflexible principle which precludes the grantee of land from showing, either that the grantor had no title, or none which was capable of passing by the grant. It is also stated to be now well settled, that a mere acceptance of a conveyance does not estop the grantee from showing that the grantor had no estate in the land conveyed.⁷ By accepting a deed, the grantee or

¹ *Osterhout v. Shoemaker*, 3 Hill, 513 ; *Rawle, Cov.* 3d ed. 403, note ; *Ham v. Ham*, 14 Me. 351 ; *Watkins v. Holman*, 16 Pet. 25, 53 ; *Small v. Proctor*, 15 Mass. 495 ; *Blight's Lessee v. Rochester*, 7 Wheat. 548 ; but see *Clee v. Seaman*, 21 Mich. 287.

² *Bac. Abr. Leases, O.* ; *Co. Lit.* 47 b ; *Gaunt v. Wainman*, 3 Bing. N. C. 69.

³ *Miller v. Shackelford*, 4 Dana, 286 ; *Bac. Abr. Leases, O.* ; *Great Falls Co. v. Worster*, 15 N. H. 412, 450.

⁴ *Currier v. Earl*, 13 Me. 216 ; *Wilkinson v. Scott*, 17 Mass. 249, 257 ; *Comstock v. Smith*, 13 Pick. 116.

⁵ *Wilkinson v. Scott*, 17 Mass. 257 ; *Fairley v. Fairley*, 34 Miss. 18.

⁶ *Cruger v. Daniel McMullen, Eq.* 157, 8 Cowen, note ; *Bush v. Marshall* 6 How. 291 ; *Galloway v. Finley*, 12 Peters, 295.

⁷ 2 *Smith, L. Cas.* 5 Am. ed. 654 ; *Sparrow v. Kingman*, 1 Comst. 242 ; *Averill v. Wilson*, 4 Barb. 180. But see *Woolfolk v. Ashby*, 2 Met. (Ky.) 288, and *post*, p. *467. That it is not an estoppel, see *Blair v. Smith*, 16 Mo. 275, 279 ; *Croxhall v. Sherrerd*, 5 Wall. 287 ; *Blight's Lessee v. Rochester*, 7 Wheat. 548. But see *Clee v. Seaman, sup.*

lessee becomes bound not to deny the effect and provisions of such deed.¹ But where a deed was not delivered in the lifetime of the grantor, but the grantee accepted it after his death, and held the estate it purported to grant, it was held that he was estopped to deny that he held under the deed, or to set up a title by adverse possession against the rights of the remainder-man, granted by the same deed.² But a vendee of land would not be estopped to deny any other title or interest of the vendor, except that which he had by the contract professed to claim; and if the vendor's deed be one of quitclaim only, the vendee, in an action of ejectment by the vendor, may deny his title.³ Thus it is never permitted to a person to accept a deed with covenants of seisin, and then turn around upon his grantor and allege that his covenant is broken, because he, the grantee, was himself seised of the premises at the time of the making of the deed.⁴ So where one, who owns land adjacent to that of another, purchases of the latter a parcel bounding by his own, and the line is definitely described in the deed, he and his successors would be estopped to claim that he was, when he took his deed, holding adversely any part of the land beyond the boundary-line thus described.⁵ But a grantor may disseise his grantee; and if he does so, he would not be estopped by his deed to claim title against his grantee by adverse possession as such disseisor to the land which he had formerly conveyed.⁶

14. Some forms of conveyance operate as an estoppel against those who make them, from their very nature, as is the case with a feofment. Others, as is the case with a simple release, have no effect beyond passing or extinguishing whatever interest the releasor has at the time. Others operate by way of estoppel, by reason of the covenants as to title they contain: and it may be stated as a general proposition, that a party to a deed is estopped to deny any thing stated in the

¹ *Shep. Touch. Prest. ed. 53*; *Comstock v. Smith*, 13 Pick. 116, 121.

² *Ford v. Flint*, 40 Vt. 382; *Clee v. Seaman*, 21 Mich. 297.

³ *Clee v. Seaman*, 21 Mich. 287.

⁴ *Fitch v. Baldwin*, 17 Johns. 161. See *Smith v. Strong*, 14 Pick. 128.

⁵ *Hodges v. Eddy*, 38 Vt. 349; *Root v. Crock*, 7 Penn. St. 378.

⁶ *Franklin v. Dorland*, 28 Cal. 180; *Hines v. Robinson*, 57 Me. 331; *Traip v. Traip*, 57 Me. 268

deed which has operated upon the other party as the inducement to accept and act under such deed; and this extends to facts stated in other deeds referred to directly, or by way of recital. Thus a feofment by a person who is not the owner of lands, passes, of necessity, a fee by wrong or disseisin. It

binds the feoffor for life by estoppel, so that he can- [*465] not claim * the right, should it descend to him, against his own feoffee. He cannot purchase the fee, since his feofment is a disseisin. But it is an estoppel only to him personally, and will not bind his heirs. Lord Coke says there is a diversity between a feofment and a warranty. A feofment is good against the feoffor, but not against his heirs; a warranty is good against one and his heirs. As far as the heir claims as heir, he may be barred by force of the warranty as a rebutter, though not bound by the feofment.¹ Thus, if an heir apparent makes a feofment, in the life of his ancestor, of land which afterwards descends to him, he will be estopped to set up a title against his feoffee.²

15. There are various reasons why a deed of simple release passes only such interest or estate as the releasor has at the time, and never operates by way of estoppel to convey any interest which he may afterwards acquire. In order to prevent maintenance and the multiplying of contentions, as stated by Lord Coke, it was an established maxim of the common law, that no *possibility*, right, title, or any other thing, that was not in possession or *vested in right*, could be granted or assigned to strangers.³ Thus a simple release by an heir apparent of his chance of succession, though made by deed, will not bar his title when it accrues.⁴ So one who has a contingent remainder, an interest by way of executory devise, or a possibility like that of an heir apparent, even though he may not at common law make a grant of such an interest by deed so as to pass the same distinctly, may convey the estate out of which his interest is to arise, in such a manner that this will operate as an estoppel, and prevent his claiming such interest when it arises.⁵ Thus equity holds a contract of an

¹ 2 Prest. Abst. 212; Burt. Real Prop. § 83; Co. Lit. 265 a.

² 2 Prest. Abst. 408, 409.

³ Co. Lit. 265 a, note 212.

⁴ 1 Prest. Abst. 302; 2 Prest. Conv. 268.

⁵ *Ante*, *238, *367.

expectant heir, who becomes heir *de facto*, binding on him, though equity does not extend this to his heir.¹ Many of the cases on this * point are collected by Putnam, J., [*466] in his opinion in *White v. Patten*, in which case there was a conveyance with covenants of warranty; from which it would seem, that, in order to work an estoppel in such cases as those supposed above, there must be either a grant or release with a general covenant of warranty, or an express affirmation in the grantor's deed of there being an estate such as he assumes to convey.² And if the grantor convey by deed all his right and interest in the granted premises, he would not be estopped to claim against his grantee under a newly acquired title, although his deed were to contain a general covenant of warranty.³

16. Thus, it is said, a mere deed of grant with or without an indenture does not, in a court of law, work an estoppel, whether operating as a grant, a release, or a confirmation; and if an heir apparent were to grant *his interest*, it would not have any effect at law, though he should afterwards become actually seised.⁴ But a fine levied by an heir binds his estate afterwards acquired by descent.⁵ So where a testator was disseised and died, having by his will made two of his sons executors, with power to sell his lands. They did so as executors, and afterwards, together with the other heirs, brought ejectment against the purchaser, on the ground, that, the testator having been disseised, nothing passed by their deed. But the court held that they were estopped to deny the effect of their deed by claiming the land themselves.⁶ A husband, entitled as such to an estate for life, conveyed the estate in trust for his wife, in order to avoid his creditors; covenanting

¹ 2 Prest. Abst. 210; 2 Prest. Conv. 268, 271; *Hayne v. Maltby*, 3 T. R. 488; *Weale v. Lower*, Pollexf. 54, where the conveyance was by fine; *ante*, pp. *341, *357; *Purefoy v. Rogers*, 2 Saund. 388 d; *Fitch v. Fitch*, 8 Pick. 483; *ante*, pp. *237, *367; *Watk. Conv.* 199, *Coventry's note*; *Stover v. Eycleshimer*, 46 Barb. 84.

² *White v. Patten*, 24 Pick. 324-328; *Wight v. Sitaw*, 5 Cush. 56, 63.

³ *Hope v. Stone*, 10 Min. 152. See opinion of Grover, J., *Moore v. Littell*, 41 N. Y. 97.

⁴ 2 Prest. Abst. 410; *Clark v. Baker*, 14 Cal. 612, 627, 629.

⁵ *Helps v. Hereford*, 2 B. & Ald. 242. ⁶ *Poor v. Robinson*, 10 Mass. 136

against the claims of all persons claiming under him. He then went into insolvency, and his assignee sold the estate, on the ground that his former deed was void as against creditors; and the husband himself purchased it. But it was held that he was estopped by his former deed to set up a title against his grantee. The defect in the title was like an incumbrance created by himself, against which he had covenanted, and by removing it he had done no more than he had by his covenant engaged to do.¹

17. And no title not *in esse* will pass by deed unless this contains a warranty, in which case it operates as an estoppel as to such future title.²

18. It is further held that the words "granted, bargained, sold, and released," in a deed, do not amount to an estoppel as to any future estate, nor do any of the deeds which take effect by virtue of the statute of uses.³

19. Though in one sense a deed of acquittance or release may be said to be an estoppel, as it is a valid and final bar to all existing claims, and all the possibilities arising from previous contracts of which it imports a relinquishment, it cannot affect rights of which the foundation is laid afterwards.⁴ Thus, where one who was entitled to a contingent remainder conveyed the same, and afterwards the estate became vested, if the conveyance was by a quitclaim, his deed was no bar to his claiming the estate, if, with covenants of warranty, he was estopped to claim it. The contingency in this case, it may be remarked, consisted in the grantor's taking as the oldest surviving son at the death of his father.⁵ So where a deed was to one for life, with a remainder to his heirs in fee-

¹ *Gibbs v. Thayer*, 6 Cush. 30, 34.

² *Jackson v. Wright*, 14 Johns. 193; *Dart v. Dart*, 7 Conn. 250; 2 Smith, Lead. Cas. 5th Am. ed. 624; *Somes v. Skinner*, 3 Pick. 52, 61; *Blanchard v. Brooks*, 12 Pick. 47.

³ Burt. Real Prop. § 593, note; Wms. Real Prop. 329, note; *Jackson v. Wright*, 14 Johns. 193; *Jackson v. Brinckerhoff*, 3 Johns. Cas. 101; Rawle, Cov. 3d ed. 407; 2 Smith, Lead. Cas., 5th Am. ed. 624; *Brown v. Jackson*, 3 Wheat. 449; *Kimball v. Blaisdell*, 5 N. H. 535; *Clark v. Baker*, *sup.*; *Dart v. Dart*, 7 Conn. 250.

⁴ Burt. Real Prop. § 149; Co. Lit. 265 a; Lit. § 446. See 2 Smith, Lead. Cas. 5th Am. ed. 624; *Bruce v. Luke*, 9 Kans. 201.

⁵ *Robertson v. Wilson*, 38 N. H. 48.

simple. It was held to be a contingent remainder to whoever might be his heirs at his death. One of his sons conveyed his interest with general covenants of warranty; and it was held to pass his interest to his grantee, by estoppel, when the tenant for life died. Another of the sons released and quit-claimed his right in the lifetime of the tenant for life, with covenants of warranty of the premises against the lawful claims of all persons claiming by, through, or under him, but was not thereby estopped to claim the remainder, when the tenant died, against his deed.¹ A *release [*467] of disseisee to a disseisor would be an effectual bar of his claim to the estate.²

20. And it may be laid down as a rule, that a grantor is estopped by his deed to say that he had no interest in the land.³ But to have this effect, the one who is estopped must have joined in the deed as a grantor therein, and must have been, moreover, capable of making a valid deed. Thus, where a husband made a deed, with covenants of warranty of his wife's estate, in which she joined by a clause relinquishing her right of dower, but not by words of grant, it was held that neither she nor her heirs were estopped thereby to claim the land, even at the end of twenty-nine years after making the deed.⁴ And where a deed was made to a *feme covert*, who, at the same time, made a mortgage to secure a part of the purchase-money, it was held to be a void deed of mortgage, since a *feme covert* could not make a deed.⁵

21. But in this respect the estoppel is not reciprocal; for a grantee who holds an *executed* title under a deed may deny his grantor's title in the same manner as he could that of a stranger.⁶ And the doctrine of accepting a deed and taking

¹ Read *v.* Fogg, 60 Me. 479, 481.

² Perkins, § 86; 2 Prest. Conv. 269.

³ By Ashhurst, J., in *Fairtitle v.* Gilbert, 2 T. R. 181; 2 Crabb, Real Prop. § 1048. See 2 Smith, Lead. Cas., 5th Am. ed. 624.

⁴ Raymond *v.* Holden, 2 Cush. 264. See Bruce *v.* Wood, 1 Met. 542; Wight *v.* Shaw, 5 Cush. 66.

⁵ Concord Bank *v.* Bellis, 10 Cush. 276, 278.

⁶ Winlock *v.* Hardy, 4 Litt. 272; Moore *v.* Farrow, 3 A. K. Marsh. 41; Lewis *v.* Baird, 3 McLean, 79; Small *v.* Proctor, 15 Mass. 499; Sparrow *v.* Kingman, 1 Comst. 242; Callender *v.* Woodruff, 11 Ark. 82. See the cases on both sides this question, and comments, in 2 Smith, Lead. Cas., 5th Am. ed. 655, 664; Flagg *v.* Mann, 14 Pick. 482; Gardner *v.* Greene, 5 R. I. 104.

possession under it, operating as an estoppel *in pais*, applies only where there is an obligation on him who accepts it to return the possession, as in the case of lessor and lessee, mortgagor and mortgagee.¹ Thus, in *Flagg v. Mann*, the deed under which the party claimed purported to convey the estate to him and another person; and it was held, that he was not thereby estopped to deny that the title passed to him and the other party as tenants in common. So if a disseisee take a deed from his disseisor, he is not thereby estopped to set up a former and better title.² But in Georgia, in an action of ejectment, it was held, that if the defendant entered under the lessor of the plaintiff, whether by purchase, gift, or lease, or otherwise, he cannot dispute his title.³ So in Kentucky it was held, in an action of ejectment, that a party was estopped to deny the validity of the title of the one under whom he claims.⁴

22. And where, in an action of ejectment, the defendant claimed title under the plaintiff's own deed, the latter was held to be estopped to aver that it did not convey a title.⁵ And where a grantor in a deed to a school district delivered the same to a committee, who gave him their note for the purchase-money, he was estopped to deny their authority to accept it.⁶ So where a grantor conveyed land to the "proprietors" of a church, for the purposes of erecting and maintaining a meeting-house thereon, and owning, managing, and disposing of the pews therein. These were an unorganized association, one of whom was the grantor. It was held that the grantor and his heirs would be estopped to deny the existence of his grantee, the association having gone on and erected the house, and incurred expense in so doing.⁷

23. The distinction should be kept in mind between an estoppel in evidence and an estoppel in point of estate, the application of which will appear by a reference to the following cases. Thus a deed-poll cannot create an estoppel *in point of estate*; but if such a deed recites that A by bond

¹ *Gardner v. Greene*, 5 R. I. 110; *Willison v. Watkins*, 3 Peters, 48.

² *Flagg v. Mann*, 14 Pick. 467, 482.

⁴ *Woolfolk v. Ashby*, 2 Met. (Ky.) 288.

⁶ *Case v. Benedict*, 9 Cush. 540.

³ *Williams v. Cash*, 27 Geo. 512.

⁵ *Cox v. Lacey*, 3 Litt. 334.

⁷ *Osgood v. Abbott*, 58 Me. 78

did so and so, the maker of the deed may not deny that there was such a bond.¹

24. And estoppels by recitals in deeds are, in some respects, as effectual as if they were actual warranties. As where the deed of a grantor recited that certain conveyances had been made to him, he could not afterwards deny that they had been made; nor could one deny this who claimed under such grantor.² It is upon this ground, that if a party convey land, and in his deed describes it as bounded by a street, he would be estopped to deny that such a street existed, or that the grantor might use the same in connection with the land granted.³ But such grantor would not, by such recital, be bound to grade or fit the way for travel.⁴ But in *How v. Alger*, the court rest the decision in the above-cited cases upon the fact that the grantor was, at the time of making his deed, the owner of the adjacent land described as the street or way.⁵

25. Where a party has solemnly admitted a fact by deed under his hand and seal, he is estopped not only from disputing * the deed itself, but every fact which it [*468] recites.⁶ But if a deed be made by several owners of an estate in common, whatever recital as to title it contains estops each grantor as to his own share only, and not as to the title of his co-grantors.⁷ And a stranger to a deed can never set up the recitals therein, by the way of estoppel,

¹ *Shep. Touch. Prest. ed.* 53.

² *Kinsman v. Loomis*, 11 Ohio, 475, 478; 2 *Smith, Lead. Cas.*, 5th Am. ed: 640; *Rangely v. Spring*, 28 Me. 142; *Farrar v. Cooper*, 34 Maine, 401; *Denn v. King, Coxe*, 432; *Doe v. Howell*, 1 *Houst.* 183.

³ *Parker v. Smith*, 17 Mass. 413; *Emerson v. Wiley*, 10 *Pick.* 310; *O'Linda v. Lothrop*, 21 *Pick.* 292; *Tufts v. Charlestown*, 2 *Gray*, 271; *Farnsworth v. Taylor*, 9 *Gray*, 162; *Rodgers v. Parker*, 9 *Gray*, 445; *Vide post*, p. *671; *Thomas v. Poole*, 7 *Gray*, 83; *Loring v. Otis*, 7 *Gray*, 563; *Stetson v. Dow*, 16 *Gray*, 323; *Dawson v. St. Paul's F. & M. I. Co.*, 15 *Minn.* 130; *Cox v. James*, 45 *N. Y.* 562; *Gaw v. Hughes*, 111 *Mass.* 296.

⁴ *Hennesy v. Old Colony R. R.*, 101 *Mass.* 541.

⁵ 4 *Allen*, 210; *Matter of Lewis St.*, 2 *Wend.* 472; *Livingston v. Mayor*, 3 *Wend.* 85; *Bellinger v. Burial Ground Soc.*, 10 *Penn. St.* 137.

⁶ *Stow v. Wyse*, 7 *Conn.* 214; *Green v. Clark*, 13 *Vt.* 158; *Lajoie v. Primm*, 3 *Mo.* 373; *Douglass v. Scott*, 5 *Ohio*, 199; *Van Rensselaer v. Kearney*, 11 *How* 322; *Clark v. Baker*, 14 *Cal.* 629.

⁷ *Sunderlin v. Struthers*, 47 *Penn. St.* 423, 424.

as against a party to the deed.¹ So a mortgagor would be estopped to deny the fact of an entry having been made for condition broken by the mortgagee when he has signed a certificate to that effect on the deed.² But merely suffering the mortgagee to enter and record a certificate of such entry for a breach of the condition does not, after the lapse of three years, estop the mortgagor to deny any breach, and to show that none had been made.³

26. So a party who traces his title through a regularly executed deed of conveyance is concluded by its recitals.⁴

27. The general doctrine as to the effect of recitals and admissions in deeds seems to be well stated thus. As to an admission of a fact, "if made for the purpose of influencing the conduct, or of deriving a benefit to another so that it cannot be denied without a breach of good faith, the law enforces the rule of good morals as a rule of policy, and precludes the party from repudiating his representations, or denying the truth of his admissions."⁵

28. A few cases will serve to illustrate and apply the propositions thus generally stated. In the case of *Stow v. Wyse*,⁶ above cited, one made a deed of land belonging to a corporation, in which he described himself as agent, duly authorized to convey, &c.; although this was not true. After that, he sued and recovered judgment against the company, and levied his execution upon the same land as belonging to the company, and then brought his action to recover the land from the grantee under the deed which he had executed as agent. It was held that he was estopped to deny that he was the authorized agent, and that all persons claiming through or under him were equally estopped.⁷ So where a husband entered upon land as that of his wife, and held the same as tenant by curtesy, and his heirs conveyed the reversion to a third party, who brought waste against the husband, he was

¹ *Allen v. Allen*, 45 Penn. St. 473.

² *Bennett v. Conant*, 10 Cush. 163.

³ *Petee v. Case*, 11 Gray, 478.

⁴ *Scott v. Douglass*, 7 Ohio, 227; *Carver v. Jackson*, 4 Pet. 85; *Douglass v. Scott*, 5 Ohio, 194; *Hall v. Orvis*, 35 Iowa, 366.

⁵ *Douglass v. Scott*, 5 Ohio, 197; *Rawle. Cov.*, 3d. ed. 407; *ante*, pl. 9 b.

⁶ *Stow v. Wyse*, 7 Conn. 214.

⁷ See also *Huntington v. Havens*, 5 Johns. Ch. 23.

estopped to assert that his wife's title was defective, or to set up a title by disseisin against that under which he entered.¹ So where land originally belonging to G. C. became, as was assumed, the property of T. F. by conveyance, who gave G. C. a power of attorney to convey any land then belonging to T. F., and G. C., under that power, and as the attorney of T. F., conveyed the land in question to the tenant, it was held that the heirs of G. C., after his death, were estopped by this sale to set up a claim to the land, on the ground, that, when G. C. made the deed as T. F.'s attorney, T. F. was not the owner of the land, but that the same, in fact, belonged to G. C. The attorney, in such a case, is estopped to dispute the title of his principal, for whom he acts.² There is, however, a marked distinction between general recitals in a deed and the recital of a particular fact: the former, as a general thing, does not conclude a party, while the latter may work an estoppel.³ In *Eveleth v. Crouch, one who [*469] had made a deed of grant with covenants of warranty offered to show that he merely acted for the grantee herself in acquiring and passing the estate. The court refused to allow the evidence, as to admit it would be to permit him directly to contradict his deed.⁴ In Jackson v. Ireland, the plaintiff claimed under a mortgage from John Ireland. The defendant was the mother of John, and claimed a life-estate under the will of her husband and his father, John himself being one of the devisees of the same land. The husband held a contract for the land from the city when he died; but no deed had been delivered, and, after his death, the city made a deed to his widow and devisees, and under this deed John claimed his title. In this deed of the city, it was recited in the *habendum*, to hold, &c., "in the manner mentioned in the said last will and testament of (the father) deceased." It was held that the mortgagees of John, claiming under him,

¹ Morgan v. Larned, 10 Met. 53.

² Harney v. Morton, 36 Miss. 411.

³ Huntington v. Havens, 5 Johns. Ch. 23; Co. Lit. 352 b; Shelley v. Wright, Willes, 9; Norton v. Saunders, 7 J. J. Marsh. 14; Hays v. Askew, 5 Jones, Law 68.

⁴ Eveleth v. Crouch, 15 Mass. 307, 309.

were estopped by the recital in his deed from the city, and could not claim adversely to the widow.¹

29. And it is stated generally that a recital in a will operates as an estoppel to parties claiming under it.²

30. The whole law, as to the effect of recitals in deeds in the matter of estoppel, is considered in the case of *Douglass v. Scott*, which can only be understood by a full statement of the circumstances which raised the question. One Massie made a deed to the heirs of one Montgomery, who had entered under an agreement for a deed, and died in possession of the land. The heirs conveyed to Kerr by deed in usual form, with warranty, reciting the patent to Massie, and Massie's deed to them; and Kerr entered under this deed. Massie never had received his patent; and having died, it now was for the first time issued to his heirs. Douglass, prior to 1816, obtained a judgment and creditor's lien on the land against

Kerr, which was kept alive; and he sold the land in [*470] 1821, and acquired a title under this * sale. In 1816,

Kerr mortgaged the estate, and in his deed recited the title by patent in Massie, the sale by Massie to the Montgomery heirs, and their conveyance to him, Kerr. The land was sold under this mortgage, and purchased by Scott, in 1823; and Kerr released to him, as did the trustees of the heirs of Massie, to whom the patent had issued. It turned out, moreover, that the deed from Massie to the Montgomery heirs was invalid for want of proper attestation. Under these circumstances, Douglass brought a bill in equity to quiet his title. The court say: "The obligation created by estoppel not only binds the party making it, but all persons privy to him,—the legal representatives of the party,—those who stand in his situation by act of law, and all who take his estate by contract entered into in his stead, are subjected to all the consequences which accrue to him. It adheres to the land; is transmitted with the estate; it becomes a muniment of title; and all who afterwards acquire the title take it

¹ *Jackson v. Ireland*, 3 Wend. 99; *Tartar v. Hall*, 3 Cal. 263. The rule does not extend to that which is mere descriptive, or an averment which is not essential. *Osborne v. Endicott*, 6 Cal. 153.

² *Denn v. Cornell*, 3 Johns. Cas. 174.

subject to the burden which the existence of the fact imposes on it." They therefore held, in the first place, that Douglass acquired the legal title of Kerr by the sale under the judgment. In the next place, they held that the recital in Kerr's deed from Montgomery's heirs, that Massie had received a patent and had conveyed the estate to them, was one upon which he, Kerr, had a right to hold them bound, as an admission of the fact by which, as a party to the deed, he was himself bound; and that Kerr's assignee, claiming under him, was alike concluded: that the land was patented to Massie, and conveyed by him to the Montgomery heirs, was proved by their admission while they were owners and were disposing of the estate, "upon which all persons deriving title under them have a right to rely, and which conclude all persons to whom their estate is transmitted;" and "that neither party, deriving title through this deed, is at liberty to question these facts." They accordingly held that Douglass had the better title.¹

* 31. It is probably upon this principle, of one being [*471] estopped by any representation deliberately made by him in his deed, that a grantor has not been admitted to controvert the fact that he owned an interest in the estate which he had thereby granted, in order to set up a claim thereto adverse to the title of his grantee, where the grant is of land or an estate, and not a mere release of his interest or title to the same.² Thus, in *Jackson v. Murray*, the court say: "Russell" (the grantor having no good title, though he had a contract for one) "cannot be allowed to say that his deed to Beach conveyed no interest."³ And in *Jackson v. Bull* it was held, that "a man shall never be permitted to claim in

¹ *Douglass v. Scott*, 5 Ohio, 197. See also *M'Cleskey v. Leadbetter*, 1 Ga. 551; *Denn v. Brewer, Coxe*, 172; *Denn v. King*, Id. 432; *Kinsman v. Loomis*, 11 Ohio, 475.

² By statute in California, one who conveys an estate in fee-simple absolute without having title, and afterwards acquires one, the same enures to the benefit of his grantee; otherwise, if his deed be a quitclaim. *Morrison v. Wilson*, 30 Cal. 347.

³ *Jackson v. Murray*, 12 Johns. 201. See *Pike v. Galvin*, 29 Me. 183; 4 Kent, Com. 261, n.; 2 Smith, Lead. Cas. 5th Am. ed. 637; See *Doe v. Dowdall*, 8 Houst. 380, citing *Fairbanks v. Williamson*, 7 Me. 96, and holding it better law than *Pike v. Galvin*.

opposition to his deed by alleging he had no estate in the premises.”¹ It will be observed, there is no reference made in these cases to any existing covenants for title. So in *M’Williams v. Nisly et als.*, the plaintiff’s ancestor conveyed the premises to the grantor of the tenant. The ground of the plaintiff’s claim was, that when their ancestor conveyed the land he had no title to it, but acquired one subsequently, in his lifetime, which had descended to them. Tilghman, C. J., says: “Can his heirs recover against his grantees? It appears to me, that in such case they would be estopped by their father’s deed from denying his title; and if there were occasion for further assurance, equity would compel them to make it.” How far this equitable consideration had effect in determining the question does not appear. But in the same case, Gibson, J., says: “So, in equity, a grantor conveying lands for which he has no title at the time shall be considered trustee for the grantee, in case, at any time afterwards, he should acquire title.” — “Chancery would compel them (the plaintiffs) to convey to the defendants.”²

[*472] *32. The doctrine, as stated by C. J. Tilghman, is recognized and declared in *Reeder v. Craig*. “If a man sell lands to which he has no title, and afterwards acquire a title, he is estopped by his first deed to say he had *no* title at the time of sale.”³ This subject is discussed with much discrimination by Field, C. J., in the case of *Clark v. Baker*, where Clark conveyed an estate to Baker, and took back a mortgage of the same for the purchase-money, neither deed containing covenants of warranty. The title of Clark was defective; and Baker, having bought in the outstanding title, made a second mortgage to one T.; and the question was, whether he could set up his after-acquired title against his mortgage to Clark. The court say, that, at common law, there were only two classes of conveyances which were held

¹ *Jackson v. Bull*, 1 Johns. Cas. 90; *Comstock v. Smith*, 13 Pick. 116, 119, 120; *Rawle, Cov.*, 3d ed. 407, 408.

² *M’Williams v. Nisly*, 2 Serg. & R. 507, 517, 518. See the remarks of Mr. Rawle upon this subject, in his work on *Covenants*, 3d ed. p. 409; *Smith, Lead. Cas.*, 5th Am. ed. 641, 651.

³ *Reeder v. Craig*, 3 M’Cord, 411; *French v. Spencer*, 21 How. 228; *Washaugh v. Entriken*, 34 Penn. St. 74.

to operate upon the after-acquired title, — those by feofment and by fine, or by common recovery. No other forms of conveyance, in the absence of covenants of warranty, had any effect in transferring the title subsequently acquired. In this country, no greater effect is given to a grant or a conveyance by bargain and sale, or lease or release, unaccompanied with covenants of warranty, than in England under the statute of uses. They pass only the estates which are vested in interest at the time, and do not bind or transfer, by way of estoppel, future or contingent estates. So far as *Jackson v. Bull* and *Jackson v. Murray*, above cited, sustain a contrary doctrine, they have been overruled by subsequent cases. But where it distinctly appears upon the face of the instrument, without the presence of the covenant of warranty, either by recital or otherwise, that the intent of the parties was to convey and receive reciprocally a certain estate, the grantor will be estopped from denying the operation of the deed according to such intent. If the seisin or possession of a particular estate is affirmed in the deed, either in express terms or by necessary implication, the grantor, and all persons in privity with him, shall be estopped from ever afterwards denying that he was so seised and possessed at the time he made the conveyance. The estoppel works upon the estate, and binds an after-acquired title as between parties and privies. By the statute of California, by conveyances under the statute of uses, where a fee-simple absolute is conveyed in land, of which the grantor has no legal estate at the time of making such conveyance, and the grantor subsequently acquires title to the same, the estate so acquired passes at once to the original grantee, creating in him a valid title and estate. And these doctrines were held to apply to cases of mortgage, estopping the mortgagor and his privies from setting up against his own mortgagor an after-acquired title to the estate.¹ So a deed to a company, describing them as a corporation, before, in fact, any act of incorporation had been passed, was held to

¹ *Clark v. Baker*, 14 Cal. 612; *Van Rensselaer v. Kearney*, 11 How. 322. So a similar statute and rule exists in Missouri. *Bogy v. Shoab*, 13 Mo. 379. See *Gibson v. Choteau*, 39 Mo. 568; also in Arkansas, *Cocke v. Brogan*, 5 Ark. 699. And in Illinois, *Frink v. Darst*, 14 Ill. 308; *Bush v. Marshall*, 6 How. 288.

estop the grantor to claim title against them upon their becoming incorporated.¹ In *Barber v. Harris*, there was a mortgage; and the question arose as to the extent of the mortgagor's title, whether it covered the entire estate, or a fractional part only. The court say: "The defendant, having executed the mortgage under which the plaintiff claimed to recover the possession of the premises, was estopped from denying that he had title to them, and from setting up title in third persons."² So where a railroad company mortgaged their railroad, which had not then been constructed, but the same was afterwards completed, it was held to be a good mortgage by estoppel, and took effect against a second mortgagee.³ And a like doctrine was applied to a mortgage of a canal by a canal company before it had been constructed.⁴ And the court of Massachusetts, while maintaining that if one grants "his right, title, claim, and demand" to an estate with covenants of warranty against all persons claiming by or under him, he may nevertheless set up a newly acquired title against his own grantor, recognize and approve of the doctrine that a grantor of an estate is estopped by his conveyance to deny that he had any title in the land at the time of the conveyance, and they hold that whatever interest he had passed to the grantees by his deed.⁵ On the other hand, it is laid down as a principle of universal application, that where a person assents to an act, and derives and enjoys a title under it, it shall not lie in his mouth to impeach it.⁶

33. There are a few exceptions to the effect given to recitals in deeds, one of which is found in the case where the deed containing the recital is, upon its face, a void one. There it does not work an estoppel.⁷ So if it be inoperative from any cause, as for want of proper execution, even if it con-

¹ *Dyer v. Rich*, 1 Met. 180, 190.

² *Barber v. Harris*, 16 Wend. 615.

³ *Galvestown R. R. v. Cowdry*, 11 Wall. 481.

⁴ *Willink v. Morris Canal Co.*, 3 Green, c. 402.

⁵ *Comstock v. Smith*, 13 Pick. 116, 119, 120; *Bruce v. Luke*, 9 Kans. 201.

⁶ *Per Buller, J., The King v. Stacey*, 1 T. R. 4.

⁷ *Sinclair v. Jackson*, 8 Cow. 587; *Wallace v. Miner*, 6 Ohio, 366; *Concord Bank v. Bellis*, 10 Cush. 276; *Lowell v. Daniels*, 2 Gray, 161; *Cuthbertson v. Irving*, 4 H. & Norm. 754.

tain covenants of * warranty.¹ And though a party [*473] claiming title under a deed is barred by the recitals in such deed, he may show that the deed in which they are contained is inoperative, defective, and void.²

34. Another exception to the application of this rule is, where the other party who would enforce the estoppel proposes to go behind the deed which contains the recitals, to defeat it. As where one holding a mortgage took a deed of release from the mortgagor, reciting that its object was to cancel the mortgage, and a third person claimed title to the same land through an attachment laid upon it between the date of the mortgage and that of the deed of release, the grantee, in such deed of release, was permitted to show that he still held under the mortgage by an agreement with the debtor to await the result of the attachment.³

35. The most striking instances of an estoppel by deed, perhaps, are those where a party, without any title to land, undertakes to convey it, covenanting as to the title, and afterwards acquires title to the same land by descent or purchase.⁴ If his covenant is such, of warranty, for instance, as to entitle the covenantee to recover for its breach just as much of the covenantor as he, the covenantor, would recover of the tenant, the covenantee, if he prevailed by enforcing his claim to the land, the law, to avoid circuitry of action, allows the tenant to avail himself of this covenant to rebut the covenantor's claim upon the land, and prevents the grantor from setting up a claim to the estate by his after-acquired title. Or it may be placed perhaps more properly, as it is sometimes insisted, upon the ground that the warranty of a grantor is as if a particular recital or averment had been inserted in his deed, and he was thereby estopped by his deed from denying its efficacy.⁵

¹ *Patterson v. Pease*, 5 Ohio, 190-192.

² *Blake v. Tucker*, 12 Vt. 39.

³ *Crosby v. Chase*, 17 Me. 369.

⁴ *Nunnally v. White*, 3 Met. (Ky.) 589.

⁵ *Rawle, Cov.*, 3d ed. 422; *Co. Lit.* 265 a; *Dart v. Dart*, 7 Conn. 256; *Jackson v. Bradford*, 4 Wend. 619; 4 Kent, Com. 261, note; 2 Smith, Lead. Cas., 5th Am. ed. 626, 627; *Somes v. Skinner*, 3 Pick. 52, 61; *Oakes v. Marcy*, 10 Pick. 195, 199; *White v. Patten*, 24 Pick. 324. See *Blanchard v. Ellis*, 1 Gray, 195; *Jackson v. Hubble*, 1 Cow. 613, 617; *Jackson v. Waldron*, 13 Wend. 189; *Kimball v. Blaisdell*, 5 N. H. 535; *Bogy v. Shoab*, 13 Mo. 378; *Wade v. Lindsey*, 6 Met. 413; *Cole v. Raymond*, 9 Gray, 217; *Mickles v. Townsend*, 18 N. Y. 577; *Irvine v. Irvine*, 9 Wall 625.

A made two mortgages in succession, one to his son, and another to B, with covenants of warranty. His son died, and, as his heir, he became entitled to the mortgage. But it was held that he could not, as assignee of his son, claim against his own mortgage to B and the covenants therein.¹ This doctrine of after-acquired title enuring to the benefit of a prior grantee is applied in Louisiana to mortgages; so that if one mortgages land without having any title to the estate, and afterwards acquire one, it enures to the benefit [*474] of the mortgagee.² But without stopping to * discuss the precise manner in which this is effected, the cases are numerous establishing the general principle that such is the effect, although they do not agree in the point whether certain of the usual covenants in deeds do or do not operate to work estoppels against the covenantors. The subject may hereafter be resumed, when the covenants in deeds are considered. For the present, it will be sufficient to refer to a few of the leading authorities upon the subject, without undertaking, generally, to draw a line between a technical rebutter and an estoppel, which the reader will find elaborately discussed by Mr. Rawle, in the ninth chapter of his valuable treatise on Covenants for Title.³ Lord Coke, in treating of a release, while commenting upon Littleton's statement, that "no right passeth by a release but the right which the releasor hath at the time of the release made," speaks of a release accompanied by a warranty, and remarks: "The warranty may rebut and bar him (the warrantor) and his heirs of a future right which was not in him at the time." He puts the case of a grandfather, father, and son, where the father disseises the grandfather, and then makes a feofment in fee, and the grandfather afterwards dies. The father, in such a case, might not enter upon his feoffee against his own feofment, though the son might upon his death. It is said there is no English authority that any other conveyance than a feofment, fine, or lease, operates by way of estoppel to pass an after-acquired title.⁴ "And so note a diversity between a release, a feofment, and a war-

¹ *Lincoln v. Emerson*, 108 Mass. 90, 91.

² *Amonett v. Amis*, 16 La. An. 227.

³ *Rawle, Cov. c. 9.*

⁴ *Gibson v. Chouteau*, 39 Mo. 566; *Valle v. Clemens*, 18 Mo. 486.

ranty. A release, in that case, is void. A feofment is good against the feoffor, but not against his heir. A warranty is good both against himself and his heirs."¹

36. The same doctrine is adopted in Connecticut; though there is this difference between a release there and in England, that in the latter it is a secondary conveyance, deriving its validity and effect from the possession of the releasee; in the former it is a primary one, and passes the releasor's right like a grant, and operates as a conveyance without a warranty. If made with a warranty, the releasor is estopped to claim the land. The same principle applies in New York² and Massachusetts.³

* 37. The cases are numerous where courts have [*475] held, that if one without any title makes a deed of land with covenants of warranty, and afterwards acquires a title to the same, it will enure to the grantee and covenantee by way of estoppel. Some of these are cited below.⁴ The effect is, that the title acquired by the grantor who has conveyed with warranty enures, *eo instanti* that he gains the title, to his grantee, and vests in him, or to the grantee of such grantee if with like covenants.⁵ But if, before the covenantor acquires a title, the covenantee sue for a breach of

¹ Co. Lit. 265 a.

² Dart v. Dart, 7 Conn. 256; Jackson v. Wright, 14 Johns. 193.

³ Trull v. Eastman, 3 Met. 121; Butler v. Seward, 10 Allen, 468.

⁴ Jackson v. Stevens, 13 Johns. 316; Brown v. McCormick, 6 Watts, 60, where the deed was with covenants of warranty, although the court do not refer to that circumstance. Jackson v. Matsdorf, 11 Johns. 91; *Somes v. Skinner*, 3 Pick. 52, 60; *Terrett v. Taylor*, 9 Cranch, 43; *Wark v. Willard*, 13 N. H. 389; *Comstock v. Smith*, 13 Pick. 116, 119; *Trull v. Eastman*, 3 Met. 121, 124; *White v. Patten*, 24 Pick. 324; *Allen v. Parish*, 3 Ohio, 107; *Bond v. Swearingen*, 1 Ohio, 190; *Lawry v. Williams*, 13 Me. 281; *Jackson v. Hoffman*, 9 Cow. 271; 5 *Prest. Abst.* 210; *Jackson v. Wright*, 14 Johns. 193; *Baxter v. Bradbury*, 20 Me. 260; 2 *Smith, Lead. Cas.*, 5th Am. ed. 626, for a collection of American cases to the same effect. *Blanchard v. Ellis*, 1 Gray, 198; *Clark v. Baker*, 14 Cal. 630; *Van Rensselaer v. Kearney*, 11 How. 822; *Perry v. Kline*, 12 Cush. 118; *Goodson v. Beacham*, 24 Ga. 150; *O'Bannon v. Paremour*, Id. 489; *Chamberlain v. Meeder*, 16 N. H. 381; *post*, p. *667; 12 *Am. Law Reg.* 146, note *King v. Gilson*, 32 Ill. 353; *post*, *667; *Kimball v. Schoff*, 40 N. H. 190; *Burton v. Reeds*, 20 Ind. 93; *McCusker v. M'Evey*, 9 R. I. 528, correcting a dictum in *Gardner v. Green*, 5 R. I. 104. See *post*, *480; *Plympton v. Converse*, 42 Vt. 712; *Doe v. Dowdall*, 3 *Houst.* 369; *Bush v. Marshall*, 6 *How.* 291.

⁵ *Crocker v. Pierce*, 31 Me. 177, 182; *post*, *667.

the covenant of seisin, it seems that he could not defeat that action by purchasing in the title and tendering it to his covenantee, if the latter refuse to accept it. In the case cited below, the tender was made six years after the original deed.¹ In *Blanchard v. Ellis*,² the court held, that if one purchase with covenants of warranty, and the grantee is wholly evicted from the premises by a title paramount to the grantor's, he cannot, after such entire eviction, purchase this title paramount, and compel the grantee to take the same against his will, either in satisfaction of the covenant against incumbrances, or in mitigation of damages for the breach of it. It is held, moreover, that if an action to recover the land be brought against the grantee and covenantee, and he notify his warrantor to defend the suit, and he fails to do so, a verdict in the action against the tenant would be conclusive against the covenantor to show that the eviction was by a paramount title.³ But if the title, in such a case, comes to the covenantor in the capacity of trustee, and not in his own right, it would not enure to the prior covenantee. The estoppel would not apply in such a case.⁴

38. The covenant need not be a general covenant of warranty, but will always work an estoppel to the extent of its terms. Thus, where there was a covenant of warranty against a particular title which the grantor afterwards acquired, he was estopped to set it up.⁵ So where one conveys with covenant against incumbrances, and afterwards buys in an outstanding mortgage, or purchases the estate under a sale for foreclosure of a mortgage existing thereon prior to his conveyance, whatever title he acquires thereby enures to the benefit of his grantee.⁶

39. But a covenant, to have this effect, must be something more than the personal covenant of him who makes it. It

¹ *Tucker v. Clarke*, 2 Sandf. c. 96.

² 1 Gray, 199.

³ *McConnell v. Downes*, 48 Ill. 272.

⁴ *Burchard v. Hubbard*, 11 Ohio, 316; *Kelley v. Jenness*, 50 Me. 455, 464; *Sinclair v. Jackson*, 8 Cow. 587; *Jackson v. Hoffman*, 9 Cow. 273; *Jackson v. Mills*, 13 Johns. 463.

⁵ *Blake v. Tucker*, 12 Vt. 39; *Trull v. Eastman*, 3 Met. 121; *Kimball v. Blaisdell*, 5 N. H. 535.

⁶ *Brundred v. Walker*, 1 Beasley (N. J.), 140.

must be of a nature to run with the land ; and if it be, it will attach to the land, and run with it, the instant the covenantor acquires the title which he has undertaken to convey by his deed.¹ The covenantee may, moreover, estop himself from setting up the covenant of his grantor by the way of claiming the estate. If the purchaser, under a deed with general covenants of warranty, be evicted by a better title, it is not in the grantor's power afterwards to acquire a title to the premises, and compel the grantee to accept the same against his will. Whether the grantee has the election, after such eviction, to claim such acquired title by estoppel, the court, in the case cited, avoid determining. But if, instead of claiming the land, the purchaser sues upon his covenants, and recovers damages for a breach thereof, he would be estopped thereby from claiming the land by estoppel, though his grantor and covenantor should have acquired it.²

39 *a*. Nor will such covenant prevent the grantor from subsequently acquiring a title to the granted premises, and availing himself of it against his own grantee, if the title conveyed by such grant was, at the time, a good one. Thus, where the grantor disseised his own grantee, and held adverse possession for twenty years, it was held that he was not estopped by his former deed and covenant to claim title to the premises by such disseisin.³

40. So the effect of the covenant will be limited in its extent by the premises granted, and with which it may run ; as where the grantor, owning one undivided sixth part of certain premises, conveyed all his estate in the premises, and covenanted against the claims of all persons to the estate, he was only estopped as to his sixth, and not as to any other shares which he afterwards acquired.⁴ So, where there was a recital of an outstanding mortgage in a deed of the premises, with covenants of warranty, it was held that the covenant

¹ *Patterson v. Pease*, 5 Ohio, 190, 192 ; *Trull v. Eastman*, 3 Met. 121 ; *Whelock v. Henshaw*, 19 Pick. 341 ; 2 *Smith*, *Lead. Cas.*, 5th Am. ed. 640.

² *Blanchard v. Ellis*, 1 Gray, 195 ; *Porter v. Hill*, 9 Mass. 34. See *post*, p. *673. See *Baxter v. Bradbury*, 20 Me. 260.

³ *Stearns v. Hendersass*, 9 Cush. 502 ; *Parker v. Proprs. of Locks, &c.*, 3 Met. 102 ; *Smith v. Montes*, 11 Texas, 24 ; *Tilton v. Emery*, 17 N. H. 538.

⁴ *Wight v. Shaw*, 5 Cush. 56 ; *Trull v. Eastman*, 3 Met. 121, 123.

was qualified by such recital.¹ Upon this ground, [*476] where the grant is in the * form of a release and quit-claim of all the grantor's right, claim, or title to the land described, with a covenant of warranty against all persons claiming by or under him, while he would be thereby estopped to claim any title existing in him at the time of making his deed, he would not be as to any after-acquired title.² The reader will remark the distinction between this case and that where the grantor conveys the land or estate itself, without limiting his conveyance to such right as he has. So that the cases cited below do not conflict with the doctrine of estoppel stated in some of the former cases, that a man may not aver any thing contrary to his express recitals in his deed, and, after having expressly conveyed land itself to which he has no title, afterwards avoid his own deed by claiming the land under a subsequently acquired title: So where one who took by devise a vested remainder in a certain part of an estate, and a contingent remainder in another part, granted, bargained, and sold all his right, title, and interest in the estate, with covenants of warranty, it was held that the grant was answered by the vested interest he had, and did not estop him from claiming that part in which he had a contingent remainder, which subsequently became vested in interest and possession.³

41. It is upon the grounds above stated that it has been held, that, in order to bar a party by his covenant of warranty, not only must the deed be a good and valid deed in its form and mode of execution,⁴ but it must convey no title to the premises, nor pass any thing upon which the warranty can operate; for, if it passes a title or interest, the covenant does

¹ Jackson v. Hoffman, 9 Cow. 271.

² Comstock v. Smith, 13 Pick. 116, 119, 120; Jackson v. Peek, 4 Wend. 300; Miller v. Ewing, 6 Cush. 34, 40; Kinsman v. Loomis, 11 Ohio, 475; Ham v. Ham-14 Me. 361; Coe v. Persons Unknown, 43 Me. 432; Pike v. Galvin, 29 Me. 183; Doane v. Wilcutt, 5 Gray, 328, 333; Harriman v. Gray, 49 Me. 538.

³ Blanchard v. Brooks, 12 Pick. 47, 66; Wynn v. Harman, 5 Gratt. 157; White v. Brocaw, 14 Ohio St. 344.

⁴ By the term "interest," as above used, it seems, is intended a *vested* interest. Blanchard v. Brooks, 12 Pick. 47; 2 Saund. 388 d; 2 Prest. Abst. 410; Patterson v. Pease, 5 Ohio, 190; Kercheval v. Triplett, 1 A. K. Marsh. 493; Dougal v. Fryer, 3 Mo. 29.

not operate as an estoppel, even though it cannot operate upon the interest to the full extent of the intention of the parties.¹ So * where A, having only an equitable fee in land, mortgaged it by lease and release to B, covenanting that he was legally *or* equitably seised, and reciting that he was legally *or* equitably entitled to the premises, and the legal estate was afterwards conveyed to him, and by him was sold to C, it was held that he was not estopped to set up his after-acquired legal estate, either by his covenant or his recital, they being in the alternative, and not positive affirmations that it was a legal interest to which he was entitled, and that the words of release in his deed only operated to pass whatever interest he had in the premises at the time.² And where the grant was of all the grantor's right, title, and interest in certain premises, with covenants that neither the grantor nor any person claiming under him should claim, &c., there was held to be a qualified warranty of the land and premises conveyed. The warranty was coextensive with the estate which the deed purported to convey; but as that did not purport to convey any interest thereafter to be acquired, it did not affect any after-acquired title.³

42. But where one, as guardian, conveyed lands, and entered into covenants of warranty as to the title in his deed, he was held to be thereby estopped from setting up a personal claim to the same land under his own title.⁴

43. This doctrine of estoppel by warranty applies to cases of conveyances of their lands by married women joining with their husbands. For though, in such cases, the wife is not personally liable upon her covenant, she and those claiming under her are estopped, in the same manner as if she were a *feme sole*, against setting up an after-acquired title to the

¹ *Lewis v. Baird*, 3 McLean, 56, 78, 79; 4 Kent, Com. 98; *Jackson v. Hoffman* 9 Cow. 271; 2 Prest. Abst. 216. The doctrine of the text is controverted by Graver, J., in *Moore v. Littel*, 41 N. Y. 97. But *quære*, if, in the case he supposes of a termor conveying the estate in fee with covenants, he is estopped, is it not rather by way of rebutter than a technical estoppel?

² *Right v. Bucknell*, 2 B. & Ad. 278.

³ *Miller v. Ewing*, 6 Cush. 34, 40; *Doane v. Wilcutt*, 5 Gray, 328, 333; *Raymond v. Raymond*, 10 Cush. 134; *Gee v. Moore*, 14 Cal. 472; *Gibbs v. Thayer*, 6 Cush. 32; *Newcomb v. Presbrey*, 8 Met. 406.

⁴ *Heard v. Hall*, 16 Pick. 457.

land conveyed.¹ But the extent of the doctrine of estoppel, as applied to married women, does not seem to be very well defined. That the doctrine of estoppel *in pais* does not apply to the estates of married women, is expressly affirmed in one case.² And in the case cited of *Jackson v. Vanderheyden* the court say, that though a deed with covenants of warranty by husband and wife of the wife's land would convey her real estate, or any existing or contingent future interest in it, "such deed cannot operate as an estoppel to her subsequently acquired interest in the same land." Thus, where a wife joined with her husband in a deed by relinquishing her right of dower in the granted premises, though it might estop her from claiming dower, it would not prevent her claiming the land by a subsequently acquired title.³ If the wife be a minor when she signs the deed, it would not work an estoppel as to her. If the estate of the wife be a reversion after an estate for life, and she and her husband join in a deed of the same, she would not be estopped thereby, when the life-estate determines, if she was a minor when executing the deed, because, until then, the husband had no right of curtesy to pass by his deed, and she, being a minor, would not be estopped to claim the estate.⁴ The court, in *Wight v. Shaw*,⁵ refer to the case of *Jackson v. Vanderheyden* with apparent approbation, but do not decide the point, nor refer to the case cited below of *Nash v. Spofford*, where the point, that, by joining with her husband in a deed with covenants of warranty, she did estop herself, was expressly decided, and where the cases of *Fowler v. Shearer* and *Colcord v. Swan*⁶ were referred to as sustaining the doctrine. And all the cases seem to agree, that a married woman would not, at common law, be personally liable

¹ *Hill v. West*, 8 Ohio, 222; *Colcord v. Swan*, 7 Mass. 291; *Nash v. Spofford*, 10 Met. 192; *contra*, *Jackson v. Vanderheyden*, 17 Johns. 167. See *Morrison v. Wilson*, 13 Cal. 494; *Jones v. Frost*, L. R. 7 Ch. 773.

² *Morrison v. Wilson*, *sup.* See also *Lowell v. Daniels*, 2 Gray, 168-170; *ante*, *459.

³ *Burns v. McGraw*, 2 Pugs. Rep. N. B. 186.

⁴ *Williams v. Baker*, 71 Penn. St. 482, 483.

⁵ *Wight v. Shaw*, 5 Cush. 67.

⁶ *Nash v. Spofford*, 10 Met. 192; *Fowler v. Shearer*, 7 Mass. 14; *Colcord v. Swan*, *sup.*

upon covenants contained in the deed of herself and husband. In Illinois, if a wife join in her husband's deed in releasing dower, she would not be bound by the covenants it contains.¹ In Pennsylvania, if she joins in a deed with covenants of warranty, she would not be bound by them.² In Iowa, a wife is bound by the covenants in her deed of land held by her separately.³ Where a husband granted his wife's land, in which she joined by releasing her right of dower and assenting to the deed, but it contained no words of grant on her part, it amounted, in fact, to nothing, because, 1. She had no right of dower to release; and, 2. Because such release could not estop her from claiming such title as she had. And the same would be the effect if they were tenants by entirety, and he conveyed the estate, but she only released her dower.⁴ The case of *Wadleigh v. Glines* was also cited in that of *Nash v. Spofford*, and this again depended upon the case of *Jackson v. Vanderheyden*, and goes to sustain the doctrine above advanced, that, though a married woman is not bound by covenants in her and her husband's deed of her land, it would estop her from claiming the land by any title she had at the making of the deed, but not against a title subsequently acquired.⁵ In a later case in Massachusetts, the court held a married woman, who conveyed lands held under the statute to her sole and separate use, bound by her covenants as if she were at the time sole and unmarried.⁶ And upon the principle of estoppel *in pais*, the courts in Illinois hold that a wife may be estopped to claim homestead where she and her husband join in a deed of the premises, and then abandon them.⁷ But in Iowa and Kentucky, it is held that a wife joining with her husband in a deed of warranty does not estop her to claim under an *after-acquired* title.⁸ And by statute in Indiana, a wife is not bound by the covenants in a deed made by her and her husband.⁹

¹ *Strawn v. Strawn*, 50 Ill. 37.

² *Dean v. Shelly*, 57 Penn. St. 426.

³ *Richmond v. Tibbles*, 26 Iowa, 474.

⁴ *Wales v. Coffin*, 13 Allen, 216; 100 Mass. 180.

⁵ *Wadleigh v. Glines*, 6 N. H. 17.

⁶ *Basford v. Pearson*, 7 Allen, 505.

⁷ *Brown v. Coon*, 36 Ill. 243, 246.

⁸ *Childs v. McChesney*, 20 Iowa, 431; *Nunnally v. White*, 3 Met. (Ky.) 593
O'Neil v. Vanderburg, 25 Iowa, 107.

⁹ *Baxter v. Bodkin*, 25 Ind. 172.

44. This doctrine of estoppel applies also to leases for years, and, it would seem, with greater force, if possible, [*478] than to deeds *poll. Thus, if a person execute an indenture purporting to *demise* land for a term, in which he has no estate in fact, or no estate by a good legal title, and the want of such estate does not appear upon the instrument, the lease will operate upon any interest which he may afterwards acquire in the same land during the continuance of the term. But it is requisite that it should be an indenture, in order to bind both parties, and make the estoppel reciprocal; while if any valid interest, however short it may be of that pretended, actually passes from the lessor to the lessee, the lease works no estoppel against him.¹

45. The case put by Coke is this: A, tenant for life of B, makes a lease for twenty years, and then buys the reversion. B then dies. A may enter and avoid his own lease by virtue of his newly acquired title; but had he had no title when he made the lease, and he then acquired one, he could not have contradicted his own lease, and say it was wholly void.²

46. Indeed, the proposition is laid down as a general one, applicable alike to all conveyances, that if the conveyance be rightful, and such as derives its validity from the statute of uses, it passes only what he has who makes it; while if it is wrongful, as by feofment, fine, and the like, it operates to bar the estate which may afterwards be in the one making it,³ though it would seem that the distinction should always be observed between the conveyance of a particular parcel of estate by description and of the right or title that the grantor has in it.

47. On the other hand, a man, by accepting a lease by

¹ Shep. Touch. Prest. ed. 53; Burt. Real Prop. § 850; Wms. Real Prop. 229, 230; Hermitage v. Tomkins, 1 Ld. Raym. 729; 4 Kent, Com. 261, and note; Jackson v. Bull, 1 Johns. Cas. 90; Co. Lit. 47 b; 2 Prest. Abst. 410. See Iseham v. Morrice, Cro. Car. 109. "Grant and demise," in an indenture of lease, are equivalent to covenants of warranty and of quiet enjoyment. Barney v. Keith, 4 Wend. 502.

² See Wms. Real Prop. 330. Equity would, in the case supposed, compel the lessor to make good his lease as a contract. Co. Lit. 47 b, note 307. By the purchase of the land, that is turned into a lease in interest which before was merely an estoppel.

³ 2 Prest. Abst. 411.

indenture from a stranger, may bind himself to be treated as the lessor's tenant, and to pay him rent during the term purported * to be granted by the lease, unless he [*479] may have been induced by the fraudulent representation to accept the lease.¹ And where one in possession of land covenanted with A B to purchase it of him, but failed to do so, and A B brought ejectment for the land, it was held that the tenant was estopped by his covenant to set up an outstanding title against the claim of the plaintiff.²

48. When it is inquired how far estoppels extend, and who are bound by them, it will be found, as has been partially anticipated, that, in the first place, they operate neither in favor of nor against strangers, but affect only parties and privies in blood, in estate, or in law; and a stranger can neither take advantage of, nor be bound by, an estoppel,³ though it is not always easy to draw the line between privies and strangers. Accordingly, where one who had been disseised conveyed the land by deed to a stranger, and then sued his disseisor for possession, it was held that his deed to a stranger did not estop him from maintaining the action.⁴ So where the deed to the stranger passed nothing for want of proper execution, the tenant, not a party to it, cannot avail himself of it.⁵

49. But a person in possession, sustaining his possession by no other title than a denial that a former owner had parted with his right, is not a stranger. He becomes privy in estate to him whose title he maintains, and is concluded by what destroys that in his hands. For if title can be traced by B to A, and B can fasten upon A the incapacity of asserting his right in consequence of his admission that he has conveyed to B, it is not just that one standing on A's claim only,

¹ 2 Prest. Abst. 210; *Alderson v. Miller*, 15 Gratt. 279; *Jackson v. Ayers*, 14 Johns. 225.

² *Jackson v. Ayers*, 14 Johns. 224; *Walker v. Sedgwick*, 8 Cal. 403.

³ *Doe v. Errington*, 6 Bing. N. C. 79; *Jackson v. Bull*, 1 Johns. Cas. 90; *Jackson v. Brinckerhoff*, 3 Johns. Cas. 103; *Miller v. Holman*, 1 Grant's Cas. 243; *Jackson v. Bradford*, 4 Wend. 623; *Kimball v. Blaisdell*, 5 N. H. 535; *Sunderlin v. Struthers*, 47 Penn. St. 423.

⁴ *Wolcott v. Knight*, 6 Mass. 418; *Jackson v. Brinckerhoff*, 3 Johns. Cas. 103

⁵ *Patterson v. Pease*, 5 Ohio, 190.

and relying on no superior right, should be permitted to contest the existence of a fact which those interested have settled.¹

50. So where one conveys lands with warranty, but without title, and afterwards acquires one, his first deed works an estoppel, and passes an estate to the grantee the in- [*480] stant the * grantor acquires his title, not only against the grantor and those claiming under him, but also against strangers who come in after the deed creating the estoppel.² And such title would enure to the benefit of the first grantee by estoppel, to the exclusion of a second grantee, to whom the grantor shall execute a deed after having acquired a title;³ though it has been insisted that such a construction does violence to the spirit of the system of registration of deeds, which ordinarily requires, that, in taking a title, one should only go back to the time his grantor acquired it, and to see that no *intermediate* encumbrance or conveyance shall have been made by him.⁴

50 *a.* The doctrine here stated, that a deed with covenant of warranty, by one having no title to one who records his deed, will give to such a grantee precedence of right, if the grantor subsequently acquire a title to the estate over a purchaser who takes a deed of the same estate from the same grantor without actual notice of such prior deed, is probably too well settled to be now controverted. But the subject has been sufficiently discussed in some of the later cases to justify noticing them somewhat at large. In Iowa, the doctrine is affirmed with the same exception as is stated in *Chamberlain v. Meeder*, cited below.⁵ The doctrine is fully sustained in Vermont⁶ and Rhode Island.⁷ In a dissenting

¹ *Kinsman v. Loomis*, 11 Ohio, 478; *Easter v. L. M. Railroad*, 14 Ohio St. 52, 54; *Morse v. Aldrich*, 19 Pick. 449; *Whatman v. Gibson*, 9 Sim. 196.

² *Somes v. Skinner*, 3 Pick. 52, 60.

³ *White v. Patten*, 24 Pick. 324. But see *Chamberlain v. Meeder*, 16 N. H. 381. If mortgaged back at the same time with the purchase, the mortgage would take precedence of the title by estoppel.

⁴ *Rawle*, Cov. 3d ed. 430.

⁵ *Morgan v. Graham*, 35 Iowa, 216.

⁶ *Cross v. Mosten*, 46 Vt. 18.

⁷ *McCusher v. McEvoy*, 9 R. I. 528; s. c. 10 R. I. 606. See also *Bigelow Estoppel*, 359.

opinion, given in the case last cited, and reported in the tenth volume of the Rhode Island Reports, Potter, J., presents in a strong light the violence, above mentioned, which it does to the doctrine of registration by imputing to purchasers constructive notice of conveyances made before the grantors had any thing to convey. The doctrine seems to rest upon the *privity* there is between a grantor and grantee, whereby the latter is bound by the same *estoppel* which would bar the former. The case cited below, from Delaware, has gone fully into the subject, and the language of the court is freely referred to. Covenants for title were unknown in the days of Coke, and were the invention of Orlando Bridgman. Now, if one grants lands with covenants of warranty, it operates, by way of estoppel, to transfer an after-acquired title; "the interest, when it accrues, feeds the estoppel." "If it is manifest on the face of the conveyance, either by recital, admission, covenant, or in any other way, that the parties actually intended to convey and receive the identical estate and interest which is the subject-matter purporting to be conveyed by the instrument, they shall be held estopped from denying the operation of the deed according to its manifest intent." "A solemn recital or admission under seal concludes both privies." "It is difficult to comprehend the wisdom of the distinction which is to be found in the books between covenants and admissions, which, operating by way of personal rebutter, prevent the grantor, and all others claiming under him, from setting up this after-acquired title; and covenants, which, operating by way of estoppel in the technical and absolute sense of that term, actually transfer the after-acquired title." "The safer doctrine, and that which, in our judgment, is fully sustained by the weight of American authority, is, that the covenant of warranty operates as an estoppel in the absolute sense of that term, so as to transfer and pass the after-acquired estate. The authorities are full and conclusive on this point." Where one, having no title, conveys land with warranty, and after acquires title and conveys to another, the second grantee is estopped to say the grantor was not seised at the time of the first conveyance." "And where both parties claim under the same person, they are *privies in estate*, and

cannot, as such, deny the title of the grantor at the time of the first conveyance; and the estoppel, working upon the estate, binds both parties and privies.”¹

51. It may, accordingly, be stated as a general proposition, that any person claiming under one who is bound by an estoppel is himself bound by the same estoppel.² Thus, in the case of *Wark v. Willard*, above cited, a purchaser from one who had made a prior deed with warranty of land to which he afterwards had acquired a title was estopped by the first deed as well as his grantor, although it had never been recorded, provided he had notice of its existence when he took his deed. Where A, by a deed of mortgage with warranty, conveyed his estate, upon which there was an outstanding mortgage, and A purchased this, and took an assignment of it to himself in his own right, it was held that this latter mortgage enured to the benefit of A's mortgagee with covenants.³ But if, after having made a conveyance with warranty without having title, the estate comes to him as a mere conduit in passing it from its owner through him to another person, it does not enure to the benefit of his original grantee.⁴

52. There is one other act of parties which may operate in the nature of an estoppel, not in conveying a title to lands from one to another, but in quieting titles so as to estop any adverse claim; and that is by arbitrament and award, where the parties have submitted to arbitrators the question of property in lands, and an award upon the point has been made and published. Such award is conclusive as to their respective rights of property, even though the submission and award were by parol.⁵ This is especially true in establishing lines

¹ *Doe v. Dowdall*, 3 *Houst.* 369.

² *Phelps v. Blount*, 2 *Dev.* 177. See *Douglass v. Scott*, 5 *Ohio*, 197; *Wark v. Willard*, 13 *N. H.* 389; *Maple v. Kussart*, 53 *Penn. St.* 351.

³ *Kelley v. Jenness*, 50 *Me.* 455.

⁴ *Kelley v. Jenness*, *sup.*; *Runlet v. Otis*, 2 *N. H.* 167; *Marsh v. Rice*, 1 *N. H.* 167.

⁵ *Doe v. Prosser*, 3 *East*, 15; *Goodridge v. Dustin*, 5 *Met.* 363, 367; *Trustee v. Yewre*, *Cro. Eliz.* 223; *Baker v. Townsend*, 7 *Taunt.* 422; *Shelton v. Alcox*, 11 *Conn.* 240; *Bowen v. Cooper*, 7 *Watts*, 311; *Shepard v. Ryers*, 15 *Johns.* 497; *Carey v. Wilcox*, 6 *N. H.* 177; *Watson*, *Arb.* 38, 39; 2 *Smith, Lead. Cas.*, 5th *Am. ed.* 650.

between two contending parties.¹ But to have that effect, such parol award must relate to something which was uncertain and in dispute.²

53. It should be stated that the original propriety of adopting the rule as one of law, that covenants of warranty contained *in deeds of conveyance should operate [*481] as an estoppel to bind an after-acquired title, where the covenantor, at the time of making his deed, had none, is examined and criticised with great learning and ability by Mr. Hare, in the American edition of Smith's Leading Cases, in which he remarks: "Notwithstanding the formidable array of authorities which support this view of the question, it is proper to point out the difficulties with which it is attended, and its apparent inconsistency with those principles of the common law on which it is assumed to be founded. It is hardly too much to say, that there is nothing either in Rawlyns' case,³ nor in any other of the earlier or more recent English authorities, to justify the belief that warranty is the sole cause of estoppel in the conveyance of land, or even that the one can arise in any case out of the other."⁴ And the court of Georgia, following the suggestions of the above annotator, declare, in an opinion by Lumpkin, J.: "The conclusion of the whole matter is, that where lands are sold by any of the modern conveyances, in which the grantor had nothing at the period of executing the deed, the title which he may subsequently acquire does not pass to the grantee by estoppel, nor entitle him to recover in ejectment brought against a stranger; that a conveyance made under such circumstances does not debar the warrantor or his heirs from recovering under any right or title not vested in the grantor at the time of making the conveyance; that the doctrine of estoppel in deeds cannot be based upon that of warranty."⁵ In the very work cited by the court of Georgia, it seems to be conceded, that this rule, which the writer controverts, is the settled rule

¹ Sellick v. Adams, 15 Johns. 197; Robertson v. McNeil, 12 Wend. 578.

² Davis v. Townshend, 10 Barb. 333; Vosburg v. Teator, 32 N. Y. 561; Terry v. Chandler, 16 N. Y. 354.

³ Rawlyns' case, 4 Rep. 52.

⁴ 2 Smith, Lead. Cas. 5th Am. ed. 626.

⁵ Way v. Arnold, 18 Ga. 192. 193.

of the American law, as generally adopted ; and as it should be the object of a work like the present to state the law as it is, rather than to discuss in the abstract what it ought to be, the principle contained in the cases cited, and in many others that might be referred to, is treated as the existing rule of law, notwithstanding the summary reversal which it has met with in the above ruling, in *Way v. Arnold*.

*SECTION VII.

[*482]

POSSESSION AND LIMITATION.

1. Possession as evidence of title.
2. How possession becomes an absolute title.
- 3, 4. Nature and character of seisin.
5. Who is in law a disseisor.
6. When one may be a disseisor by election.
7. How far seisin and possession are identical.
8. When seisin follows possession.
9. Of seisin, whether in deed or in law.
10. Disseisin defined, and its effect on title.
11. Intent essential to constitute a disseisin.
12. Seisin may be regained by re-entry.
13. Effect of "descent cast" upon regaining seisin.
14. Effect upon seisin of the disseisor's abandoning possession.
15. Taylor v. Horde, — the questions therein involved.
16. Effect of deeds recorded in passing seisin.
17. What entry and possession will give a title.
18. Title gained by possession always a fee.
19. Requisites of possession to give a title.
- 19 a. Same subject.
20. Possession must be actual, with intent to gain title.
21. The possession must be continued.
22. It must be visible, notorious, distinct, and definite.
23. It must be hostile or adverse.
24. Possession by one of two owners presumed not to be adverse.
25. When possession rightfully taken may become adverse.
26. Cases illustrative of such possession as gives title.
27. Seisin, once gained, presumed to continue.
28. When possession of successive holders gained by disseisin may be united.
29. The one in possession may convey land by deed with covenants, &c.
30. Disseisin of a particular tenant does not affect reversioner.
- 31, 32. Cases illustrating what would be open exclusive possession.
33. What acts on land constitute a disseisin in themselves.
34. How far disseisin by erecting buildings extends.
35. Disseisin limited to actual ouster and possession.
36. How far entry under a deed defines the limits of a disseisin.
37. How far the limits of one disseisor affected by possession of another.
38. Upon what ground the law protects title by disseisin.
39. Rule where the act of disseisin is equivocal.
40. Mere possession does not give title.
41. Limitation not applicable against the State.
42. Possession to give title must not be opposed by owner.
43. Effect of adverse occupation, where no actual ouster.
44. Effect of occupation as purchaser, without deed.

- 45. Effect of such occupation after partition made.
- 46. Effect on title of occupation by *cestui que trust*.
- 46 a. Limitation as affecting trusts.
- 47. Possession by purchaser without deed, when a presumptive title.
- 48. Effect of adverse possession to establish an absolute title.
- 49. Limitation as affected by personal disabilities.

NOTE.— Local statutes of limitation.

1. POSSESSION as an element of title has already been mentioned. As theoretically constituting the origin of title in a primitive state of society, and as serving a no less important agency in the evidence it affords in establishing title under the more complex and arbitrary rules of property in its advanced stages in organized States, it now becomes proper to consider the subject; although it is not proposed to enter into any discussion of the grounds upon which the theory of individual property in the general heritage of the earth can be maintained. It is sufficient to state, that whoever is in possession of real property is so far regarded by law as the owner thereof, that no one can lawfully dispossess him of the same, without showing some well-founded title of a higher and better character than such possession itself furnishes.¹

2. It may be further remarked, that possession, however naked, may become an absolute title, or conclusive evidence of a title, under the operation of that policy of the law, which, for the peace of the community, does not allow a possession to be questioned, after it shall have been enjoyed for such a length of time as renders it unreasonable, in the eye of the law, to require evidence, *aliunde*, that it was holden under a right of ownership derived from some other sufficient and legitimate source. What this time shall be is regulated by rules prescribed by statute, varying according to the judgment of each particular State, expressed through its legislation. But, as will more fully appear in the sequel, in order that a possession of lands should have the effect which is above suggested, it must be maintained during the requisite period of time, as a right resulting from an exclusive property in, and dominion over, the estate, and not subordinated to the will of any other person. * Such a

¹ 2 Sharsw. Bl. Com. 196 and note; Wood, Civil Law, 78, 126.

possession as this would answer to the common-law notion of seisin, and is of even broader significance, since it implies the seisin of an estate in fee-simple; while, at common law, seisin may be predicated of any freehold estate, whether of inheritance or not. As the instances of acquiring title by possession to vacant or derelict lands are too rare to be taken into account in treating of law as an existing institution, it seems the readiest way to arrive at the rules which govern the ownership of estates, as affected by possession, to consider the subject, first, under the head of Seisin and Disseisin; second, as to the effect of lapse of time in perfecting a title begun by that tortious act to which the feudal and common law give the name of *disseisin*; and third, in view of the cases where, by analogy, a possession under a claim of ownership has been held to confer a title, though not originally gained by any tortious dispossession of another.

3. It was attempted, in a former part of this work, to define in what seisin, at common law, consisted, and how it might be acquired and lost; and it is not intended to repeat what was there said.¹

4. It may be well to bear in mind, that there can be but one actual seisin of an estate. It may be held by several persons at the same time; but it is still in itself one and indivisible. Two persons cannot be actually seised of the same land, claiming it by title adverse to each other. So there may be what answers to actual seisin when used in respect to expectant estates like reversions, dependent upon estates to which the immediate, actual seisin is united. But that is not the seisin which grows out of the possession of land, and constitutes him in whom it is vested the recognized tenant of the freehold, within the meaning and theory of the feudal and common law.²

5. Now, if any one usurps this right of seisin and possession, and exercises the powers and privileges of such tenant of the freehold, and thereby keeps out or displaces him to whom these rightfully belong, he is, in the eye of the law, a dis-

¹ Vol. 1, pp. *32-*39; *Langdon v. Potter*, 3 Mass. 215.

² *Com. Dig. Seisin*, A. 1, A. 2; *Cornell v. Jackson*, 3 Cush. 508.

seisor. And an infant may be a disseisor by entering and holding possession.¹ Of *course, to complete the disseisin, that is, to divest the seisin from the one and invest the other with it, there was originally required to be such a recognition of the disseisor by the lord under whom he claimed to hold, and by the other tenants, as constituted him one of the *pares curiæ* of the lord's court, thus rendering an actual disseisin a complex operation, involving something more than the mere tortious act of entry by one upon an other's possession, whereby the latter was deprived of that which he had hitherto enjoyed; though it will not be attempted to show precisely how this was accomplished.² Though there are no such tests at the present day to determine whether a tenant has been disseised or not as might have been applied while the feudal organization of manors, with their incidents, continued in force, yet the same general notion is associated with an actual disseisin as prevailed under the feudal *régime*, that, as to all persons except him whose seisin has been wrongfully divested, the tenant is to be deemed the owner of the inheritance. And this is further sustained by the course of modern legislation, which forbids any one to question this ownership after a prescribed period of acquiescence.³ There are, in some of the States, processes authorized to remove what is considered a cloud upon the title of an owner which another has created by putting on record a deed of the land as belonging to him, or setting up an adverse title to the owner. If this is done in New York, such process will not lie if the deed itself shows that it is not a valid title; nor would it if the requisite evidence to establish the deed should, of itself, disclose facts enough to show its invalidity, as might be the case in a tax-deed.⁴

6. It should, however, be constantly borne in mind, that though, for purposes of remedy, if the dominion over, and free

¹ *Lackman v. Wood*, 25 Cal. 151.

² Co. Lit. 266 b, Butler's note, 217; 2 Prest. Abst. 284; Com. Dig. Seisin, F. 1; Ang. Lim. 2d ed. 405.

³ *Lund v. Parker*, 3 N. H. 49; *Newhall v. Wheeler*, 7 Mass. 189; *Slater v. Rawson*, 6 Met. 439, 443; *Coburn v. Hollis*, 3 Met. 125, 128.

⁴ *Fonda v. Sage*, 48 N. Y. 173. See Mass. Gen. Stat. c. 134, §§ 49, 50.

enjoyment of, the real property of any one is wrongfully interfered with or disturbed, he may, at his election, often treat the wrong-doer as a disseisor, although not himself actually ousted or dispossessed,¹ yet the act which makes one a disseisor by election is not an actual disseisin, such as will, under the effect of the statute of limitations, ripen into an indefeasible title to land.² But if the disseisee by election seeks to recover a judgment for title and possession against him whom he sues as a disseisor, he must abandon possession of the premises while the action is pending, otherwise the tenant may plead that the plaintiff has entered and disseised him, and thus abate the process.³

7. Several of the points incidentally suggested in what has * been said above will be found to be fully [*485] sustained by Wilde, J., in the case of Slater v. Rawson, where there was an entry upon and claim to land by one party; but being woodland, and unenclosed, the true owner was held not to be thereby in any manner dispossessed, the court saying: "It is true that two adverse parties cannot both be seised of the same land at the same time. But if A enters on the land of B, without ousting him, or doing some act equivalent to an ouster, he will not thereby acquire a seisin as against B, unless B elects to consider himself disseised; but A's possession would constitute a legal seisin against any one who might enter upon him and oust him without right." "According to modern authorities, there seems to be no legal difference between the words *seisin* and *possession*, although there is a difference between the words *disseisin* and *dispossession*; the former meaning an estate gained by wrong and injury, whereas the latter may be by right or by wrong; the former denoting an ouster of the disseisee or some act equivalent to it, whereas by the latter no such act is implied." And in the language of the court in Mississippi, "Disseisin

¹ Smith v. Burtis, 6 Johns. 215; 2 Prest. Abst. 287; Stearns, Real Act. 14; 2 Sulliv. Lect. 157; Taylor v. Horde, 1 Burr. 60; Prescott v. Nevers, 4 Mason, 329; Prop. of No. 6 v. M'Farland, 12 Mass. 327.

² 4 Kent, Com. 485; Doe v. Hull, 2 D. & R. 38.

³ Munro v. Ward, 4 Allen, 150; Burns v. Lynde, 6 Allen, 312; Stearns, Real Act. 216.

and ouster mean very much the same thing as adverse possession." ¹

8. It is accordingly held, that where two persons are in possession at the same time, under different claims of right, he has the seisin in whom is the true title. Both cannot be seised; and the seisin, consequently, follows the title.² If there is a mixed possession, but neither can show a better title, neither can bring trespass against the other.³ But where there is no adverse holding, the possession follows the property in the land, and is in him who has the title.⁴

9. There is a seisin in deed, and a seisin in law; and the difference between the two is, that in one case an actual possession has been taken, and in the other there is a right like that of an heir upon descent from his ancestor, while the possession is vacant, before he has made an actual entry.⁵ There is also a *constructive* possession without being a possession *in fact*, if accompanied by an entry under "color of title," as it is called. As where one, under a title-deed describing a parcel by metes and bounds, enters upon the premises, claiming to hold the same under his deed, he is constructively in possession of all that is included in his deed, though he actually occupies but a part; nor can he be disseised except by an actual entry and occupancy by another, and only to the extent of such occupancy. So the legal title to wild lands draws to it the possession, unless it has been interrupted by an actual entry and adverse possession by another.⁶ Two persons cannot be in adverse, constructive possession of the same land at the same time.⁷

10. "Disseisin," in the language of Mr. Preston, "is the

¹ Slater v. Rawson, 6 Met. 439, 444. See Smith v. Burtis, 6 Johns. 216, 217; Ang. Lim. 2d ed. 410; Magee v. Magee, 37 Miss. 151. For a full discussion of Possession, as held under the civil law and treated of by Bracton, see Gütterbock's Bracton, by Coxe, pt. 2, c. xi.

² Barr v. Gratz, 4 Wheat. 213; Smith v. Burtis, 6 Johns. 218; Codman v. Winslow, 10 Mass. 146, 151; 2 Prest. Abst. 286, 290; Kent, Com. 482; Anonymous, 1 Salk. 246; Den v. Hunt, Spenc. 491; Stevens v. Hollister, 18 Vt. 294; Ang. Lim. 2d ed. 442; Whittington v. Wright, 9 Ga. 23; Brimmer v. Long Wharf, 5 Pick. 131.

³ Tappan v. Burnham, 8 Allen, 70; Barnstable v. Thacher, 3 Met. 239.

⁴ Holley v. Hawley, 39 Vt. 531.

⁵ Co. Lit. 153; 2 Prest. Abst. 282.

⁶ Young v. Herdie, 55 Penn. St. 172.

⁷ Hodges v. Eddy, 38 Vt. 344, 345.

privation of seisin. It takes the seisin or estate from one man and places it in another. It is an ouster of the rightful owner * of the seisin. It is the commencement of a [*486] new title, producing that change by which the estate is taken from the rightful owner, and placed in the wrong-doer. Immediately after a disseisin, the person by whom the disseisin is committed has the seisin or estate, and the person on whom this injury is committed has merely the right or title of entry." "As soon as a disseisin is committed, the title consists of two divisions: first, the title under the estate or seisin; and secondly, the title under the former ownership."¹

11. But to constitute an actual disseisin, there must not only be an unlawful entry upon lands, or, in technical words, an entry not *congeable*, but it must be made with an intention to dispossess the owner, as the act otherwise would be a mere trespass.² Thus it is said, the *quo animo*, in which the possession was taken, is a test of its adverse character; and before one's possession is pronounced adverse, it must be found that he intended to hold in hostility to the true owner." Possession, to be supported by the law, must be under a claim of right; and adverse possession must be strictly proved.³ Where a party claims by a disseisin, ripened into a good title by lapse of time, as against the legal owner, he must show an actual, open, exclusive, adverse possession of the land.⁴ And all these elements are essential to be proved. Strictly speaking, the consent of the legal owner to an act of disseisin is a contradiction in terms. Disseisin, like trespass, is a tortious act, adverse in its nature, and in derogation of the right of the true owner.⁵

12. So a seisin once lost by disseisin may be regained by a re-entry by the disseisee upon the land, without turning the person in the actual seisin out of possession. But the entry

¹ 2 Prest. Abst. 284.

² *Smith v. Burtis*, 6 Johns. 218; 4 Kent, Com. 488; *Bradstreet v. Huntington*, 5 Pet. 439; *Ewing v. Burnet*, 11 Pet. 41; 2 *Smith, Lead. Cas.*, 5th Am. ed. 519, n. 561; *Clarke v. McClure*, 10 Gratt. 305; *Ang. Lim.*, 2d ed. 408; *Wiggins v. Holley*, 11 Ind. 2.

³ *Grube v. Wells*, 34 Iowa, 150.

⁴ *Snoddy v. Kreutch*, 3 Head. 304; *Gordon v. Sizer*, 39 Miss. 820

⁵ *Per Bigelow, J., Cook v. Babcock*, 11 Cush. 209, 210

in such case, to have this effect, must be of such a character, and accompanied by such notice, as clearly to indicate to the one in possession that his possession is invalid, and his right to the same challenged. A casual entry would not be sufficient.¹ In other words, the re-entry, in order to regain a seisin, must be done with that intent, and must be made upon some part of the land.² It is enough, however, that the owner goes upon the land with the intent thereby to regain his seisin. No formal declaration need be made upon the land; and a seisin thus gained authorizes the owner of the land to convey a good title to it, though, till this re-entry, he had been disseised.³ And if the owner is again denied the occupation by the person in possession, it will be a re-disseisin.⁴ As affecting the question of title, however, these principles are chiefly important in determining whether a title has been gained by adverse enjoyment for the requisite period since the time when the actual seisin was gained by the one, and lost by the other.

13. But so important was the effect of seisin deemed at common law as evidence of title, that, if one died actually seised, his seisin was at once cast upon his heir; and though the ancestor had acquired it by disseisin, the right of the disseisee to regain the seisin by an entry was lost, and he was driven to prove his title in an action at law for the recovery of his land, whereby alone he could rebut the presumption

that the seisin in the heir was lawful; ⁵ though this [*487] effect of a * "descent cast" in "tolling the entry,"

as it was called, is pretty generally, if not universally, abrogated in this country, and was so far changed by the 32 Henry VIII., c. 33, that no descent cast would bar a right of entry for regaining seisin by a disseisee, unless the ancestor should have been in possession of the lands in question for the space of five years next after making disseisin thereof.

14. An abandonment by a disseisor of his possession of the

¹ O'Hara v. Richardson, 46 Penn. St. 390; Burrows v. Gallup, 32 Conn. 499.

² Peabody v. Hewett, 52 Me. 46.

³ Brickett v. Spofford, 14 Gray, 514.

⁴ 2 Prest. Abst. 292.

⁵ Co. Lit. 238 a; Smith v. Burtin 6 Johns. 217.

estate operates a restoration of the seisin to the true owner,¹ unless the one who thus abandons is a joint-disseisor, in which case the other disseisor becomes sole seised.² *

* NOTE. — Although the propositions contained in the text are in accordance with the language of the courts in the cases cited, there are difficulties in the way of reconciling them which must occur to any one who considers them in connection with other familiar principles of law. If two are tenants of land by disseisin, there is no such privity between them that either can claim the other's share or interest by reason thereof, because *privity* only grows out of "some such relation as that of ancestor and heir, grantor and grantee, or devisor and devisee." "Separate successive disseisins do not aid each other: their several consecutive possessions cannot be tacked, so as to make a continuity of disseisin." *Sawyer v. Kendall*, 10 Cush. 244. The difficulty is to ascertain upon what principle one co-disseisor succeeds to the rights and possession of another co-disseisor who abandons the premises, and with it his disseisin, rather than the disseisee. The authority on which this rests is *Allen v. Holton*, 20 Pick. 465, where it is said, "When he (the co-disseisor) abandoned the possession, his right, if he had any, was extinguished." And in *Melvin v. Proprietors, &c.*, 5 Metcalf, 32, it is said, "In the latter case (*Allen v. Holton*) it was decided, that where one of two disseisors, in possession *as tenants in common*, abandons the land, the abandonment does not enure to the benefit of the disseisee, but the co-tenant holds the land against the disseisee in the same manner as if he had been from the beginning a sole disseisor." This reasoning would seem to lead one to the conclusion, that, if two disseisors acquired a title by adverse enjoyment of twenty years, they would each become the independent owner, so far as the other was concerned, of an undivided half of the estate in common, without any privity between them, each relying upon his own disseisin commenced twenty years before. And if, during that time (say at the end of fifteen years), one had abandoned his disseisin, it is not quite clear how the other disseisor, who, till then, had only stood as disseisor of one undivided half of the land, would, without any new act or declaration, become, *ipso facto*, a disseisor from the date of his first entry, so as to become the owner thereby, by disseisin, of the whole estate, if he continue to hold it till the expiration of the twenty years. Against this it is expressly said in the same case, "Whenever one quits the possession, the seisin of the true owner is restored, and an entry afterwards by another wrongfully constitutes a new disseisin." And in *Potts v. Gilbert*, 3 Wash. C. C. 479, speaking of successive disseisins, the court say, "The moment A (the first disseisor) quits the actual possession, the legal possession of the real owner is restored, and the entry of B constitutes him a new disseisor." "There is no privity between A and B." And the same doctrine is laid down in *Cleveland v. Jones*, 3 Strobb. 483.

If this be so, the moment one disseisor who is tenant in common abandons, his disseisee would seem to be restored to his original rights as to so much of the

¹ *Melvin v. Proprs. Locks and Canals*, 5 Met. 15, 32; *Potts v. Gilbert*, 3 Wash. C. C. 475; *Sawyer v. Kendall*, 10 Cush. 241, 245; *Cleveland v. Jones*, 3 Strobb 479, n.

² *Allen v. Holton*, 20 Pick. 458; *Ang Lim.*, 2d ed. 446

15. Before proceeding to examine more in detail what constitutes such a possession as will avail as conclusive evidence of title, it seems proper to refer, for a moment, to a controversy which was carried on in England for many years, and till a recent period, growing out of an opinion expressed by Lord Mansfield in the case of *Taylor v. Horde*, as to the effect of a feofment made by a tenant for life or years upon the right of the lessor. It was the theory of the old common law, that, if one in possession of land made a feofment thereof, it operated upon the seisin, divesting it from him in whom it had been, and vesting it in the feoffee, and, of course, working an actual disseisin of the lessor. Lord Mansfield, on the contrary, held that it did not so operate, except at the election of the lessor. The doctrine was controverted by Mr. Preston with no little tartness of spirit, and by Mr. Butler with quite as much ability. But it is now the doctrine of Westminster Hall and the courts of our own country.¹ Indeed, feofment with livery of seisin is believed to be practically unknown in this country.

16. But a deed duly executed, delivered, and recorded, will, it is believed, in all the States, actually pass the seisin of the grantor of the estate thereby conveyed, unless himself disseised, without any formal entry, either by force of the express provisions of statutes, or of the doctrine of uses which prevails in most of the States to a greater or less extent, as will be shown hereafter when treating of titles by deed.² A

[*488] recorded deed, however, does not *disseise the owner of the land, unless the grantor occupies some part of

interest in the land as such disseisor had given up, and to become thereby a tenant in common with the other disseisor. And why should not the familiar principle then apply, that one tenant in common cannot disseise his co-tenant by merely continuing to hold and occupy the premises. *Ante*, vol. 1, *418.

¹ *Taylor v. Horde*, 1 Burr. 60; 2 Prest. Abst. 279, 390, 401; 4 Kent, Com. 484-489; Ang. Lim., 2d ed. 407; Co. Lit. Butler's note, 285; *Miller v. Miller*, Meigs, 493.

² *Wells v. Prince*, 4 Mass. 64, 68; *Barr v. Gratz*, 4 Wheat. 213; *Green v. Liler*, 8 Cranch, 229; 4 Dane, Abr. 85; *Caldwell v. Fulton*, 31 Penn. St. 475; *Matthews v. Ward*, 10 Gill & J. 443; *Higbee v. Rice*, 5 Mass. 344; *Effinger v. Lewis*, 32 Penn. St. 367; *Breckenridge v. Ormsby*, 1 J. J. Marsh. 244. So in New Brunswick. *Wortman v. Ayles*, 1 Hannay (N. B.), 65; *Wyman v. Brown* 50 Me. 160.

the premises.¹ A warranty deed duly executed and recorded raises a presumption that the grantor had a title which he could convey, and that he had, by his deed, vested a seisin in the grantee. In the absence of adverse possession, seisin follows the legal title, and seisin in law carries with it the legal possession.² But a deed not acknowledged or recorded cannot be evidence of seisin or possession, except as against the grantor. It is not, therefore, evidence of possession of wild lands in an action against a trespasser upon the same.³ But in Pennsylvania, if acknowledged, a deed may be used in evidence, though it may not have been recorded.⁴

17. As the title now under consideration is the result of possession sufficiently long continued, it becomes proper to examine, in the next place, in the light of these general hints upon the doctrine of disseisin, the nature and character of the possession that will serve to establish a valid title.

It is said by Mr. Smith, in his comments upon *Taylor v. Horde*, that "the doctrine of adverse possession, until lately, constituted, and perhaps still constitutes, one of the least settled, although most important, heads of the English law."⁵ The difference between an actual disseisin and one by election was very strongly marked. In case of the former, the owner could no longer convey his lands, since all he had left was a right of entry, which the policy of the law against maintenance would not allow him to part with to another. Therefore the statute of limitations of 21 Jac. I., c. 16, applied only to cases where one had been actually put out of his tenancy, and not to those where the owner elected to consider himself disseised.⁶ It became, therefore, necessary, in order to determine whether the claimant had been out of possession of the estate so as to have left in him only a right of entry, to ascertain in what character the person who was actually in possession held the same; and, to that end, the courts looked at his conduct while he had been in possession.⁷

¹ *Putnam School v. Fisher*, 38 Me. 324.

² *Farwell v. Rogers*, 99 Mass. 33.

³ *Kellogg v. Loomes*, 16 Gray, 49; *Estes v. Cook*, 22 Pick. 295.

⁴ *Keichline v. Keichline*, 54 Penn. St. 76.

⁵ 2 Smith, *Lead. Cas.*, 5th Am. ed. 529.

⁶ 2 Smith, *Lead. Cas.*, 5th Am. ed. 530.

⁷ 2 Smith, *Lead. Cas.*, 5th Am. ed. 530, 531.

18. But before entering upon the examination of what must be the character of a possession in order that it may work a disseisin, and lay the foundation of a title to become complete under the statute of limitations, it should be clearly understood that the estate thereby acquired is, and must be, if any thing, a fee. The man who has and claims the seisin of lands, not subordinate, but adverse to the rights of all other persons,

has thereby the fee, of which he can only be divested [*489] by the entry * of a claimant with a better right, or by act of the law; and both of these are barred by his being suffered to hold such seisin for the period prescribed by the statute of limitations.¹ But whether the estate which two joint-disseisors gain by their possession is that of joint-tenants, or tenants in common, does not seem to be well settled.²

19. The language upon the subject of the statute of limitations of the American annotator upon the work of Mr. Smith is: "The proper and mere operation of the statute of limitations, probably in all the States, is the creation of a positive bar to the assertion and vindication of an admitted and complete title."³ "The nature of that adverse possession which is required to constitute a bar to the assertion of a legal title by the owner of it, or by one against whom the adverse occupant brings ejectment," "must be an *actual, visible, notorious, distinct, and hostile* possession."⁴ The party must claim the land as his own openly and exclusively.⁵ Actual residence upon or enclosure of land is not always requisite to constitute such possession. Acts done under a claim of right equivalent to actual possession, if they are open, notorious, and hostile, may be sufficient.⁶ If one occupies another's land by a permanent structure, it is a disseisin of the owner, though done

¹ 2 Prest. Abst. 293; Co. Lit. 271 a; Ang. Lim., 2d ed. 396; M'Call v. Neely, 3 Watts, 71; Wheeler v. Bates, 1 Fost. 460.

² Fowler v. Thayer, 4 Cush. 111; ante, pl. 14, note.

³ Ang. Lim., 2d ed. 397.

⁴ Hawk v. Senseman, 6 S. & R. 21, by Duncan, J.; 2 Smith, Lead. Cas., 5th Am. ed. 560, 561; Calhoun v. Cook, 9 Penn. St. 226; Melvin v. Proprs. Locks and Canals, 5 Met. 15, 33; Turney v. Chamberlain, 15 Ill. 271; Armstrong v. Ristean, 5 Md. 256; Ang. Lim., 2d ed. 410-412, 416; 2 Greenl. Ev., § 557; Robinson v. Lake, 14 Iowa, 424; Cahill v. Palmer, 45 N. Y. 484; Booth v. Small, 25 Iowa, 177.

⁵ Jackson v. Berner, 48 Ill. 208.

⁶ Booth v. Small, 25 Iowa, 177; Whalley v. Small, 29 Iowa, 289.

under a mistake; nor could the tenant, if sued by the owner, plead non-tenure or disclaimer to the suit. And if a railroad take land by eminent domain for the uses of the road, and then occupy it for purposes outside of the uses of the road, as by leasing it to tenants for shops or stores, it would be a disseisin of the land-owner, and render them liable to an action for disseisin and for mesne profits, though it would not deprive the road of the use of the premises for purposes pertaining to the exercise of their corporate franchises.¹ Passing over land, therefore, lying open and unenclosed in the same manner as others, having occasion to pass there for convenience, though continued for twenty years, will not give one a title by adverse possession.² "The whole doctrine of adverse possession," say the court of Alabama, "rests upon the presumed acquiescence of the owner." "Acquiescence cannot be presumed, unless the owner has, or may be presumed to have, notice of the possession."³ Actual knowledge on the part of the owner must be shown in order to create an adverse possession.⁴ But the court, in *Calhoun v. Cook*, remark: "As to badges of adverse possession, the decisions are not entirely consistent;" though that such a possession is necessary to effect a title seems to be admitted by all. In view of what courts have themselves admitted, the difficulty, if not impracticability, of laying down any precise rule by which, in all cases, the question of adverse possession may be determined, it seems desirable, even at the hazard of repetition, to ascertain what rules courts have recognized in fixing a criterion by which to determine what cases come within the effect of the statute of limitations. In the first place, inasmuch as the title of the true owner may, by the application of this statute, be often divested by the wrongful act of another, the law is stringent in requiring clear proof of the requisite facts. There must be, *first*, an actual occupancy,

¹ *Proprietors, &c. v. Nashua, &c. R. R.*, 104 Mass. 1, 12.

² *Gittings v. Moale*, 21 Md. 148.

³ *Benje v. Creagh*, 21 Ala. 151; *Brown v. Cockerell*, 33 Ala. 47; *Atherton v. Johnson*, 2 N. H. 34; *Cook v. Babcock*, 11 Cush. 210; *Thomas v. Marshfield*, 13 Pick. 250; *School District v. Lynch*, 38 Conn. 330.

⁴ *Alexander v. Polk*, 39 Miss. 755.

clear, definite, positive; and notorious; ¹ *second*, it must be continued, adverse, and exclusive, during the whole period prescribed by the statute; ² *third*, it must be with an intention to claim title to the land occupied, or, in other words, the fact of possession, and the *quo animo* it was commenced and continued, are the only tests.³ If, therefore, the intention is wanting of claiming against the true owner, the possession of a tenant will not be adverse, nor, however long continued, bar the owner's right of entry.⁴ It is always competent to show the declarations of a tenant while in possession of the premises as to the intent with which it is holden.⁵ And in Massachusetts, declarations by one who has been in possession, made more than twenty years after the occupancy began, are competent to show the motives and views with which he held it.⁶ But in Vermont, where one who had been in possession more than fifteen years sold the estate to a third party, who held it for twelve, when the original owner brought an action to recover the premises, and offered to show that the defendant's grantor, *after* being in possession fifteen years, declared to him that he had never claimed any land by possession, and never would, the court held, that no declaration of defendant's grantor, made after he had been in possession fifteen years (the period of limitations), could be received to affect the tenant's title, inasmuch as by that length of possession he had become absolute owner of the estate.⁷ And there need be no direct proof of a claim made to the title by the tenant or a disclaimer of the owner's title. "It is necessary only that he should enter into and take possession of the lands as if they were his own."⁸ In one case, two adjacent owners, whose lands were separated by a straight division-line, made a crooked fence for their mutual convenience, and

¹ *Cook v. Babcock*, 11 Cush. 210; *Little v. Downing*, 37 N. H. 367.

² *Doswell v. De La Lanza*, 20 How. 32; *Thomas v. Marshfield*, 13 Pick. 250; *Denham v. Holeman*, 26 Geo. 191.

³ *Grant v. Fowler*, 39 N. H. 101; *Jackson v. Wheat*, 18 Johns. 44; *Magee v. Magee*, 37 Miss. 152.

⁴ *Magee v. Magee*, *sup.*; *Cook v. Babcock*, *sup.*; *Jones v. Hockman*, 12 Iowa, 108; *Wright v. Keithler*, 7 Iowa, 92.

⁵ *McNamee v. Moreland*, 26 Iowa, 109.

⁶ *Church v. Burghardt*, 8 Pick. 328.

⁷ *Hodges v. Eddy*, 41 Vt. 488.

⁸ *Johnson v. Gorham*, 38 Conn. 521; *Bryan v. Atwater*, 5 Day, 181.

occupied their lands in this way longer than the term of limitations; but it was held to create no title in either party beyond the true line, inasmuch as neither intended to disseise the other.¹ If, therefore, one enter under a bond for a deed, and hold possession prior to the time of payment of the purchase-money, it will not be adverse.² So if one enter with a wish or intent to purchase, not knowing who the owner is, but not claiming the premises as his own.³ Upon the question of the extent of a party's possession, under which he claims title by disseisin, much may depend upon whether it is done under claim or color of title by some written instrument, like a deed, levy of execution, decree of court, or the like, in which the parcel in question is described by metes and bounds, or whether the act was simply one of disseisin. In the former case, the extent of claim and constructive possession of the party making the entry, and occupying under it, is often referred to the description of the premises in such deed or written instrument; whereas, in the latter case, the possession reaches no farther than there is a *pedis possessio*, an actual occupation by some defined, certain limits, indicated by a substantial enclosure, or something of a like notorious character.⁴ The placing and maintaining of a fish-house or an engine-house upon another's land by a city was held to be a disseisin of the owner to the extent of such occupancy.⁵ Every element which goes to make a possession adverse must concur, or it will not confer a title. "And if," in the language of the court of Pennsylvania, "there be one element more distinctly material than another in conferring title, where all requisites are so, it is the existence of a *continuous* adverse possession for twenty-one years." An actual interruption of the possession is fatal to the claim under it.⁶ Where, therefore, the tenant so far yielded to the claim of a third party to

¹ *Morse v. Churchill*, 41 Vt. 649; *Church v. Burghardt*, 8 Pick. 328.

² *Ormond v. Martin*, 37 Ala. 604.

³ *Long v. Young*, 28 Geo. 130.

⁴ *Hanna v. Renfro*, 32 Miss. 129, 130; *Little v. Downing*, 37 N. H. 355; *Barr v. Gratz's Heirs*, 4 Wheat. 213; *Bell v. Longworth*, 6 Ind. 273; *Farrar v. Fessenden*, 39 N. H. 268, 281; *Scales v. Cockrill*, 3 Head. 436; *Doe v. White*, 1 Kerr (N. B.), 627-629; *post*, *498.

⁵ *Boston v. Richardson*, 105 Mass. 372.

⁶ *Groft v. Weakland*, 34 Penn. St. 308.

a right of possession as to let him enter and occupy under an agreement to surrender the possession, if he did not, by such a time, produce the evidence of his right, and, failing to do so, he quit possession, and the first tenant re-entered, it was held to break the requisite continuity of his possession to acquire title thereby. He could not *tack* the two periods together, to make, in the aggregate, the requisite period of adverse possession.¹ The tenant, therefore, must remain permanently on the land, or else occupy it in such a way as to leave no doubt on the mind of the true owner, not only who the adverse claimant is, but that it is his purpose to keep him out of his land. Nor will it be sufficient, that when, leaving the land, the tenant had a secret purpose and intent to return at his convenience, sooner or later, and reoccupy the land.² If, therefore, there is any period during the twenty years in which the person having the right of entry could not find an occupant on the land on whom he could bring or sustain his ejectment, technically called "the tenant to the *præcipe*," that period cannot be counted against him as part of the twenty years.³ But this possession need not be continued by the same person. It will be sufficient that it is held by different persons in succession, holding in privity with each other, or with the one who claims title by such possession.⁴

20. In analyzing the requisites of such a possession as will give title, it requires, in order to constitute an actual possession, that there should be an entry made, so that there may be an ouster effected, and an adverse possession begun; that is, he who would set up such a title must go upon the land with a palpable intent to claim the possession as his own.⁵ Taking

¹ *Austin v. Bailey*, 37 Vt. 224.

² *Denham v. Holeman*, 26 Geo. 191. See *Morrison v. Kelly*, 22 Ill. 623; *Nixon v. Porter*, 38 Miss. 415.

³ *Trotter v. Cassady*, 3 A. K. Marsh. 366.

⁴ *Wheeler v. Moody*, 9 Texas, 377; *Schrack v. Zubler*, 34 Penn. St. 38; *Doswell v. De La Lanza*, 20 How. 32; *Cooper v. Smith*, 9 S. & R. 33. How far husband is held to be in privity with wife in possession of lands, see *Doe v. Gregory*, 2 A. & E. 14; *Doe v. Wing*, 6 Car. & P. 538; *Doe v. Jauncey*, 8 C. & P. 99; *Holton v. Whitney*, 30 Vt. 405; *Johnson v. Nash*, 15 Texas, 419; *Menkens v. Blumenthal*, 27 Mo. 198; *Clark v. Chase*, 5 Sneed, 636. This may be done by statute in California. *Franklin v. Dorland*, 28 Cal. 180.

⁵ 2 Smith, Lead. Cas., 5th Am. ed. 561.

a deed is not enough to make an adverse possession ; it must be followed by an actual entry ; and it is only from the time of such entry being made that the statute of limitations begins to run in favor of him who claims under it.¹ But taking possession under a deed from one who has no title to the premises is adverse to the real owner, whose deed, executed while such grantee is in possession, would be void because of his being disseised.² Where, however, a tenant, by curtesy, devised his estate to A for life, remainder to B in fee, and A entered and occupied the estate for more than twenty years, and then conveyed it in fee, the heirs of the original owner not interfering, it was held that B, at A's death, was entitled to the estate, since A, entering under the will, was estopped to claim any more than a life-estate as against the remainder-man, and his adverse holding enured to the benefit of the remainder-man.³ And a possession may be adverse wherever an ouster may be presumed.⁴ This intent to claim and possess the land is one of the qualities *es- [*490] sential to constitute a disseisin. A mere going upon the land by any one, and staying there without the intent to claim and assert the land to be his own, would not operate as an ouster. The intention guides the entry, and fixes its character.⁵ Thus where there was a freehold in the surface-soil, and a separate freehold and ownership in the mines beneath, no length of occupation of the surface by the owner thereof will affect the title to the mines by the way of constructive disseisin or possession. But, like any other stranger, he may disseise the mine-owner by digging and carrying away the minerals, and carrying on the processes of mining. But, to have that effect, there must be, on his part, an open, continuous, adverse, and notorious possession of the mine.⁶ But where one purchased one hundred acres of land, and enclosed and occupied one hundred and thirty, supposing it to be only

¹ *Robinson v. Lake*, 14 Iowa, 424.

² *Sands v. Hughes*, 53 N. Y. 293.

³ *Board v. Board*, L. R. 9 Q. B. 48.

⁴ *Bradstreet v. Huntington*, 5 Pet. 439 ; *San Francisco v. Fulde*, 37 Cal. 349

⁵ *Society, &c. v. Pawlet*, 4 Pet. 507 ; *Ewing v. Burnet*, 11 Pet. 41 ; *Ang. Lim.*, 2d ed. 401, 413 ; *La Frombois v. Jackson*, 8 Cow. 609, 613, 617 ; *Ford v. Wilson*, 35 Miss. 504 ; *Magee v. Magee*, 37 Miss. 138.

⁶ *Armstrong v. Caldwell*, 53 Penn. St. 287.

the one hundred which he had purchased, and supposing it all to belong to him, though he did not originally intend to enclose or take possession of any more than what he had purchased, yet, if he continue actually to occupy and improve the whole parcel, it will be considered an adverse occupation within the statute of limitations, and, after twenty years, will bar the claim of the true owner.¹ In the case, however, of *Howard v. Reedy*, the court held, that if, under such circumstances, possession was taken and continued to be held for the period of limitation under a mistake, it would not operate as a bar to the claim of the true owner.²

21. As to the necessity that the possession should be *continued*, it seems that it must be kept up during the requisite period prescribed by statute, by actual residence or a continued cultivation or enclosure, if the property is susceptible of a permanent, useful improvement; otherwise, such use and occupation of it as, from its nature, it is susceptible of, will be sufficient, if done with a claim of ownership.³ And even if the continuity of possession be broken by fraud or wrongful entry, it would defeat the operation of the statute.⁴ Though it may have been twenty years since the tenant entered upon the land, if he had been out of possession of it two years in that time, it would not bar the owner's right to recover it.⁵ But if one enter upon land, it is not necessary, in order to his retaining continuous possession, for him to remain on the land constantly. It depends somewhat upon the condition of the premises. If he leaves it without an intention to return, his possession is at an end. Paying taxes on land is not an act of possession, though it may be used as evidence of the intent with which possession may have been taken by the one who pays them.⁶ But entering upon land adjoining a pond, and cutting a load or two of thatch there growing, between high and low water mark of the pond, every year for twenty

¹ *Crary v. Goodman*, 22 N. Y. 170; *Brimmer v. Long Wharf*, 5 Pick. 131.

² *Howard v. Reedy*, 29 Geo. 152.

³ 2 Smith, Lead. Cas., 5th Am. ed. 562; *Ewing v. Burnet*, 11 Pet. 41; *Brandt v. Ogden*, 1 Johns. 156; *Ang. Lim.*, 2d ed. 446.

⁴ *San Francisco v. Fulde*, 37 Cal. 349.

⁵ *Carlisle v. Cooper*, 4 C. E. Green, 259.

⁶ *Webb v. Richardson*, 42 Vt. 465.

years, are mere acts of trespass, and do not constitute a disseisin.¹ Cases illustrative of the several general propositions here contained will be given hereafter.

22. To give a possession the requisite characteristics of being visible, notorious, distinct, and definite in its extent, the ouster, in the first place, must be of such notoriety that the owner may be presumed to have notice of it and of its extent.² But if the possession be openly and notoriously held by a party, it may avail as a disseisin of the true owner, although it be not shown that actual notice of its being under an adverse claim was given to the owner.³

23. The last requisite or quality of the possession is, that it must be hostile or adverse, which is partly a question of fact, and partly one of law. Whether the possession in fact is adverse, or is under the owner's title, is one for the jury, with this limitation, that the burden of showing the possession to have * been adverse is upon the party alleging it. [*491] One may show as a fact, in order to prove that his possession is adverse to all persons, that, while in possession, he sued one in trespass who had entered upon him and prosecuted the action to final judgment, although such defendant was no party to the suit in which the evidence was offered.⁴ But what constitutes an adverse possession, and what evidence of its being such is sufficient, are questions of law for the court. As the possession derives its character from the intent with which it was taken and is held, it is competent to show by the declarations of the occupant, made during the occupancy, that he did not hold adversely.⁵ Thus, where the line between two adjacent owners is in dispute, and they agree that the fence between them is not the true line, and

¹ *Wheeler v. Spinola*, 54 N. Y. 387.

² 2 *Smith*, Lead. Cas., 5th Am. ed. 563, 564; *Hodgkinson v. Fletcher*, 3 *Doug.* 31; *Cook v. Babcock*, 11 *Cush.* 210; *Doe v. Campbell*, 10 *Johns.* 477; *Denham v. Holeman*, 26 *Geo.* 191; *Pray v. Pierce*, 7 *Mass.* 383; *Doolittle v. Tice*, 41 *Barb.* 181; *Close v. Samm*, 27 *Iowa*, 503; *Grube v. Wells*, 34 *Iowa*, 152.

³ *Samuels v. Borrowscale*, 104 *Mass.* 207.

⁴ *Hollister v. Young*, 42 *Vt.* 403.

⁵ 2 *Smith*, Lead. Cas., 5th Am. ed. 566, 567; *Sailor v. Hertzogg*, 2 *Penn. St.* 182; *Ang. Lim.*, 2d ed. 413. See *Beverly v. McBride*, 9 *Ga.* 447, that the question of adverse seisin is exclusively for the jury. *Ricard v. Williams*, 7 *Wheat.* 59, 112; *Church v. Burghardt*, 8 *Pick.* 327. How far it is a question of law, and how far of fact, see *Bradstreet v. Huntington*, 5 *Peters*, 438; *Magee v.*

that that shall be ascertained, an occupancy in reference to such a fence will not be adverse on either side: it is deemed to be by mutual consent. But if a fence is placed upon what is assumed to be the true line, and the parties occupy up to it, it will gain a title, if continued for twenty years, although after that time it is discovered not to be on the proper line.¹ But though the occupancy may be explained, so as to do away with the effect otherwise to be ascribed to it, it must be done by the party seeking to disturb the effect of the twenty years' possession.² Where, therefore, one enters in subseruiency to the title of the real owner, there must be a clear, positive, and continued disclaimer and disavowal of the title under which he entered, and an assertion of an adverse right brought home to the owner, in order to lay a foundation for the operation of the statute of limitations.³ Where the husband entered in the right of his wife, who was tenant for life, and continued to hold the premises after her death for more than twenty years, it was held that his possession was adverse to the owner after her death, and consequently operated as a statute bar to his claim.⁴

24. As the possession of one of several tenants in common, so far as it is exclusive, is always deemed to be subordinate to the rights of his co-tenants, and to be held for their benefit, he must, if he seeks to give to it the character of a disseisin, show what is tantamount to an actual ouster of such co-tenants; as, for instance, an appropriation of the profits, under a claim of exclusive right, or with a palpable intent to possess the whole exclusively.⁵ Merely taking a deed by one of two

Magee, 37 Miss. 154; *Doe v. Harbrough*, 1 N. & Man. 422; *Doe v. Jauncey*, 8 C. & P. 99; *Hale v. Silloway*, 1 Allen, 21; *Tappan v. Burnham*, 8 Allen, 70; *McNamee v. Moreland*, 26 Iowa, 109.

¹ *Russell v. Maloney*, 39 Vt. 588.

² *Doe v. Lawley*, per Denman, C. J., 13 Q. B. 954.

³ *Hall v. Stevens*, 9 Met 418; *Day v. Cochran*, 24 Miss. 261; *Clarke v. McClure*, 10 Gratt. 305; *Floyd v. Mintsey*, 7 Rich. 181; *Criswell v. Altemus*, 7 Watts, 581; *Long v. Mast*, 11 Penn. St. 189; *Harrison v. Pool*, 16 Ala. 167; *Ang. Lim.*, 2d ed. 401.

⁴ *Doe v. Gregory*, 2 Ad. & E. 14.

⁵ 2 *Smith, Lead. Cas.*, 5th Am. ed. 567; *Challefoux v. Ducharme*, 8 Wis. 287; *Zeller's Lessee v. Eckert*, 4 How. 295; *McClung v. Ross*, 5 Wheat. 124; *Alexander v. Kennedy*, 19 Texas, 488; *Bennet v. Bullock*, 35 Penn. St. 364; *Owen v. Morton*, 24 Cal. 376; *Peters v. Jones*, 35 Iowa, 512.

co-tenants from a stranger of the entire estate, and putting the same on record, is not an ouster of his co-tenant, nor a notice of a claim to exclusive and adverse possession. Nor would a deed by one co-tenant of the entire estate to a stranger be a notice to his co-tenant, of an adverse claim of ownership which would work an ouster of his seisin.¹ A sole pernancy of profits by one co-tenant, continued for a long series of years, where there has been no claim of right to such exclusive enjoyment, is evidence upon which a jury is to determine whether it was done with the intent to exclude his co-tenant, its effect depending upon such finding.² But, for one co-tenant to oust another, he must do such acts as would be an ouster of a landlord by a tenant, or of any one to whom he stood in a fiduciary relation.³

25. And the principle is of universal application, that, where there has been a privity of title and possession, the occupant, if he seeks to rebut the claim of the other party by setting up an adverse possession, must show an ouster by some unequivocal act, insisting upon his own right, and denying that of the other; and his possession must have been notorious, hostile, and exclusive as against the true owner.⁴ And where one party shows documentary evidence of title to land, and another sets up only adverse possession, the burden is on him to show all that is essential to constitute such a title.⁵

26. These principles would probably, so far as their soundness is concerned, be rarely questioned. It has, therefore, been *deemed sufficient to refer for their support [*492] to the positions laid down by the authors quoted. But in order to illustrate the application of these doctrines, it is proper to refer also to a few from the multitude of cases which have arisen in the English and American courts upon the subject of disseisin, adverse possession, and title acquired under the operation of the statutes of limitation. The courts of Massachusetts had occasion to consider this subject in *Parker v. Proprietors, &c.*, in which the doctrine is thus stated: "If a person enters on land having no right or title,

¹ *Holley v. Hawley*, 39 Vt. 531.

² *Lefavour v. Homan*, 3 Allen, 355.

³ *Holley v. Hawley*, 39 Vt. 534; *Roberts v. Morgan*, 30 Vt. 319.

⁴ *Long v. Mast*, 11 Penn. St. 189.

⁵ *Kowland v. Updike*, 4 Dutch. 101

and maintains exclusive possession, taking the rents and profits, his possession would be considered adverse, and, if of sufficient notoriety, would amount to a disseisin; but if a person enter, having a title and right of entry, his entry and possession are presumed to be in conformity to his title."¹ "To constitute disseisin, it is not necessary, at the present day, to prove the forcible expulsion of the owner, nor is it necessary to prove an actual ouster of the co-tenant." "The intention so to hold the estate must be manifest;" and the open and notorious possession of the person who, in that case, claimed as purchaser, was held to be constructive notice of a claim adverse to the co-tenant of his grantor, the rightful owner. "This adverse entry and possession, claiming the whole estate, constitutes a disseisin."² And the court, in various forms, repeat the doctrine, that actual force is not necessary, and that possession, notorious and adverse, is equivalent to an actual expulsion. It has accordingly been held, that, if one enter under a void grant or a sale by parol, it is a disseisin of the true owner.³ And a continued possession for twenty years, under claim of right, under such a deed or sale, ripens into a right of possession, which defeats the owner's right of entry, and gives an absolute title against every one not excepted by statute.⁴

[*493] * 27. If a seisin, moreover, is admitted as proved to be in any one at any given time, the law presumes it to continue till negatived by evidence by him who alleges a disseisin.⁵

¹ See *Means v. Welles*, 12 Met. 356; *Den v. Sharp*, 4 Wash. C. C. 609; *Tappan v. Tappan*, 11 Fost. 41.

² *Parker v. Proprs. Locks and Canals*, 3 Met. 99, 102; *Ricard v. Williams*, 7 Wheat. 60; *Bradstreet v. Huntington*, 5 Pet. 445; *Barr v. Gratz*, 4 Wheat. 213; *Manchester v. Doddridge*, 3 Ind. 360; *Prescott v. Nevers*, 4 Mason, 330; *Clapp v. Bromaghan*, 9 Cow. 530; *Fishar v. Prosser*, Cowp. 217; *Owen v. Morton*, 24 Cal. 376.

³ *Melvin v. Proprs. Locks & Canals*, 5 Met. 15, 33; *Comins v. Comins*, 21 Conn. 418.

⁴ *Jackson v. Newton*, 18 Johns. 355; 2 *Crabb*, Real Prop. 1006; *Blair v. Smith*, 16 Mo. 273; *Sumner v. Stevens*, 6 Met. 337; *Ashley v. Ashley*, 4 Gray, 197.

⁵ *Brown v. King*, 5 Met. 173; *Brimmer v. Proprs. Long Wharf*, 5 Pick. 135; *Fosgate v. Herkimer Co.*, 9 Barb. 287; *Currier v. Gale*, 9 Allen, 525.

28. In the case of successive holders of land after a disseisin committed by the first of them, the seisin thereby acquired by him will not enure to the benefit of the others who come into possession after him, unless there is a privity of estate between them and him by purchase or descent.

Their consecutive possessions cannot, in the language of the law, be tacked together to make a continuity of disseisin. And this applies in the case of the wife of a disseisor holding after his decease, as, unless she claims as his devisee, she does not come in with the requisite privity, such as exists between ancestor and heir, grantor and grantee, or deviser and devisee.¹ He cannot add the possession of his predecessor to his own, unless he enters under and through him by privity of estate.² Therefore, where A, who was in possession under color of title, gave an estate for life by will to one, and a remainder to another in fee, and the tenant for life entered and held possession during life, and was followed by the remainderman, the latter could not tack the possession of the tenant for life upon his own, as he took from the deviser, and not from the tenant for life. And the same doctrine was applied to acquiring an easement of way by user by several successive owners of the dominant estate.³ In a subsequent case, the court extended the doctrine of successive owners tacking their consecutive possessions to gain a title by limitation to a purchaser who held under the executor of an insolvent who was the first disseisor, and had devised the estate to one who held it for a time until sold for the payment of testator's debts. The purchaser held directly from the disseisor, and his devisee gained no rights as against his creditors.⁴ And in

¹ *Sawyer v. Kendall*, 10 Cush. 241, 244; *Armstrong v. Risteau*, 5 Md. 256; *Melvin v. Proprs. Locks and Canals*, 5 Met. 15, 32; *Wade v. Lindsey*, 6 Met. 407, 412; 2 *Smith, Lead. Cas.*, 5th Am. ed. 265; *Overfield v. Christie*, 7 Serg. & R. 173; *Ang. Lim.*, 2d ed. 447; *Alexander v. Pendleton*, 8 Cranch, 462; *Chilton v. Wilson*, 9 Humph. 399; *Doe v. Brown*, 4 Ind. 143; *Johnson v. Nash*, 15 Texas, 419, 422; *Jackson v. Leonard*, 9 Cow. 653; *Doe v. Campbell*, 10 Johns. 477; *Doe v. Barnard*, 13 Q. B. 945; *Ward v. Bartholomew*, 6 Pick. 415; *Schrack v. Zubler*, 34 Penn. St. 88; *Cochrane v. Ferris*, 18 Texas, 850; *Marr v. Gilliam*, 1 Cold. (Tenn.) 488.

² *San Francisco v. Fulde*, 37 Cal. 349; *Austin v. Rutland R. R. Co.*, 45 Vt. 215.

³ *Leonard v. Leonard*, 7 Allen, 277.

⁴ *Peele v. Chever*, 8 Allen, 89.

another case it was held sufficient to continue the original disseisin and possession, that the second occupant came in under the first, and continued to hold, although there was no deed from the first to the second creating a privity of estate between them. It would be sufficient if done under a contract by which the second was to have possession.¹ In Tennessee, it is not necessary to show even a parol agreement between successive occupants. It is enough that the owner has been kept out of possession the requisite period of time, if there has been a continuous possession by successive occupants; and the same is the law in North Carolina.² So where a husband entered, in right of his wife, upon land to which she had no title but by possession, and, after her death, continued to hold possession of the premises for a period long enough, if added to that during which he had held it during his wife's life, to make the requisite term of limitation, it was held that he could not tack these together, so as thereby to acquire a title.³ But where a husband entered upon land claiming it as belonging to his wife, and, after his death, she continued to occupy till the two periods amounted to the term of limitation, it was held to be a sufficient adverse possession to gain for her a title thereby.⁴ So where a married woman, under a contract of purchase, entered upon and occupied land uninterruptedly and exclusively for more than twenty years, it was held that she thereby acquired a title to the same; and, in an action by the heirs of the original owner against the husband to recover the land, it was held that he might defend against the same under the title of his wife, although he had, during her occupancy, but without her knowledge, made a deed of release of the premises to the original owner, the latter never having availed himself of such release.⁵ So where the husband and wife entered upon land by virtue of a parol gift to the wife, and occupied the estate during the term of limitation, the husband doing nothing inconsis-

¹ *Smith v. Chapin*, 31 Conn. 530.

² *Scales v. Cockrill*, 3 Head, 435; *Candler v. Lunsford*, 4 Dev. & Bat. Law, 409.

³ *Doe v. Wing*, 6 C. & P. 538. See *Doe v. Jauncey*, 8 C. & P. 99.

⁴ *Holton v. Whitney*, 30 Vt. 405.

⁵ *Steel v. Johnson*, 4 Allen, 425. *Outcalt v. Ludlow*, 32 N. J. 239.

ent with a sole ownership by the wife, it was held that she acquired a title thereby to the premises.¹ Where a husband, in possession of land adversely to the true owner, died, leaving it to his widow and heirs, and she married again, and the claimant sued the husband and obtained judgment for the land, but did not make her or the first husband's heirs parties to the suit, it was held not to affect their rights, and, by continuing the possession, they acquired a title by limitation.² But, in some of the States, the right of the purchaser under a disseisor to tack his grantor's possession to his own is denied.³

29. The prevailing doctrine in the United States seems to be, that one who is in possession of lands may convey them by deed, such possession giving him, for the purpose of conveyance, a sufficient seisin, which will consequently carry with it a covenant of warranty such as the grantor may enter into in the deed of conveyance; and this may be availed of by the assignee of the grantee to whom the land may be conveyed, even though the possession by such grantor was not sufficient to work an actual disseisin of the real owner of the estate.⁴ So one in possession may have a writ of entry against one who disturbs him in this possession, although the demandant could not himself defend against a third party in whom was the freehold.⁵ So if one enter upon woodland, and spot a line of trees around it, claiming it as his own, it will give him a good title to the land against all persons but the real owner; and if a stranger enter upon it, the one thus in possession may have trespass against him, although, as against the owner, such possession would not work a disseisin.⁶

30. It may be remarked, in passing, that no disseisin of the tenant of a particular estate, and occupation under it, however long continued, will affect the right of the reversioner. And the doctrine may be laid down as universal, that no possession can be held to be adverse as to one who has no right

¹ *Clock v. Gilbert*, 39 Conn. 94.

² *Hamilton v. Wright*, 30 Iowa, 480.

³ 2 *Smith, Lead. Cas.*, 5th Am. ed. 563; *King v. Smith, Rice*, 10.

⁴ *Slater v. Rawson*, 6 Met. 439. See *Overfield v. Christie*, 7 Serg. & R. 178.

⁵ *Currier v. Gale*, 9 Allen, 525; *Hubbard v. Little*, 9 Cush. 475.

⁶ *Woods v. Banks*, 14 N. H. 112; *Hicks v. Coleman*, 25 Cal. 131-137; *Hodges v. Eddy*, 38 Verm. 345.

of entry and possession during its continuance.¹ The latter may enter whenever the particular estate shall determine [*494] by its limitation.² The statute does not run against a reversioner till the death of the tenant for life, where the latter has conveyed the estate in fee.³ And where a husband and wife were disseised, and the disseisor held adverse possession for the period of limitation, which possession would bar the right of the husband, if living, at his death she or her representatives might claim the land.⁴ But this does not apply to the case of a disseisin done to a mortgagor, as to its affecting the mortgagee.⁵

31. Under the rule requiring open, visible, and exclusive possession to constitute an actual disseisin of the owner, it was held, that causing the land to be run around by a surveyor, and trees marked on the lines, and occasionally cutting grass upon a part of it, was not enough to accomplish this.⁶ It is not evidence of either title or possession.⁷ Nor would an entry under a deed of wild land from one who has no title, though it were formally executed and recorded, have this effect, unless followed by a visible occupancy or exclusive possession, manifested by fences or otherwise.⁸ So entering occasionally upon land adjoining that of another, and making sugar in a camp built thereon, and this continued for more than twenty years, is not such a possession as the statute contemplates.⁹ So where one had a lot of land unenclosed, lying adjoining a stream, and another used it for laying a lot of old wheels and loose stones upon it, crossing it from time to time, but not enclosing it, it was held not to be a disseisin of the

¹ *Devyr v. Schaeffer*, 55 N. Y. 451.

² *Miller v. Ewing*, 6 Cush. 34; *Jackson v. Schoonmaker*, 4 Johns. 390; *Salmons v. Davis*, 29 Mo. 176; *Doe v. White*. 1 Kerr, N. B. 627.

³ *Gernet v. Lynn*, 31 Penn. St. 94; *Melvin v. Locks & Canals*, 16 Pick. 137; s. c. 17 Pick. 255; *Raymond v. Holden*, 2 Cush. 269; *Pinkney v. Burrage*, 30 N. J. Law, 21.

⁴ *Gregg v. Tesson*, 1 Black, 150, 154; *ante*, vol. 1, pp. *142, *143.

⁵ *Poignard v. Smith*, 8 Pick. 272.

⁶ *Kennebec Purchase v. Springer*, 4 Mass. 416; *Smith v. Burtis*, 6 Johns 218; *Slice v. Derrick*, 2 Rich. 627; *O'Hara v. Richardson*, 46 Penn. St. 391

⁷ *Oatman v. Fowler*, 43 Vt. 465.

⁸ *Bates v. Norcross*, 14 Pick. 224; *Lane v. Gould*, 10 Barb. 254.

⁹ *Smith v. Mitchel*, 1 A. K. Marsh. 207.

true owner, nor an adverse possession of the land, it being done without first receiving any deed of the premises.¹ And a case illustrative of what is required to make a possession *exclusive*, within the meaning of the law, was where a fisherman took possession of an island which had formed in a navigable river, and occupied it for a sufficient length of time to acquire a title to it, if his possession had been exclusive; but as it was shown that it was used by any one, who had occasion to go upon it for fishing, as public property, it did not give him any title to the same.² And an enclosure of land, to be sufficient to answer this purpose, must be a substantial enclosure, and with an actual occupancy, definite, positive, and notorious. Nor would the making of what is called a "lop" or "slash" fence around a parcel of woodland answer this purpose, unless actual notice to the owner is proved.³ Where, therefore, one claimed a parcel of woodland by disseisin against another, in whom was the record-title, and, to establish his claim, showed that he entered and cut for use and sale the wood and timber growing upon it, at one time cutting it all off; that he, moreover, cleared a small part for cultivation, and ran a line between this and the other party's other land, *lopping* trees along the line to mark it; all of which was known to the other party; but the land in question was never enclosed by fences, nor built upon, nor cultivated,—it was held, that all this did not constitute an actual seisin, as these were not, in their nature, acts of exclusive possession.⁴

32. And yet it is not, as a universal proposition, necessary to prove an actual residence or an actual enclosure. The erection of a fence, for instance, is nothing more than an act presumptive * of an intention to assert an ownership and possession over the property. Other acts

¹ *Corning v. Troy Iron Co.*, 44 N. Y. 588, 596.

² *Tracy v. N. & Wor. R. R.*, 89 Conn. 382.

³ *Coburn v. Hollis*, 3 Met. 125; *Jackson v. Schoonmaker*, 2 Johns. 230; *Den v. Hunt*, Spenc. 487; *Hale v. Glidden*, 10 N. H. 397; *Smith v. Hosmer*, 7 N. H. 436; *Hutton v. Schumaker*, 21 Cal. 453; *Borel v. Rollins*, 30 Cal. 415-417.

⁴ *Slater v. Jepherson*, 6 Cush. 129; *Stevens v. Hollister*, 18 Vt. 294; *Parker v. Parker*, 1 Allen, 245; *Stevens v. Taft*, 11 Gray, 35; *Morris v. Callanan*, 105 Mass. 133; *Morrison v. Chapin*, 97 Mass. 76; *Coburn v. Hollis*, 3 Met. 128; *Young v. Herdie*, 55 Penn. St. 172.

may be equally evincive of such an intention;¹ and there need not be a fence, building, or other improvement, made to constitute an adverse possession. Where acts of ownership have been done upon land, which, from their nature, indicate a notorious claim of property in it, within the knowledge of an adverse claimant, and without interruption or an adverse entry by him, it will be sufficient. Thus, where the owner of a parcel of wild land sold a certain number of acres to be taken from one side of the lot, and the parties went on and fixed the line of division, but made no fence, and each occupied up to that line for twenty years, it was held to give the purchaser a good title by possession, although it was afterwards found that the line was fixed too far distant from the side-line of the lot.² And neither actual occupation, cultivation, nor residence, is necessary, when the property is so situated as not to admit of any permanent, useful improvement, and the continued claim of the party has been evidenced by public acts of ownership such as he would exercise over property which he claimed in his own right, and would not exercise over property which he did not claim.³ Thus, it is said, "much depends upon the nature and situation of the property, and the uses to which it can be applied, or to which the owner or claimant may choose to apply it." "To constitute an adverse possession, it is only necessary that it should have been under a claim or color of title." "The possession will be adverse if had and continued under the claim or color of title, however groundless the supposed title may prove to be."⁴

33. But there are some acts which are of such a notorious character as of themselves to constitute a disseisin, without any necessity of showing that they were known to the real owner of the land, such as building a fence around the land, or erecting buildings upon it.⁵ And one, by maintaining a

¹ *Ellicott v. Pearl*, 10 Pet. 412; *Langworthy v. Myers*, 4 Iowa, 18.

² *Faught v. Holway*, 50 Me. 24.

³ *Ewing v. Burnet*, 11 Pet. 41. See *Blood v. Wood*, 1 Met. 528, 535; *Den v. Hunt*, Spenc. 487; *Bailey v. Carleton*, 12 N. H. 9; *Ang. Lim.*, 2d ed. 415, 416; *La Frombois v. Jackson*, 8 Cow. 604; *Royall v. Lisle*, 15 Ga. 545.

⁴ *Ford v. Wilson*, 35 Miss. 504, 505; *Grant v. Fowler*, 39 N. H. 104; *Farrar v. Fessenden*, 39 N. H. 281; *post*, *498; *Close v. Samm*, 27 Iowa, 503.

⁵ *Poignard v. Smith*, 6 Pick. 172, 178; *Ang. Lim.*, 2d ed. 416, 423; *Jackson v. Warford*, 7 Wend. 62.

fence within a highway under a claim of right for forty years, will gain for the occupant a prescriptive right against the Commonwealth.¹ If one tenant in common erect a building upon the common land for his own use, it is an ouster to that extent of his co-tenants; and they may have trespass against him for so doing, or may remove the buildings.²

34. If the disseisin be merely by the erection of buildings, it would not, it seems, extend beyond the part of the land actually occupied by them, as where one built a blacksmith's and carpenter's shop upon another's land, and the occupants of the latter shop occasionally made use of the adjoining land to dry boards upon, and those of the blacksmith-shop used other parts of the lot to run carriages on, and to put tires on wheels, it was held that the disseisin extended only to the part covered by the buildings;³ and so far as it was a disseisin, it operated against the mortgagee, though done to the possession of the mortgagor.

35. It may be stated, as a generally conceded principle, that *acts of disseisors are, in respect to the [*496] lawful owners or true proprietors, to be limited to an actual ouster and exclusive occupation by such disseisors, and, as many cases say, to what one has under actual improvement and within a substantial enclosure.⁴

36. Although the doctrine above laid down would not probably be controverted in any case where the entry of the party claiming adversely to the true owner is not made under the color of title by deed, there are numerous cases where it has been held, that if one enters under such deed or written in-

¹ *Cutter v. Cambridge*, 6 Allen, 20.

² *Bennett v. Clemence*, 6 Allen, 18; *Stedman v. Smith*, 8 E. & Bl. 1; *Erwin v. Olmsted*, 7 Cow. 229.

³ *Poignard v. Smith*, 8 Pick. 272; *Boston v. Richardson*, 105 Mass. 372.

⁴ *Brimmer v. Proprs. Long Wharf*, 5 Pick. 131, 135; *Blood v. Wood*, 1 Met. 528, 535; *Miller v. Shaw*, 7 Serg. & R. 129; *Cresap v. Hutson*, 9 Gill, 269; *Jackson v. Schoonmaker*, 2 Johns. 234; *Davidson v. Beatty*, 3 Harr. & M'H. 594; *Brandt v. Ogden*, 1 Johns. 156; *Den v. Hunt*, Spenc. 487; *Lane v. Gould*, 10 Barb. 254; *Sharp v. Brandow*, 15 Wend. 597; *Jackson v. Warford*, 7 Wend. 62; *Smith v. Hosmer*, 7 N. H. 436; *Watrous v. Southworth*, 5 Con. 305; *Cluggage v. Duncan*, 1 Serg. & R. 113; *Ang. Lim.*, 2d ed. 429; *Pipher v. Lodge*, 16 Serg. and R. 231; *Hatch v. Vermont Central Railroad*, 28 Vt. 142; *Goewey v. Urig*, 18 Ill. 238; *Hanna v. Renfro*, 32 Miss. 129, 130.

strument, and occupies and improves the land, the limits and extent of his legal possession will be defined by the boundaries contained in such deed or instrument, though such deed be itself of no validity in conveying a title. The cases cited below will be found to favor both these propositions.¹ And if the possession be vacant, it is probably true that a grantee entering under a deed which is recorded, and occupying a part of the premises described therein, may be deemed to have gained a seisin of all that is embraced within its boundaries. But, in the case of wild lands, the seisin follows the title, except so far as one, entering without title, shall have actually occupied by enclosures or by cultivation of an open and notorious character, and thereby divested the real owner [*497] of the possession.² And while * it is laid down as a principle of universal application, that the law never raises a constructive possession against the real owner of land,³ merely flowing land for working a mill does not disseise the owner, nor gain a title to the land flowed, beyond a mere easement in it.⁴ It is also held to be a sound proposition, that if an entry be wrongful, though it be under a deed, a possession thereby gained will only extend so far as the tenant shall actually occupy the premises.⁵ But where a man entered, under a claim of title, upon another's tract of land, and improved and

¹ 2 Smith, Lead. Cas., 5th Am. ed. 563; Hoag v. Wallace, 8 Fost. 547; Swift v. Gage, 26 Vt. 224; Hoye v. Swan, 5 Md. 537; Royall v. Lisle, 15 Ga. 545; Turney v. Chamberlain, 15 Ill. 271; Green v. Liler, 8 Cranch, 250; Ellicott v. Pearl, 10 Pet. 412; Spaulding v. Warren, 25 Vt. 316; Barr v. Gratz, 4 Wheat 213; Kennebec Purchase v. Springer, 4 Mass. 416; Blood v. Wood, 1 Met. 528, 535; Lane v. Gould, 10 Barb. 254; Noyes v. Dyer, 25 Me. 468; Little v. Downing, 37 N. H. 367; Farrar v. Fessenden, 39 N. H. 279; Sanborn v. French, 2 Foster, 249; Jackson v. Newton, 18 Johns. 355; Brackett, Petitioner, 53 Me. 228; Wells v. Jackson Iron Co., 48 N. H. 491; Close v. Samm, 27 Iowa, 503.

² Jackson v. Schoonmaker, 2 Johns. 230; Bailey v. Carleton, 12 N. H. 9; Sharp v. Brandow, 15 Wend. 599; Little v. Megquier, 2 Me. 176; Ang. Lim., 2d ed. 400, 426; Jackson v. Howe, 14 Johns. 405; Cluggage v. Duncan, 1 Serg. & R. 113; Criswell v. Altemus, 7 Watts, 426; Sicard v. Davis, 6 Pet. 124; Den v. Hunt, Spenc. 487; Morrison v. Hays, 19 Ga. 294; Doe v. White, 1 Kerr, N. B. 632, 641.

³ Miller v. Shaw, 6 Serg. & R. 140; Ang. Lim., 2d ed. 433; Jackson v. Woodruff, 1 Cow. 286; Slice v. Derrick, 2 Rich. 627; Steedman v. Hilliard, 3 Rich. 101.

⁴ Bartholomew v. Edwards, 1 Houst. 17.

⁵ Den v. Hunt, Spenc. 487.

fenced a part of it, and had the boundaries of his claim surveyed and marked, including woodland not enclosed, and openly and exclusively used the woodland as his own, in connection with his improvements, as farmers ordinarily use their woodlands, it was held to be an actual occupation of such woodland, rebutting the constructive seisin and possession of the one who originally held the title.¹ But if the owner also, during this time, went upon this wild land, and did acts of ownership thereon which he had a right to do, it would negative the essential requisite of the possession, that of being exclusive on the part of him who claimed to have gained title by it.² And it is universally true, that actual possession of a part is legal possession of all the land covered by the party's title.³ The doctrine is ably discussed by Parker, C. J., in *Bailey v. Carleton*, where a sound distinction seems to be maintained. If a purchaser enter upon land described in a deed, and do such acts of ownership upon it as would raise a reasonable presumption that the owner, knowing them, must have understood that there was a claim of title, the deed or color of title under which he has entered serves to define specifically the boundaries of the claim or possession. But if the occupation is not of a character to indicate a claim which may be coextensive with the limits of the deed, then the principle, that the party is presumed to enter adversely according to his title, has no sound application, and the adverse possession may be limited to the actual occupation. Accordingly, it was held that where a grantor embraced land to which he had no title in the same deed with that to which he had a title, and his grantee entered upon and occupied that * part only to which the grantor had a [*498] title, it did not operate as a disseisin of the owner of the other land described in the deed, although such deed was duly recorded. No presumption of a claim and of a color of

¹ *Wolf v. Ament*, 1 Grant, Cas. 150; *Ament v. Wolf*, 33 Penn. St. 331; *Murphy v. Springer*, 1 Grant, Cas. 73.

² *O'Hara v. Richardson*, 46 Penn. St. 390, 391; *Royer v. Benlow*, 10 S. & R. 303.

³ *Eifert v. Read*, 1 Nott & M'C. 364; *Anderson v. Darby*, Id. 369; *Gardner v. Gooch*, 48 Me. 492; *Hardisty v. Glenn*, 32 Ill. 64; *Fairman v. Beal*, 14 Ill. 244.

title, beyond the actual occupation, could arise as to other lots, so as to give it the character of a disseisin or possession adverse to the true owner, so as to bind him, although such grantee might be held to be in possession according to his title, in a controversy with one who should make a subsequent entry without right.¹ In the case of *Little v. Megquier*, the claimant entered under a void deed which was regularly recorded, describing the land, and caused the boundaries of the same to be run out according to the deed, and paid the taxes thereon for many years. The land was wild and uncultivated. But it was held that these acts did not work a disseisin of the true owner; for, to do that, the grantee must have entered upon the land, and continued openly to occupy and improve it.

36 *a*. The importance which the law attaches to the circumstance, that one, making a disseisin of another's estate, enters under what is called *color of title*, in determining the extent and limits of such disseisin, seems to justify, if it do not require, a somewhat more extended reference to cases where this doctrine has been applied. The term "color of title" means a deed or survey of the land placed upon the record of land-titles, whereby notice is given to the true owner, and all the world, that the occupant claims the title.² The effect of having color of title is sometimes to extend, by construction, a possession beyond the actual occupation, and sometimes to change the character of casual acts of entry upon land from acts of mere trespass to those of possession.³ But there can be no *constructive* possession of lands, except under color of title.⁴ If, however, one is in possession of land bounded by a highway under a claim of title, it would extend to the centre of the highway, and give him a title, after

¹ *Bailey v. Carleton*, 12 N. H. 9. See also *Jackson v. Richards*, 6 Cow. 617; *Sharp v. Brandow*, 15 Wend. 599; *Little v. Megquier*, 2 Me. 176; *Cluggage v. Duncan*, 1 Serg. & R. 111, 119; *Jackson v. Woodruff*, 1 Cow. 286; *Smith v. Ingram*, 7 Ired. 175; *Williams v. Miller*, Id. 186; *Waggoner v. Hastings*, 5 Penn. St. 300. See *Seigle v. Louderbaugh*, 5 Penn. St. 490; *Chandler v. Spear*, 22 Vt. 388; *Osborne v. Ballew*, 12 Ired. 373; *Berryman v. Kelly*, 13 Ired. 269; *White v. Burnley*, 20 How. 235.

² *Hodges v. Eddy*, 38 Vt. 345.

³ *Jakeway v. Barrett*, 38 Vt. 323.

⁴ *Wells v. Jackson Iron Co.*, 48 N. H. 491.

twenty years, and it would carry the property in trees growing upon the side of the highway.¹ But actual occupation is equally effectual, whether with or without color of title, so far as it extends.² And no one can claim color of title by deed, when entering upon land beyond what his deed purports to convey.³ As to what constitutes a color of title, any instrument having a grantor and a grantee, and containing a description of the lands intended to be conveyed, and apt words for their conveyance, gives color of title to the lands described.⁴ The color must arise out of some conveyance purporting to convey title to a particular tract of land.⁵ And a possession, under color of title, is with a claim of right by virtue of the colorable title.⁶ The color of title suffices only to give boundary to the possession.⁷ But a release or quitclaim of all one's interest in certain land, by deed, raises no color of title unless it appears that the releasor had some title to or possession of the premises.⁸ Among the instances where a deed, not in itself effectual in passing a good title, has given color of title to one who has entered under it, are those of tax-deeds.⁹ Where one takes a deed and puts it on record, and enters upon the land described in it, it is understood as an entering and taking possession of all that is embraced in that deed. This is constructive possession of all not actually occupied.¹⁰ In Illinois, it is a sufficient color of title if one is in possession under a deed purporting to convey a title to the grantee, where the tenant is purchaser, and has paid for the land. His deed is a color of title, though, by mistake, it is made in a wrong name, "if the deed be regular upon its face."¹¹ In Iowa, a man may acquire a title by possession under "color of title," which implies a proper title, or a "claim of title," which is to be established wholly

¹ *Bliss v. Ball*, 99 Mass. 598.

² *Hodges v. Eddy*, *sup.*

³ *Woods v. Banks*, 14 N. H. 111.

⁴ *Brooks v. Bruyn*, 35 Ill. 394.

⁵ *Shackleford v. Bailey*, 35 Ill. 391.

⁶ *Russell v. Erwin*, 38 Ala. 48.

⁷ *Minot v. Brooks*, 16 N. H. 376.

⁸ *Woods v. Banks*, *sup.*

⁹ *Dillingham v. Brown*, 38 Ala. 311; *Prescott v. Nevers*, 4 Mason, 326; *Little v. Megquier*, 2 Me. 176; *Brackett, Petitioner*, 53 Me. 236; *Wells v. Company*, 47 N. H. 235, 260, 261.

¹⁰ *Webb v. Richardson*, 42 Vt. 405.

¹¹ *Ellston v. Kennicotte*, 46 Ill. 183; *Morrison v. Norman*, 47 Ill. 479.

by parol evidence, and either will be sufficient. A descent cast, where an ancestor was in possession, gives color of title. Nor need the paper convey a good title in order to give "color of title" to the one claiming under it.¹

So a quitclaim-deed from one claiming under a tax-deed, though insufficient to pass a good title, gives, to one in possession under it, color of title.² So the deed of a married woman gives to the grantee named a color of title, and extends his possession to the limits described in it.³ And a void deed may raise a color of title, defining the extent and boundary of the possession under it, by the description in the deed.⁴ Thus, where J. S., while occupying an estate of great extent, but with no other title except an exclusive possession, granted it by deed, with metes and bounds, which was recorded, to J. D., who entered upon the premises, claiming them as his own, it was held to give him such a possession as, under the statute, might ripen into a title, and might be availed of against a stranger entering upon the premises, although he never had enclosed the same by a fence. And this doctrine applies as well to extensive as limited tracts or parcels of land.⁵ And the foregoing doctrine extends to carrying the flats in front of and adjoining to upland, which has thus been conveyed and described, where possession of the upland has been taken under the deed.⁶ But where the void deed purported to convey two distinct parcels, and the grantee entered upon only one, and occupied it, it was held not to affect the other parcel described in his deed.⁷

37. In a case where the owners of adjacent lands in their deeds bounded respectively on each other, but no measure or monument was given, it was held that the possession and title followed the prior occupancy, where this had been continued for twenty years or more. And where one erected a

¹ *Hamilton v. Wright*, 30 Iowa, 480.

² *Minot v. Brooks*, *sup.*

³ *Sanborn v. French*, 2 Foster, 246; *Brackett, Petitioner*, *sup.*

⁴ *Wofford v. McKinna*, 23 Tex. 46; *Charle v. Saffold*, 13 Tex. 94; *Pillow v. Roberts*, 13 How. 472.

⁵ *Hicks v. Coleman*, 25 Cal. 181-187; *Moss v. Scott*, 2 Dana, 275; *Jackson v. Elston*, 12 Johns. 454; *Thomas v. Harrow*, 4 Bibb, 563; *Kennebec Purchase v. Laboree*, 2 Me. 275; *Kimball v. Lohmas*, 31 Cal. 154; *French v. Rollins*, 21 Me. 372; *Welborn v. Anderson*, 37 Miss. 162, 163.

⁶ *Brackett, Petitioner*, 53 Me. 231, 244. ⁷ *Grimes v. Ragland*, 28 Geo. 123.

house so that the eaves extended over the disputed line, it was submitted to the jury which was first, — the occupancy of the other party up to the line claimed, or the erection of the house with its extended eaves. If the latter, then the subsequent occupation of the former by cultivating, &c., up to the body of the house, was no disseisin of the owner to the extent of his eaves; if the former, the erection of the eaves did not disseise the occupant of the land, though it might give the owner of the house an easement in the other land to that extent.¹ How far the outer edge of the eaves of a house constitutes the line of land bounding by the “house,” and how far extending the eaves of one’s house over and beyond the line of his land is a disseisin of the land over which they project, has been the subject of discussion and remark by the court of Massachusetts, whereby the rule of law upon the subject may perhaps be found less definite than is desirable as a practical question. In one case the court held, that, if a parcel of land be bounded by the side of a building, it means the eaves of the building, or edge of the eaves.² In another case the court held, that it was a question for the jury to determine whether the owner of a house has acquired title to the land between the body of the house and “exterior limits of his eaves” by adverse occupation.³ In another it was held, that building a house on one’s land, and projecting the eaves over that of an adjacent owner, was “an adverse occupation, which, if continued for twenty years, will give a title to the soil by prescription.”⁴ In another, the owner of a house, whose wall formed the line of his land, projected the cornices and eaves thereof over that line, and maintained them in that condition. Aside from this, the owners, on the one side and the other, occupied up to the line of the wall. The court say, “The fact that the eaves and cornices thereof project over that line gave them no title to the land, and no right to prevent the defendant, owning that land, from erecting any building upon it, so long as he did

¹ *Thacker v. Guardenier*, 7 Met. 484; *Carbrey v. Willis*, 7 Allen, 370; *Millett v. Fowle*, 8 Cush. 150; *Wash. Easements*, 3d ed. 498.

² *Millett v. Fowle*, 8 Cush. 151; *Carbrey v. Willis*, 7 Allen, 371.

³ *Block v. Pfaff*, 101 Mass. 539; *Randall v. Sanderson*, 110 Mass. 119.

⁴ *Smith v. Smith*, 110 Mass. 304.

not cut off or interfere with the eaves or cornices of their house.”¹ It would seem that the owner of the house, by projecting his eaves beyond the line of his land, may gain an easement in the adjacent land without gaining a title by adverse enjoyment.²*

[*499] * 38. The policy of the law, in giving the title to the one who shall have had such an adverse possession of lands as has been above described, is thus stated by Gibson, C. J., in *Sailor v. Hertzogg*: “The statute protects the occupant, not for his merit, for he has none, but for the demerit of his antagonist in delaying the contest beyond the period assigned for it, when papers may be lost, facts forgotten, or witnesses dead.”³

39. But wherever the act of supposed disseisin is equivocal in its nature, the presumption always is, that it is in accordance with, and not in hostility to, the title of the true owner.⁴ Such possession is never conclusive: it only raises a presumption of fact, and not a presumption of law. It is only evidence of a grant, subject to be controlled like other presumptions of fact.⁵

40. And mere possession, without a claim of right, gives no title, however long the same may be continued.⁶

* NOTE. — By the French law, by custom or agreement, applicable to most houses, a right exists in the owner to use space enough adjoining the same to place a ladder for purposes of repairing the same, though it be upon the land of the adjacent owner. This space is generally of a defined width, and extends upon each side of such house, if it be a separate structure, and is called “*Tour de l’Echelle*.” It is regarded as a servitude which the land owes to the building. But if the owner of the building suffers the water from the roof to fall upon this space, he is, as it seems, bound to keep the same paved, so that the water shall not penetrate his neighbor’s soil. Merlin, *Répertoire de Jurisp.* “*Tour de l’Echelle*,” § 3; 1 *Lois des Bâtimens, &c.*, par Lepage, 244, 252 (ed. 1857).

¹ *Eaton v. Evans*, 115 Mass. 204.

² *Wash. Ease*. 3d ed. 498.

³ *Sailor v. Hertzogg*, 2 Penn. St. 182. See *Ang. Lim.*, 2d ed. 412, 413. See *La Frombois v. Jackson*, 8 Cow. 616, by Viele, Senator.

⁴ *Pipher v. Lodge*, 16 Serg. & R. 229, 231; *Smith v. Hosmer*, 7 N. H. 436; *Smith v. Burtis*, 6 Johns. 218; *Jackson v. Sharp*, 9 Johns. 163; *Fosgate v. Herkimer Co.*, 9 Barb. 287; *Pierson v. Turner*, 2 Ind. 123; *Alexander v. Polk*, 39 Miss. 755.

⁵ *Stevens v. Taft*, 11 Gray, 36.

⁶ *La Frombois v. Jackson*, 8 Cow. 603; *Adams v. Guice*, 30 Miss. 397; *Grube v. Wells*, 34 Iowa, 150; *McNamee v. Morland*, 26 Iowa, 97.

41. It is, moreover, a principle of universal application, that the statute of limitations, in respect to the possession of lands, does not run against a State,¹ at common law; for a State cannot be disseised except as provided by statute.

42. To give effect to an adverse possession as a source of title, not only must the possession be such as raises a presumption of a deed, but it must be yielded to without opposition by the real owner.² When, therefore, such owner protested against the acts of possession of the other party, and consulted counsel in regard to them, it prevented the party who did the acts from thereby gaining a title.³ But where a lower mill-owner drew water from an upper pond against the denial of his right so to do on the part of the upper mill-owner, and continued to do so for twenty years, he acquired a right so to do. The upper owner having the power to prevent it, and neglecting to do so, was held to be an acquiescence on his part.⁴

43. Though the cases chiefly referred to thus far have been those where there was something tantamount to an actual ouster or expulsion of the original owner, followed by a possession of the requisite character, it is not necessary that the possession should have been originally acquired by such an act, * if it is taken and retained under a [*500] claim of ownership on the part of the tenant, and this is known and yielded to by the original owner. Such possession is deemed to be adverse, though not in its character hostile. Thus, where two adjacent owners of land agreed upon a fence of convenience between their lands, varying from the true line, and each occupied up to it for more than twenty years without claiming to own beyond the true line, their original rights were held not to be affected; whereas,

¹ *Lindsey v. Miller*, 6 Pet. 666; *The People v. Van Rensselaer*, 8 Barb. 189; *The People v. Clarke*, 10 Barb. 120; *Kingman v. Sparrow*, 12 Barb. 201; *Doe v. Durden*, 20 Ga. 467; *Ward v. Bartholomew*, 6 Pick. 409; *Burgess v. Gray*, 16 How. 48, 65; *Vickery v. Benson*, 26 Ga. 590.

² *Stevens v. Taft*, 11 Gray, 35, 36.

³ *Stillman v. White Rock Co.*, 3 Woodb. & M. 538, 549. But it ought to be stated that the decision in this case related to an incorporeal hereditament, and not the title to the soil and freehold.

⁴ *Kimball v. Ladd*, 42 Vt. 747.

if each had, in such case, occupied up to the fence, and claimed a right so to do by reason of such holding, it would, after twenty years, have given a title in accordance with such occupancy.¹ But where the wall between the parties was three feet in thickness, and stood wholly upon one of the owner's land, and both parties occupied up to it, and the one on whose land it did not stand claimed to own to the middle of it, but this was not known to the other party, and no change in occupancy took place, it was held that this claim had no effect in changing the rights of the respective owners to the land occupied by the wall: there was no adverse occupation on the part of the claimant.² So if the possession indicated by a fence originate and is continued in a mistake, or misapprehension as to the true line, commencing when it was erected, it is not deemed to be adverse.³ The law upon this subject is thus stated by the court of Alabama: "If a party occupy up to a certain fence because he believes it to be the line, but having no intention to claim up to the fence if it should be beyond the line, an indispensable element of adverse possession is wanting. The *intent* to claim which is set up is upon the condition that the fence is upon the line; or, if the fence is put over the line from mere convenience, the occupation and exercise of ownership are without claim of title, and the possession would not be adverse." But it is stated, that if the parties agree upon and build a *dividing-fence* between their parcels, and they respectively occupy up to that, it would be an adverse possession. The effect of the occupancy, therefore, would depend upon the intention of the parties while enjoying it. And cases in other States recognize the same doctrine, that an occupation, for the period of limitation by adjacent owners, up to an agreed division-line between their lands, would bar their right to deny that it was the true line.⁴

43 a. The difficulty of determining whether the occupancy

¹ *Burrell v. Burrell*, 11 Mass. 294. See *Smith v. Hosmer*, 7 N. H. 436; *Fishar v. Prosser*, Cowp. 218; *Bradstreet v. Huntington*, 5 Peters, 439, 440; *Duke v. Harper*, 6 Yerg. 285; *Doe v. Bird*, 11 East, 49; *Russell v. Maloney*, 39 Vt. 578.

² *Huntington v. Whaley*, 29 Conn. 391.

³ *Howard v. Reedy*, 29 Geo. 154.

⁴ *Brown v. Cockerell*, 33 Ala. 45; *Holton v. Whitney*, 30 Vt. 410; *St. Louis University v. M'Cune*, 28 Mo. 481.

by adjacent owners of lands separated by a fence constitutes an adverse possession, so as to affect the title to the same, would seem to justify an extended consideration of the subject. Thus it has been held that such an occupancy, if the fence is not on the true line, would constitute an adverse possession if done as a matter of right, although there may not have been any controversy between the adjacent owners.¹ But where there was a grant of Lot No. 1 adjoining Lot No. 260, and the purchaser made a fence fifteen rods from the true line upon No. 260, and the owners of the two lots occupied them, as they were fenced, without claiming or yielding any thing except the lots as they had been conveyed, it was held, in the absence of positive evidence of the owner of No. 1 claiming to hold to the fence as a right, that it gave him no title by adverse possession.² So where adjacent owners made a fence upon their dividing-line, but, by mutual mistake, it diverged from the true line a part of the distance, and they continued to occupy up to the fence for more than twenty years before the mistake was detected; then the one whose strip of land was cut off by the fence sued to recover it; it was held not to be an adverse possession by the other occupant, or to work a disseisin of the true owner.³ But where, to fix a line between two owners, they employed referees, who established it by bounds, and one built a fence upon this line, and the parties made a deed intending to describe this line, but varied from it by mistake, and each continued to occupy up to the fence for the period of limitation, it was held to establish the fence as the line.⁴

44. Thus, if one purchases and pays a consideration for land, and enters and occupies it the requisite period of time, it will give him a title, under the principle that his possession is adverse;⁵ so if he enters and occupies under a deed which proves to be invalid, or his title proves to be otherwise defective.⁶ But if he enters under an agreement to purchase, until

¹ *Brown v. Bridges*, 31 Iowa, 138; *Stuyvesant v. Dunham*, 9 Johns. 61; *McNamee v. Morland*, 26 Iowa, 109; citing *Russell v. Maloney*, 39 Vt. 588.

² *Grube v. Wells*, 34 Iowa, 148, 150. ³ *Worcester v. Lord*, 56 Maine, 265.

⁴ *Foulke v. Stockdale*, Iowa, 9 West. Jur. 84.

⁵ *Brown v. King*, 5 Met. 173.

⁶ *Ang. Lim.*, 2d ed. 485, 486; *La Frombois v. Jackson*, 8 Cow. 589, 596, 597

the consideration is paid he will be considered as holding subordinate to the title of the true owner.¹ So a holding by one who enters under a parol gift of land would be sufficient to give him an effectual title against the donor.²

45. So where the co-tenants made a parol partition of lands, and each occupied in severalty the share assigned to him, it was held that such possession was so far adverse as to create a title to the same in severalty.³ And, upon the same principle, if one of several co-tenants takes exclusive possession of a portion of the common estate, and holds it for a sufficient length of time, it will be presumed in law that the parties have made partition.⁴

46. And where a *cestui que trust*, who was entitled [*501] to the *possession of the estate by the nature of the trust, was suffered to occupy the premises for a long space of time, it was held that the law would either presume a conveyance of the legal estate to him from the trustee, or that he had held by adverse possession.⁵ Thus where A bought land with B's money, but took a deed in his own name, and B entered upon and occupied the same for twenty years, it was held to divest A of his legal estate in the premises, although, during that time, he had applied to A to give him a deed, and he had refused to give it.⁶ So though, as a general proposition, a *cestui que trust* in possession of land is tenant at will of the trustee, and a sub-letting by a tenant at

602, 613; *Hall v. Stevens*, 9 Met. 418, 422; *Barker v. Salmon*, 2 Met. 32; *Jackson v. Wheat*, 18 Johns. 40; *Blight v. Rochester*, 7 Wheat. 535; *Stansbury v. Taggart*, 3 McLean, 457.

¹ *Brown v. King*, 5 Met. 173; *Knox v. Hook*, 12 Mass. 329; *McClannahan v. Barrow*, 27 Miss. 664; *Stamper v. Griffin*, 12 Ga. 450; *Den v. Kip*, 2 Dutch. 351; *Stansbury v. Taggart*, 3 McLean, 457. See *Ripley v. Yale*, 18 Vt. 220; *Fosgate v. Herkimer Co.*, 12 Barb. 352; *Vrooman v. Shepherd*, 14 Barb. 441; *Doe v. Edgar*, 2 Scott, 732; *Ormond v. Martin*, 37 Ala. 604.

² *Sumner v. Stevens*, 6 Met. 337; *Pope v. Henry*, 24 Vt. 560. See *Comins v. Comins*, 21 Conn. 413; *Greene v. Munson*, 9 Vt. 40. See also *Cole v. Roe*, 39 Mo. 413, that such a holding would not be adverse. *Clark v. Gilbert*, 39 Conn. 94; *Ontcalt v. Ludlow*, 32 N. J. 239; 12 Am. L. Reg. 276.

³ *Gregg v. Blackmore*, 10 Watts, 192; *Jackson v. Moore*, 13 Johns. 513.

⁴ *Russell v. Marks*, 3 Met. (Ky.) 45.

⁵ *Kinsman v. Loomis*, 11 Ohio, 475; *Jackson v. Moore*, 13 Johns. 516; *New market v. Smart*, 13 Am. L. Reg. 390-404, and note by Judge Redfield.

⁶ *Ripley v. Bates*, 110 Mass. 162.

will does not determine the tenancy without notice to the lessor, yet where the *cestui que trust* entered into an agreement with one C., a stranger, by which the latter took possession of and occupied the premises, until, by sufferance of C., one L. entered and occupied them for the term of more than twenty years, paying no rent therefor, and, at that time, the *cestui que trust* died, it was held, that, by such possession of L., the entry of the trustee was barred, the same having been adverse, and not as a tenant at will.¹

46 a. Although a trustee may disavow and disclaim his trust, and thereby drive the claimant to an action within the period of limitation, no length of time bars a direct trust between the trustee and *cestui que trust* without an express disavowal of the trust by the trustee.² The rule is a settled one, that, so long as the trust subsists, the right of a *cestui que trust* cannot be barred by his being out of possession. This can only be done by barring and excluding the estate of the trustee.³ There can be no disseisin of a trust.⁴ But a *cestui que trust* may disseise his trustee, and gain the legal estate, though his possession will be presumed to be permissive, and not adverse to his trustee.⁵ And a stranger, by an adverse possession as against a trustee, continued for the requisite period of time, may bar both the legal estate of the trustee and the equitable interest of the *cestui que trust*.⁶

47. It seems to be the law, as now understood, that if one enters under a contract to purchase, and holds undisturbed possession for twenty years, claiming to hold as owner, it is sufficient to raise a presumption of a grant from the original owner.⁷

48. In summing up the effect of an adverse possession continued for such a length of time as to operate as a statute bar

¹ Melling v. Leak, 16 C. B. 652, 670.

² Ante, p. *184. Governor v. Woodworth, 68 Ill. 258.

³ Zeller's Lessee v. Eckert, 4 How. 295; Découche v. Savetier, 3 Johns. Ch. 216; Cholmondeley v. Clinton, 2 Meriv. 361; Overstreet v. Bate, 1 J. J. Marsh 370.

⁴ Dow v. Jewell, 18 N. H. 358.

⁵ Whiting v. Whiting, 4 Gray, 241; Cholmondeley v. Clinton, sup.

⁶ Goss v. Singleton, 2 Head (Tenn.), 67, 76.

⁷ Maltonner v. Dimmick, 4 Barb. 566; Ashley v. Ashley, 4 Gray, 200.

to the claims of others to establish a title to lands, the language of the court in *School District, &c. v. Benson* may be adopted: "A legal title is equally valid when once acquired: whether it be by a disseisin or by deed, it vests the fee-simple, although the modes of proof, when adduced to establish it, may differ." "An open, notorious, and adverse possession for twenty years would operate to convey a complete title as much as any written conveyance. And such title is not only an interest in the land, but it is one of the highest character, the absolute dominion over it, and the appropriate mode of conveying it is by deed."¹ The operation of the statute takes away the title of the real owner, and transfers it, not in form, indeed, but in legal effect, to the adverse occupant. In other words, the statute of limitations gives a perfect title. The doctrine is stated thus strongly, because it seems to be the result of modern decisions, although it was once held that the effect of the statute was merely to take away the remedy, and did not bind the estate, or transfer the title. In *Moore v. Luce*, cited below, the court say explicitly, "It is a mistake to suppose the person barred by the statute loses nothing but his remedy;" and the cases cited below sustain the same general doctrine.² The court of Vermont have held that adverse possession for the statutory period gives the possessor an absolute, indefeasible title to the land against the whole world, on which he could either sue or defend as against the former owner. As a natural consequence, the former owner is divested of all the new owner acquires. This gives to adverse possession the effect of a conveyance. And an agreement made after the lapse of the statutory period to waive the benefit of the statute is not effective, but the title remains in the party who has acquired it under the statute until he con-

¹ *School District, &c. v. Benson*, 31 Me. 384, 385.

² *Steel v. Johnson*, 4 Allen, 426; *Schall v. Williams Valley Railroad*, 35 Penn. St. 191, 205; *Ford v. Wilson*, 35 Miss. 504; *Ellis v. Murray*, 28 Miss. 129; *Graffius v. Tottenham*, 1 W. & Serg. 494; *Grant v. Fowler*, 89 N. H. 103; *Pederrick v. Searle*, 5 S. & R. 240; *Moore v. Luce*, 29 Penn. St. 262; *Armstrong v. Ristean's Lessee*, 5 Md. 256; *Blair v. Smith*, 16 Mo. 273. See Maine's An. Law, 286, 287, as to the principle on which the speculative basis of prescription rests, and whether long possession gives a right, or operates as a *finis litium*, and in what cases the doctrine of *usucaption* applied.

veys it back with all the solemnities required in any deed of land. If, therefore, one be in possession of land, he may have trespass against another for entering upon it, although he have a clear, paper title, if he has, in the mean time, lost his title by adverse possession of a third party. It would be like the entry of a stranger.¹

49. The cases cited in illustration of the principles which have been applied in determining the questions that have arisen under this branch of the subject, though numerous, are but a sample of the almost infinite variety which may be found in the books since the times of 21 Jac. I., when the English statute of limitations was enacted, which was in force there until that of 3 & 4 Wm. IV., c. 27, was substituted in its stead. It has not been thought worth while to copy either of these statutes, as they are easily accessible to the reader, since the several States have each its own local laws upon the subject, which will be found, it is believed, in an intelligible though summary form, in the accompanying note. In most if not all statutes of limitation, both of England and this country, there are saving clauses in respect to persons under disabilities, such as coverture in women, infancy, lunacy, and the like. But, with few or no exceptions, a disability, to have that effect, must exist at the time when the adverse possession and consequent right of action to recover the land by the true owner begins or accrues. The saving does not extend to any disability subsequently arising.² If, therefore, possession is taken while the owner is a *feme covert*, an infant, or insane, the statute does not begin to run so long as the disability continues.³ And where possession was taken during the life of a tenant for life, and the reversioner, then a *feme sole*, married during the life of such tenant, her disability of coverture existing at his death prevented the statute from running against her so long as she remained a *feme covert*.⁴ But where

¹ *Hughes v. Graves*, 39 Vt. 365. See *Phillips v. Kent*, 3 Zab. 155.

² *Mercer's Lessees v. Selden*, 1 How. 37; *Seawell v. Bunch*, 6 Jones (Law), 197; *Clark's Ex'rs v. Trail*, 1 Met. (Ky.) 40, 41; *Haynes v. Jones*, 2 Head (Tenn.), 372; *Cotterell v. Dutton*, 4 Taunt. 820, 830; *Tracy v. Atherton*, 36 Vt. 503, 510; *McFarland v. Stone*, 17 Vt. 174; *Reimer v. Stuber*, 20 Penn. St. 458.

³ *Gage v. Smith*, 27 Conn. 74; *Seawell v. Bunch*, *sup.*; *Little v. Downing*, 87 N. H. 355; *Edson v. Munsell*, 10 Allen, 557; *Peters v. Jones*, 35 Iowa, 512.

⁴ *McLane v. Moore*, 6 Jones (Law), 520.

the tenant, claiming by adverse possession, entered in the lifetime of the ancestor, who was under no disability, and continued to hold after his death, till the expiration of the twenty years, during a part of which time the heir was under disability, which existed at the time of the descent of the estate, it was held that he was thereby barred.¹ So where the disseisin took place in 1834, and the disseisee became insane in 1843, and continued so the remainder of the twenty years, he was held to be barred.² And where the demandant, who was a *feme sole* when the tenant took possession, soon after married, and remained a *feme covert* during the twenty years, her right was barred by the statute.³ In Georgia, however, if a disability occurs on the part of the owner during the term of limitation, it suspends the operation of the statute while the disability continues.⁴

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* NOTE.

In *Alabama*, actions for the recovery of lands, tenements, or hereditaments, or the possession thereof, must be commenced within ten years after the cause of action accrues. Such action may be brought by the State within twenty years. When a right of entry on land accrues, the entry must be considered as having been made, and the cause of action as having accrued. If the person entitled to bring such action, or make an entry on land or defence founded on the title to real property, be, at the time such right accrues, within the age of twenty-one years, a married woman, or insane, or imprisoned on a criminal charge for any term less than for life, the suit may be brought, or the entry or defence made, within three years after the termination of such disability. But the period of limitation can in no case be extended beyond twenty years from the time the cause of action or right accrued. Upon an arrest or reversal of a judgment for the plaintiff, a new action may be commenced within a year, though the period limited may have expired. Code, 1867, §§ 2899, 2900, 2909, 2910.

In *Arkansas*, when any person or persons, their heirs or assigns, have had

¹ *Becker v. Van Valkenburgh*, 29 Barb. 324 ; *Fleming v. Griswold*, 3 Hill, 85. See *Lincoln v. Purcell*, 2 Head (Tenn.), 143. See, as to the effect upon prescription as to easements, &c., of descent of the servient estate to a minor heir before the requisite period of adverse enjoyment, *ante*, p. *50.

² *Allis v. Moore*, 2 Allen, 306.

³ *Currier v. Gale*, 3 Allen, 328 ; *Thorp v. Raymond*, 16 How. 247. See also *Ang. Lim.*, 4th ed. § 477-480.

⁴ *Everett v. Whitfield*, 27 Ga. 159. See, as to incorporeal hereditaments in similar cases, *Washburn, Easements*, 110, 114 ; *ante*, p. *50.

three years' possession of any lands, tenements, or hereditaments, claiming the same by virtue of a deed, devise, grant, or assurance, they are entitled to keep and hold in possession such quantity of land as is specified and described in their deed of conveyance, devise, grant, or other assurance; and such possession constitutes an effectual bar to any action brought for the recovery thereof in law or equity, and vests an absolute and indefeasible title in fee-simple to such lands and tenements, unless the person entitled to such action is at the time of the possession taken, or after the accruing of the right of title, within the age of twenty-one years, *feme covert*, or *non compos mentis*, in which case he may bring his action within two years after the removal of the disability. Cumulative disabilities are not allowed, but only those which existed at the time when the right first accrued. Suits for the recovery of lands must be within seven years after the cause of action accrued; but, if the person entitled to such action is under any of the disabilities before mentioned at the time the right first accrued, he may bring the same within three years next after the removal of the disability. No cumulative disability is allowed. No entry upon lands is valid as a claim, unless an action is commenced thereon within one year after such entry, and within seven years from the time when the right accrued. Dig. Stat. 1858, c. 106, §§ 1-3, p. 748.

In *Colorado*, all real actions are to be commenced within six years next after the cause of action shall accrue: if any person entitled to bring such action be within the age of twenty-one years, or a married woman, or insane, imprisoned, or absent from the United States, such person may bring the said action within six years after the disability is removed; if a judgment for the plaintiff shall be reversed, a new action may be brought within a year. Rev. Stat. 1868, c. 55, §§ 1, 15, 18.

In *Connecticut*, entry into land is limited to fifteen years next after the right first accrued; and no entry is sufficient unless an action is commenced thereupon, and prosecuted with effect, within one year next after the making thereof; provided, that if the person who has such right is, at the time of its first accruing, within the age of twenty-one years, *feme covert*, *non compos mentis*, or imprisoned, he or his heirs may bring an action, or make an entry, within five years after the removal of the disability, or, in case of the death of such *per- [*503] son entitled to the action, within five years after the death. Upon the reversal of a judgment rendered for the plaintiff, a new action may be brought within one year. Conn. Gen. Stat. 1866, p. 551; 1875, c. 18, §§ 1, 16.

In *Delaware*, the right of entry into any land is barred after twenty years after the right first accrued; and no action for or in respect to any real property can be maintained, unless the plaintiff, his ancestor, or predecessor, has had actual seisin or possession of the premises within such time. But if the person entitled to the action or entry is, at the time the right first accrues, an infant, or a married woman, insane, or imprisoned, the action may be brought within ten years after such disability is removed; and if such person die under any of these disabilities, any person claiming under him has the benefit of this saving. Del. Code, 1852, c. 122, p. 439; Code amended 1874, p. 727.

In *Florida*, no action for the recovery of real property shall be maintained, unless it appear that the plaintiff, his ancestor, predecessor, or grantor, was seised or possessed of the premises in question within seven years before the commencement of such action. If any person entitled to bring an action for the recovery of real property, or to make an entry, be within the age of twenty-

one years, or insane, imprisoned, or a married woman, such action may be commenced or entry made within seven years after such disability is removed. Where a judgment for a plaintiff is reversed, a new action may be commenced within a year. Bush. Dig. 1872, pp. 472, 473; Acts of 1872, p. 20.

In *Georgia*, adverse possession, under a written evidence of title for seven years, gives a good title by prescription. Actual adverse possession of lands by itself, for twenty years, gives good title by prescription, with the exception in favor of minors, married women, persons imprisoned, and insane persons, each of whom shall have the same time, after the removal of such disability, to assert his claim or title to the land against the one claiming by prescription. A prescription commenced ceases as to persons under disability during such disability; and upon a removal thereof, the prior possession may be tacked upon the subsequent possession, to make out the prescription. Successive possessions may be tacked to make the prescription. Code, 1873, c. 7.

In *Illinois*, the right of entry is limited to twenty years next after the right accrued; and every real, possessory, ancestral, or mixed action, or writ of right, must be brought within such period. When any person is possessed of any real property by actual residence thereon, having a connected title in law or equity, deducible of record from the State or the United States, or from any officer authorized to sell such land for the non-payment of taxes, or on execution, or under any order, judgment, or decree of any court of record, such action must be brought within seven years next after possession being taken; but when the possessor acquires such title after taking such possession, the limitation begins to run from the time of his acquiring title. Such possession, [*504] *to be a bar, must be continued for seven years next preceding the time of asserting the right of entry, or the commencement of the action. The heirs, devisees, and assigns of the person having such possession and title have the benefit of his possession. A provision like this, respecting the right of action within seven years, applies also to the right of entry. Every person in the actual possession of lands or tenements, under claim and color of title, made in good faith, for seven successive years, paying all taxes assessed thereon, is adjudged the legal owner; and all persons claiming under such possession before such seven years have expired, who continue and complete the same in like manner, have the benefit of this provision. One having color of title, made in good faith, to vacant and unoccupied land, and paying the taxes assessed thereon for seven successive years, is adjudged the legal owner of the same; and others holding under him have the benefit of his possession. But such tax-payer is not entitled to the benefit of this provision, if any person, having a better paper title to such vacant and unoccupied land, pays the taxes on it for any one or more years of said term of seven years. These provisions respecting possession under claim or color of title do not extend to lands or tenements owned by the United States or the State of Illinois, nor to school and seminary lands, nor to lands held for the use of religious societies, nor to lands held for any public purpose. Nor do they extend to lands or tenements when there is an adverse title to them, and the holder of such adverse title is under the age of twenty-one years, insane, imprisoned, *feme covert*, out of the United States, and in the employment of the United States or the State of Illinois; provided such person commence an action for the recovery of such lands or tenements within three years after the removal of such disabilities, or, in case of vacant and unoccupied land, shall, within such time, pay all the taxes,

with interest thereon at the rate of twelve per cent *per annum*, that have been paid on such land, to the person or persons who have paid the same. Upon the reversal or arrest of any judgment for the plaintiff, or upon his being nonsuited, a new action may be brought within one year thereafter. In all cases where the person entitled to the entry or action is, at the time, under the age of twenty-one years, insane, or *feme covert*, he may make such entry or bring such action within the various times limited after the removal of such disability. If a person entitled to make entry or bring an action dies, his heirs, or persons claiming under him, may exercise such right within two years after his death, notwithstanding the time before limited in that behalf has expired; and no person shall commence an action or make a sale to foreclose any mortgage, or deed of trust in the nature of a mortgage, unless within ten years after the right of action or right to make such sale accrues. 2 Ill. Comp. Stat. 1858, 751, 752; Rev. Stat. 1874, c. 83, §§ 1-11, 24.

In *Indiana*, actions for the recovery of the possession of real estate must be brought within twenty years. Any person, being under legal disabilities when the cause of action accrues, may bring his action within two years after the disability is removed. If the person entitled to bring the action die before the expiration of the time limited, his representatives may bring the same within eighteen months after the death of such person. If the plaintiff fail in the action from any cause except negligence in the prosecution, or the action abate or is defeated by the death of a party, or judgment be arrested or reversed, a new action may be brought within five years after such determination. 2 Ind. Rev. Stat. 76, 77; Stat. 1862, vol. 2, pp. 156-162.

In *Iowa*, actions for the recovery of any real property must be brought *within ten years after the right accrues. But minors may commence [*505] such action within one year after attaining their majority. If the person entitled to the action die within one year next previous to the expiration of the limitation, this does not apply until one year after such death. If the plaintiff fail for any cause, except negligence, in the prosecution of his action, a new one may be brought within six months thereafter. Iowa, Code, 1851, c. 99, §§ 1659, 1666-1668; Revision, 1860, §§ 2740-2750; Code, 1873, pp. 432, 433.

In *Kentucky*, an action for the recovery of real property can only be brought within fifteen years after the right first accrued to the plaintiff, or to the person through whom he claims. If, at the time the action accrued, such person was an infant, married woman, or of unsound mind, such person, or the person claiming under him, may bring the action within three years after the removal of such disability, or death of the person under disability: cumulative disabilities are not allowed. The period within which the action may be brought cannot in any case, by reason of any death, or the existence or continuance of any disability, be extended beyond thirty years from the time the right first accrued. Where an occupant of land, or the person under whom he claims, has a connected title thereto in law or equity, deducible of record from the Commonwealth, and has had an actual occupancy of the same by settlement thereon for seven years, such possession is a bar to any right of entry or action under an adverse title. But this limitation does not apply to a person who is an infant, a married woman, one of unsound mind, or out of the United States, in the employment of the United States or of the State, until seven years after the removal of such disability; but the disability of one of several claimants saves only his own right, and not that of another. 2 Ky. Rev. Stat., Stant. ed. 1860, 123-125, c. 63, arts. 1, 2; Gen. Stat. 1873, c. 71, arts. 1, 2.

In *Louisiana*, thirty years' possession prescribes land, though possessed without any title, or *knavishly*. If possessed fairly and honestly, and by *just title*, that is, by one by virtue of which property may be transferred, such as a *sale* or *donation*, though no real right may be thereby given, ten years' possession will be sufficient if the true proprietor resides in the State, and *twenty years* in case he resides abroad. There is another prescription of four years, which was against a minor upon his coming of age, as to any real estate alienated by the tutor in cases not provided by law. For the prescription arising from the ten or twenty years' possession, there must be good faith, and apparently good title: if, therefore, the title be defective with respect to *form*, there can be no basis for the ten or twenty years' prescription. Also, any interruption, either natural or legal, suspends prescription. Husbands and wives cannot prescribe against one another. Minors, and persons under interdiction, cannot be prescribed against. Married women may be prescribed against, though not separated as to property, for all belonging to them and administered by their husbands, saving their recourse against their husbands. But prescription does not take place during marriage, as it respects property alienated which made a part of the dowry; nor in any case during marriage, when the action of the wife may be prejudicial to her husband. Lands not acquirable by alienation *cannot be obtained by prescription. Creditors, and every other person who may have any interest in acquiring an estate by prescription, have a right to plead it, even in case the person claiming such an estate should renounce the said right of prescription. Abstract from the Civil Code of Louisiana; 4 Griffith's Annual Law Register, p. 686.

In the Revised Statutes of Louisiana for 1856, an amendment to the code provides that absentees, and non-residents of the State, shall stand on the same footing in relation to the laws of prescription as persons present in or residents of the State. La. Rev. Stat. 1856, p. 82, § 29.

In *Maryland*, whenever land is taken up under a common or special warrant, or warrant of re-survey, escheat, or proclamation warrant, any person, body politic or corporate, may give in evidence, under the general issue, his possession thereof; and if it appears in evidence that the person, body politic or corporate, or those under whom they claim, have held the lands in possession for twenty years before the action brought, such possession is a bar to all right or claim derived from the State under any patent issued upon such warrant. Md. Code 1860, vol. 1, art. 57, § 9, p. 397.

In *Massachusetts*, no person can commence an action for the recovery of lands or make an entry thereon, unless within twenty years after the right of action or of entry first accrued, or after he or those under whom he claims have been seised or possessed of the premises. But if such right or title first accrued to an ancestor or predecessor of the person who brings the action or makes the entry, or to any other person under whom he claims, the twenty years are computed from the time when the right or title so first accrued. The right of entry or of action of a person disseised is deemed to have accrued at the time of such disseisin. If he claims as heir or devisee of one who died seised, his right is deemed to have accrued at the time of such death, unless there is an intervening estate; in which case his right is deemed to accrue when such estate expires, or would have expired by its own limitation. His right, so far as it is affected by any limitation prescribed in any remainder or reversion, is deemed to accrue when the intermediate or precedent estate would have expired by its own limitation,

notwithstanding any forfeiture thereof for which he might have entered at an earlier time. He may enter, however, when entitled to do so by reason of any forfeiture, or breach of condition; and if he claims under such a title, his right is deemed to have accrued when the forfeiture was incurred, or the condition was broken. In all cases not otherwise specially provided for, the right is deemed to have accrued when the claimant, or the person under whom he claims, first became entitled to the possession of the premises under the title upon which the entry or the action is founded. If any minister or other sole corporation is disseised, any of his successors may enter upon the premises, or bring an action for the recovery thereof, at any time within five years after the death, resignation, or removal of the person so disseised, notwithstanding the twenty years after such disseisin have expired. If, at the time when such right first accrues, the person entitled to it is within the age of twenty-one years, disabled by marriage, insane, *imprisoned, or absent from the United States, such [*507] person, or any one claiming under him, may make the entry or bring the action at any time within ten years after such disability is removed, though the twenty years before limited have expired. And if such person dies under these disabilities, the entry may be made or the action brought by his heirs, or any other person claiming under him, at any time within ten years after his death, notwithstanding said twenty years have expired. But in such case no further time is allowed on account of the disability of any other than the first person who was under disability, and died without having recovered the premises. A person is not deemed to have been in possession, unless he has continued in open and peaceable possession of the premises for one year next after such entry, or unless an action is commenced upon such entry and seisin within one year after he is ousted or dispossessed. When the right of entry or action of a tenant in tail or remainder-man is barred by limitation, the estate-tail, and all remainders and reversions expectant thereon, are also barred. When a tenant in tail or remainder-man dies before the expiration of the period of limitation, no person claiming any estate which the tenant in tail or remainder-man might have barred can make an entry or bring an action to recover such land, except within the period during which the tenant in tail or remainder-man, if he had so long lived, might have made such entry, or brought such action. Suits for the recovery of lands in behalf of the Commonwealth must be brought within twenty years, except as to the Province lands in the town of Provincetown, and land owned by the State in the basin of the Back Bay. A notice given to prevent the acquisition of an easement is deemed so far a disturbance of the right in question, as to enable the party claiming it to bring an action of tort as for a nuisance or disturbance, for the purpose of trying the right. On the abatement of the action by the death of any party thereto, or on reversal or arrest of judgment, a new action for the same cause may be brought at any time within one year after the determination of the original action, or after the reversal of the judgment. Mass. Gen. Stat. 1860, c. 154, p. 774.

In *Maine*, the statute of limitations of real actions was originally derived from that of Massachusetts, and the general provision of the statutes of these States are identical; namely, those limiting the time of bringing the action or making the entry, those defining the time when the right accrues, the saving provisions in favor of those under legal disabilities, those relating to actions brought by a minister or other sole corporations, and to actions brought by the State. It is further provided in *Maine*, that, to constitute such adverse possession as to bar

the right of recovery, it shall not be necessary for the lands to be surrounded with fences, or rendered inaccessible by water; but it is sufficient, if the possession, occupation, and improvement are open, notorious, and comporting with the ordinary management of a farm, although the part used as a wood-lot is not enclosed. When a writ in such action fails from insufficient service or negligence of the officer, or the action is defeated for any matter of form, or by death or other disability, or the demandant's judgment is reversed, a new action [*508] may be brought within six months. No action for the recovery of *lands can be commenced or maintained against any person in possession thereof, when he or those under whom he claims have been in actual possession for more than forty years, claiming to hold by adverse, open, and exclusive possession in their own right. Me. Rev. Stat. 1847, c. 105, p. 616; 1871, c. 105, pp. 769, 771.

In *Michigan*, the statute is the same as that in Massachusetts, except that there is no provision specially relating to tenants in tail and remainder-men, or the acquisition of easements. Mich. Comp. Laws, 1857, c. 164.

By Act 1863, No. 227, it is provided, that actions for the recovery of lands, or the possession thereof, shall be brought within fifteen years after the right of action or of entry shall have first accrued to the plaintiff, or to some person through whom he claims; except that where the defendant claims title to the land by deed made upon a sale thereof by an executor, administrator, or guardian, or by a sheriff under process of court, it shall be within five years; and within ten years where the defendant claims title under a deed made by some officer of the State or of the United States, upon the sale of land for taxes. These periods of limitation are computed from the time when the right or title first accrued to the plaintiff, or to his ancestor, predecessor, grantor, or other person from whom he claims. The person establishing the legal title to the premises is presumed to have been possessed thereof within the time limited for bringing the action, unless it appear that the same have been possessed adversely to such legal title by the defendant, or by those from whom he claims. If the person entitled to entry be a minor, a married woman, insane, or imprisoned, or absent from the United States, unless within one of the British provinces of North America, he may make such entry, or bring such action, at any time within five years after such disability is removed. Upon the death of such person under disability, the entry may be made or the action brought by his heirs, or any one claiming under him, at any time within five years after his death. Laws, 1863, p. 388; 1871, c. 228.

In *Minnesota*, actions for the recovery of real property, or for the recovery of the possession thereof, cannot be maintained, unless the plaintiff, his ancestor, predecessor, or grantor, was seised or possessed of the premises within twenty years before the commencement of the suit. If the person entitled to the action be, at the time it accrues, within the age of twenty-one years, insane, or imprisoned on a criminal charge, or in execution under sentence as a criminal, for a time less than his natural life, or a married woman, the time of such disability is not a part of the time limited, except that the period cannot be extended more than five years by any disability except infancy, nor longer than one year after the disability ceases. If the person entitled to the action die before the expiration of the time limited, his representatives may commence an action within one year; and when judgment for the plaintiff is arrested or reversed, he may commence anew within one year. Minn. Comp. Stat. 1858, c. 60, §§ 4, 17, 18, 25; Stat. at Large, 1873, vol. 2, pp. 782-785.

In *Oregon*, the statute is like that of *Minnesota*, except that the time while the party entitled to the action is under the legal disabilities mentioned is not to be a part of the time limited in any case. *Oreg. Stat.* 1855, p. 192 *et seq.*; 1872, pp. 106-109.

In *Mississippi*, no person may make an entry or commence an action to recover any land but within ten years after the time at which the right to make such entry, or to bring such action, shall have first accrued to him, or to some person through whom he claims. But if at such time the person entitled to make the entry or bring the action was under any of the disabilities of infancy, coverture, imprisonment, idiocy, lunacy, unsoundness of mind, or absence beyond the limits of the United States on business of the State or the United States, such person, or any one claiming under him, may, notwithstanding the period of ten years shall have expired, make an entry or bring an action at any time within ten years after the removal of such disability, or the death of such person under the disability. After the death of such person under disability, no farther time beyond ten years is allowed for the disability of any other person. The same provisions apply to suits in equity to recover land, except that, in the case of a concealed fraud, the right of action is deemed to have accrued at the time when the fraud shall, or with reasonable diligence might, have been first known or discovered. *Misa. Rev. Code*, 1857, p. 398, c. 57, §§ 1, 2; 1871, c. 45, § 2147-2150.

In *Missouri*, actions for the recovery of lands, or for the recovery of the possession thereof, cannot be commenced or maintained, unless the plaintiff, his ancestor, predecessor, grantor, or other person under whom he claims, was seised or possessed of the premises within ten years before the commencement of such action. No entry is deemed valid as a claim unless an action is commenced * within one year after the making such entry, and within [*509] ten years from the time the right accrued. If the person entitled to the action be, at the time his right accrues, within the age of twenty-one years, insane, or imprisoned on any criminal charge, or in execution upon some conviction of a criminal offence for any time less than life, or a married woman, he may bring his action within three years after such disability is removed, provided that no action shall be commenced or entry made by any person under such disabilities after twenty-four years from the cause of the action or right of entry accrued. The possession of part of a tract or lot of land in the name of the whole, and with the usual acts of ownership over the whole, is deemed a possession of the whole. If any person die under the disabilities specified, his heirs, or any person claiming under him, may bring the action within three years after his death. 2 *Mo. Gen. Stat.* 1866, c. 191, § 1; 1872, vol. 2, c. 89, art. 2.

In *Nebraska*, actions to recover lands must be brought in ten years after the cause of action accrues; and if the claimant is married, imprisoned, insane, or a minor, in ten years after the removal of such disability. *Rev. Stat.* 1866, p. 395; *Stat.* 1873, pp. 525, 526.

In *Nevada*, five years is the limitation for actions for entry. *Laws*, 1867, *Comp. L.* 1873, vol. 1, p. 244.

In *New Hampshire*, actions for the recovery of any real estate must be brought within twenty years after the right first accrued to the plaintiff, or to any person under whom he claims. If the person first entitled to maintain an action for the recovery of such estate was within the age of twenty-one years, a married

woman, or insane, at the time such right accrued, such action may be commenced within five years after such disability is removed. N. H. Gen. Stat. 1867, c. 202, §§ 1, 2.

In *New Jersey*, the right of entry into any lands, tenements, or hereditaments, or of action for the same, is barred after twenty years from the time when the right of entry or cause of action first accrued; provided that the time during which the person having such right or title shall have been under the age of twenty-one years, *feme covert*, or insane, shall not be taken or computed as part of the said limited period. Upon a reversal or arrest of judgment given for the plaintiff, he or his representatives may commence a new action for the same within one year from such time. Nixon, Dig. N. J. Laws, 1855, p. 436; 1868, pp. 512, 513.

In *New York*, no action for the recovery of any real property, or for the recovery of the possession thereof, can be maintained, unless the plaintiff, his ancestor, predecessor, or grantor, was seised or possessed of the premises within twenty years before the commencement of such action; and no action, or defence to an action, founded upon the title to real property, or to rents or services out of the same, is effectual, unless the party prosecuting the action or making the defence was in such manner possessed of the premises within twenty years. No entry is deemed valid as a claim unless an action be commenced thereupon within one year after the making of such entry, and within twenty years from the time when the right accrued. The person establishing a legal title to the premises is presumed to have been possessed of them within the time required by law; and the occupation of another person is deemed to have been under such legal title, unless the premises appear to have been held adversely for twenty years before the commencement of such action. When the occupation is under claim of title founded upon a written instrument, as being a conveyance,

or upon the decree or judgment of a competent court, and is continued [*510] * for twenty years, it is deemed to have been adverse, except that the possession of one lot is not deemed a possession of any other lot of the same tract. Land claimed in such manner is deemed to have been adversely possessed, — 1. Where it has been usually cultivated or improved; 2. Where it has been protected by a substantial enclosure; 3. Where, although not enclosed, it has been used for the supply of fuel, or of fencing-timber for the purposes of husbandry, or the ordinary use of the occupant; 4. Where a known farm or a single lot has been partly improved, the portion of such farm or lot that may have been left not cleared or not enclosed, according to the usual course and custom of the adjoining country, shall be deemed to have been occupied for the same length of time as the part improved and cultivated. Where there has been an actual continued occupation, not founded upon a written instrument, judgment, or decree, the premises so actually occupied are deemed to have been held adversely; and, in such case, land is deemed to be held adversely, — 1. Where it has been protected by a substantial enclosure; 2. Where it has been usually cultivated or improved. The possession of a tenant is deemed the possession of the landlord until the expiration of twenty years from the termination of the tenancy, or from the last payment of rent where there was no written lease. If the person entitled to commence the action or make the entry or defence be, at the time his right first accrues, within the age of twenty-one years, insane, or imprisoned on a criminal charge, or in execution upon conviction of a criminal offence for a term less than life, or a married woman, the

action may be commenced, or the entry or defence made, within ten years after the disability shall cease, or after the death of the person entitled who shall die under such disability. The State cannot sue for any real property unless the right or title of the people shall have accrued within forty years, or unless the people or those from whom they claim shall have received the rents and profits within such time. 2 N. Y. Rev. Stat. 4th ed. pp. 494-496; and 5th ed. vol. 3, pp. 502-504; Stat. at Large, vol. 2, pp. 304, 306.

In *Wisconsin*, the statute of limitations respecting real property is the same as that of New York, from which it was copied, except that a continued occupation under a claim founded on a written instrument or judgment for ten years is deemed adverse, and constitutes a bar; and the possession of a tenant is deemed the possession of the landlord until the expiration of ten years only from the termination of the tenancy, or from the last payment of rent where there is no written lease. Nor is there any limitation of actions by the State. Wis. Rev. Stat. 1858, c. 138, §§ 1-13, p. 819.

In *California*, the statute was also copied from that of New York, and is the same, except that the term of limitation is five years, and the time of limitation of actions in respect to real property by the State is ten years. Wood, Dig. Cal. Laws, 1858, pp. 45-47; Code, 1872, §§ 315-328.

* In *North Carolina*, no person can enter or make a claim to any real [*511] property but within seven years next after his right first accrues; and no action for the recovery of real estate shall be maintained, unless the claimant, or those under whom he claims, were in possession within twenty years before the commencement of such action. A person in possession of real estate under colorable title for seven years can have no action or entry sustained against him; provided, if the person entitled to any entry or claim of lands was within the age of twenty-one years, *feme covert*, *non compos mentis*, imprisoned, or beyond the seas, such person may make an entry or commence an action within three years next after the removal of such disability of infancy, coverture, unsoundness of mind, or imprisonment; or persons within eight years after the title of claim becomes due. If a judgment or verdict for the plaintiff is reversed or arrested, he may commence a new action at any time within a year thereafter. The possession of any real property for twenty-one years, under color of title, and under known and visible lines or boundaries, is a bar to the State. N. C. Rev. Code, 1854, p. 371, c. 65, §§ 1, 2; Battle's Revisal, 1873, pp. 147-149.

In *Ohio*, an action for the recovery of the title or possession of lands, tenements, or hereditaments, can only be brought within twenty-one years after the cause of such action shall have accrued. But if a person entitled to such action be, at the time this right or title first accrues, within the age of twenty-one years, a married woman, insane, or imprisoned, he may bring such action within ten years after such disability is removed. If the action be commenced in due time, and a judgment for the plaintiff be reversed, or if he fail otherwise than upon the merits, and the time limited shall have expired, the plaintiff, or if he die, and the cause of action survive, his representatives, may commence a new action within one year after such reversal or failure. Ohio, Rev. Stat. 1854, c. 87, §§ 9, 10, 22, p. 626; Rev. Stat. 1860, c. 87, §§ 9, 10, 23.

In *Kansas*, actions must be brought as follows: 1st. An action for the recovery of real property sold on execution, brought by the execution debtor, his heirs, or any person claiming under him, by title acquired, after the date of the

judgment, within five years after the date of the recording of the deed made in pursuance of the sale; 2d. An action for the recovery of real property sold by executors, administrators, or guardians, upon an order or judgment of a court directing such sale, brought by the heirs or devisees of the deceased person, or the ward or his guardian, or any person claiming under any or either of them, by title acquired after the date of the judgment or order, within five years after the recording of the deed made in pursuance of the sale; 3d. An action for the recovery of real property sold for taxes, within two years after the date of the recording of the tax-deed; 4th. An action for the recovery of real property not hereinbefore provided for, within fifteen years; 5th. An action for the forcible entry and detention, or forcible detention only, of real property, within two years. Any person entitled to bring an action for the recovery of real property, who may be under any legal disability when the cause of action accrues, may bring his action within two years after the disability is removed. Gen. Stat. 1868, c. 80, §§ 16, 17, p. 632.

In *Pennsylvania*, the right of entry into any real estate is barred after the expiration of twenty-one years after the right first accrued, and the right of action to recover lands is barred by the same period. But if any person or persons, having such right or title, are within the age of twenty-one years, *feme covert*, *non compos mentis*, or imprisoned, then such person or persons and their heirs may bring their action or make their entry within ten years after the removal of such disability; and in case such person or persons die within the said term of ten years, under such disabilities, the heir or heirs of such person or persons have the same benefit that such person or persons might have had by living until the disabilities ceased; and if any proceeding upon such right or title is abated, the same may be renewed within three years from the time of such abatement. Act 26 March, 1785. In the city and county of Philadelphia, the right of entry and of action is barred after the expiration of forty years after the right first accrued. Acts 1851 and 1852. Thirty years' possession of land is evidence that the title has been parted with by the Commonwealth, as between parties other than the Commonwealth; and, as against the Commonwealth, twenty-one years' possession perfects a defeasible estate. Act 27 April, 1855. Any ground-rent, annuity, or other charge upon real estate, is presumed to have been extinguished after the lapse of twenty-one years without any payment or other [*512] acknowledgment of its existence. Act 27 April, 1855. By the *act of

April 22, 1856, it is provided that no exception respecting the limitation of actions in favor of persons under legal disabilities shall extend so as to permit any action for the recovery of any lands to be maintained after thirty years from the time the right of entry accrues. *Purd. Dig. Penn. Laws*, 1857, pp. 538, 539, 1131, 1185.

In *Rhode Island*, where any person or persons, or others from whom he or they derive their title, either by themselves, tenants, or lessees, shall have been for the space of twenty years in the uninterrupted, quiet, peaceable, and actual seisin and possession of any lands, tenements, or hereditaments, for and during the said time, claiming the same as his, her, or their proper, sole, and rightful estate in fee-simple, such actual seisin and possession gives a good title to such person or persons, their heirs and assigns for ever; and one suing for the recovery of any such lands may rely upon such possession as conclusive title thereto; and when pleaded in bar to an action, and duly proved, it is effectual in law for barring the same. These provisions are not to be construed or taken to preju

dice the rights and claims of persons under age, *non compos mentis*, *feme covert*, or those imprisoned, or those beyond the limits, &c., of the United States, they bringing their suit therefor within the space of ten years next after such impediment is removed; or to bar any person having any estate in reversion or remainder, expectant or depending, in any lands, tenements, or hereditaments, after the end or determination of the estate for years, life, or lives, such person pursuing his title by due course of law within ten years after his right of action shall accrue. R. I. Rev. Stat. 1857, c. 148, §§ 2, 3, p. 339; Gen. Stat. 1872, c. 164, §§ 2, 3.

In *South Carolina*, the law is the same as in New York. Rev. Stat. 1873, pp. 588, 590.

In *Tennessee*, seven years' adverse possession of any lands, tenements, or hereditaments granted by this State or the State of North Carolina, under a conveyance, devise, grant, or other assurance of title purporting to convey an estate in fee, without any claim by action at law or in equity commenced within that time, vests an indefeasible title in fee; and the neglect to sue for such property for seven years after the cause of action accrues bars the action. No suit for any real property can be had but within seven years after the right accrues, except for such as have been reserved for the use of schools. Possession is not adverse when taken and continued under a title, bond, mortgage, or otherwise in subordination to another's right. If the person entitled to commence an action is, at the time the cause of action accrues, within the age of twenty-one years, or of unsound mind, or a married woman, or beyond the limits of the United States and the territories thereof, such person, or his representatives and privies, may commence the same within three years after the removal of such disability. Upon the reversal or arrest of judgment, the plaintiff, *or those claiming under him, may commence a new action within one [*513] year. Tenn. Code, 1858, pp. 581, 582, §§ 2755, 2757, 2763-2768.

In *Texas*, one who has the right of entry into any real estate must make entry therein within ten years after this right shall have accrued, or be forever barred. But if such person be under the age of twenty-one years, a *feme covert*, or insane, or if forcible occupation of the premises, or county containing them, by a public enemy, prevent entry, the time of such disability is not computed as a part of the period of limitation. Peaceable possession is defined to be such as is continuous, and not interrupted by adverse suit to recover the estate. A suit for the recovery of real estate, as against one in possession under title, or color of title, must be instituted within three years next after the cause of action shall have accrued; but in this limitation the duration of disability to sue, from minority, coverture, or insanity, is not computed. The term *title* is defined to mean a regular chain of transfer from or under the sovereignty of the soil; and color of title is constituted by a consecutive chain of such transfers down to the one in possession, without being regular, as for want of registry, or such defect as may not extend to or include the want of intrinsic fairness and honesty, or when the party in possession shall hold the same by a certificate of head right, land warrant, or land script, with a chain of transfers down to him in possession, provided the right of the government shall not be barred. One who shall have had five years' like peaceable possession of real estate, cultivating, using, or enjoying the same, and paying tax thereon, if any, and claiming under a deed or deeds duly registered, is held to have full title, precluding all claims, but shall not bar the government; and saving to the person or persons, having

superior right and cause of action, the duration of disability to sue arising from non-age, coverture, or insanity. Ten years of such peaceable possession and cultivation, use or enjoyment, without any evidence of title, gives to such naked possession full property, preclusive of all other claims in and to six hundred and forty acres of land, including the improvement; yet the right of the government is not barred, and there is a saving to those under disability, as above. *Oldham & White*, Dig. Tex. Laws, 1859, p. 300; *Paschal's Dig.* 1866, §§ 4621-4624.

In regard to the first provision of the act given above, it is held, that it was not intended, as might be supposed from the literal import of the terms, that every owner of real estate must, within ten years from the accrual of his title, make entry upon his lands, or be thereafter debarred of all right therein. *Horton v. Crawford*, 10 Tex. 382. This section bars the right of entry after ten years from the accrual of the right; but it applies only to cases in which the other party has had no adverse possession. *Redding v. Redding*, 15 Tex. 249.

In *Vermont*, no action for the recovery of any lands, or for the recovery of the possession thereof, can be maintained, and no entry can be made, unless within fifteen years next after the cause of action first accrued to the person entitled to the right, or those under whom he claims. If, at such time, any person entitled to such action is a minor, or a married woman, insane, or [*514] imprisoned, the *action may be brought within the time limited, after the disability is removed. The same period of limitation applies to the State. *Vt. Comp. Stat.* 1850, c. 61; *Vt. Gen. Stat.* 1863, c. 63, §§ 1-3; *Appendix*, 1870, c. 63, §§ 1-3, 22.

In *Virginia*, an entry on or an action to recover any land must be within fifteen years next after the time at which the right first accrues. This applies to lands lying east of the Alleghany Mountains; but ten years is the limitation as to lands lying west of the mountains. No continual or other claim preserves any right of making an entry, or of bringing an action. If the person entitled to such entry or action was, at the time the right first accrued, an infant, married woman, or insane, such person, or any other claiming through him, may make an entry or bring an action within ten years after the removal of the disability, or the death of such person under disability, provided the term of limitation be in no case extended beyond thirty years after the right first accrued. In case of the death of a person under disability, no farther period beyond ten years is allowed by reason of any disability of any other person. If the suit is abated, or judgment is arrested or reversed, on a ground not affecting the right to recover, a new suit may be brought within one year. *Va. Code*, 1849, c. 149, §§ 1-4, 18; *Code*, 1873, c. 146, §§ 1-5, 21.

West Virginia. — "No person shall make an entry on or bring an action to recover any land but within ten years next after right so to do accrued to himself, or to persons under whom he claims. Excepted persons within five years after removal of disability." With the exception of these two terms of limitation, the law is the same as in Virginia. *Code*, 1870, c. 104, §§ 1-4, 19.

It may be added in general terms, and is applicable to every statute of limitations, where the period prescribed by statute has once run, so as to cut off the remedy which one might have had for the recovery of property in the possession of another, the title to the property, irrespective of the original right, is regarded in the law as vested in the possessor, who is entitled to the same protection in respect to it which the owner is entitled to in other cases. A subsequent

repeal of the limitation law could not be given a retroactive effect so as to disturb this title. Cooley, *Constitutional Limitations*, 365.

Questions involving the effect of a state of war upon the statute of limitations of a State in that condition have grown out of the civil war between the North and South in the United States; and in giving an opinion in the case of *Hanger v. Abbott*, Clifford, J., uses the following language: "When the courts of justice are open, and judges and ministers of the same may by law protect men from wrong and violence, and distribute justice to all, says Lord Coke, it is said to be a time of peace; but where, by invasion, insurrection, rebellion, or such like, the peaceable course of justice is disturbed and stopped, so as the courts of justice be, as it were, shut up, *et silent leges inter arma*, then it is said to be time of war." — "If a man is disseised in time of peace, and the descent is cast in time of war, this shall not take away the entry of the disseisee." It was accordingly held, that the time during which the courts in the rebellious States were closed to citizens of the loyal States was to be excluded from the computation of time fixed by the statutes of limitation. 6 Wall. 532, 541; *Coleman v. Holmes*, 44 Ala. 124.

CHAPTER III.

TITLE BY GRANT.

SECT. 1. Public Grant.

SECT. 2. Title by Office Grant.

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*SECTION I.

PUBLIC GRANT.

1. Grant defined.
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12. Nature and mode of issuing patents of lands.
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19. The property in mines in the State of California.
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- 40, 41. How courts apply the doctrine of legal and equitable rights to public lands.
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48. Of the doctrine of pre-emption of public lands.
49. Of public grants in New England and other original States.
50. Of confiscation of lands.

1. **THOUGH** the word "grant" was originally made use of, in treating of conveyances of interests in lands, to denote a transfer by deed of that which could not be passed by livery, and, of course, was applied only to incorporeal hereditaments, it has now become a generic term, applicable to the transfers of all classes of real property, and will be used in that broad sense in speaking of the formal transfer of titles to lands.¹

2. In the English treatises upon this subject, one mode of creating titles to lands and hereditaments is said to be by private act of parliament, and another by the king's grant. By the former is meant an act of parliament concerning a particular subject or person; by the latter, an act evidenced by letters-patent under the great seal, granting something from the king to a subject.²

3. By public grant, as used in this chapter, is intended the mode and act of creating a title in an individual to lands which had previously belonged to the government, in some

¹ 4 Kent, Com. 494, 550; Wms. Real Prop. 147, 195; Stat. 8 & 9 Vict. c. 106, § 2; 3 Wood, Conv. 7; 2 Bl. Com. 310; *Dudley v. Sumner*, 5 Mass. 488, 471 Co. Lit. 301 b; Lolor, Real Estate, 249; 4 Kent, Com. 492.

² Cruise, Dig. Tit. 33, 34.

cases the government being that of the United States, and in others that of the respective States.

4. Upon the discovery and settlement of this country by * Europeans, there was a kind of ownership of the territory recognized in the native tribes, though there seems to have been no well-defined idea of individual property in lands on the part of the natives, beyond, perhaps, the spot under immediate occupation.

5. Nor has any title, beyond the right of occupation, been recognized in the native tribes by any of the European governments or their successors, the Colonies, the States, or the United States. The law, in this respect, seems to have been uniform with all the Christian nations that planted colonies here. They recognized no seisin of lands on the part of Indian dwellers upon it; and the Indian's deed was simply regarded as an extinguishment of his claim, and not as passing the soil or freehold. The title gained by the grantee under it grew out of his making an actual entry upon the land under a claim of title. It is accordingly true, that in none of the English patents making grants of the country is the Indian title excepted; and even Penn had begun to fix his settlement under his patent before he conferred with the Indians as to the lands.¹

6. The sovereignty and general property of the soil in the territory of the original English colonies were claimed by and conceded to Great Britain by right of discovery.² But the discovery of an island in the ocean gives the discoverer no title to the same. Such discovery confers on the United States the property in and sovereignty over the island, and all citizens have equal rights in respect to the same until exclusive rights have been derived from the United States.³ The claim of England to that part of this continent which lies between Newfoundland and the Gulf of Mexico is based upon the discovery of that part of the coast by John Cabot in 1496.⁴

¹ 4 Dane, Abr. 68-70. But see "Indian Titles," 13 Alb. L. Jour. 28.

² See *Johnson v. M'Intosh*, 8 Wheat. 543 *et seq.*; *Martin v. Waddell*, 16 Pet. 367.

³ *Am. Guano Co. v. U. S. Guano Co.*, 44 Barb. 27.

⁴ 1 Story, Const. 3.

7. The right of soil, and, more or less, of sovereignty, was granted to companies or proprietors by letters-patent, under which communities were formed, with greater or less powers of jurisdiction and government, into colonies, provinces, or proprietaries, according to the style and form of their organization.¹

8. The jurisdiction over and disposal of the lands within the limits of these bodies politic were, as a general proposition, committed to and made subjects of the immediate governing power thereof, in place of the original jurisdiction and property of the royal government.²

9. All lands, however, lying outside of these colonies, remained the property of the crown as representing the nation, subject to the Indian title of occupation; and this was also true of whatever lands the crown may have acquired by treaty from other European nations.³ It belongs to a treatise on history, rather than upon law, to trace the changes that took place in the sovereignty over and the title to the public lands which belonged to the crown and the respective colonies prior to the peace of 1783, when all jurisdiction of the mother-country over the Territories, afterwards embraced within the jurisdiction * of the States, individually or collectively, was abandoned. It is therefore only necessary to start, so far as the general government is concerned, with the condition of things as they were left by the adoption of the Federal Constitution.

10. Whatever territory had belonged to the British government became the property of the general government, as successors to the British crown. To these lands were added those extensive regions, especially to the north and west of the Ohio, which New York, Virginia, Connecticut, and other States, ceded to the United States as a common fund for the joint benefit of the Union, and also the more recent purchases

¹ *Worcester v. Georgia*, 6 Pet. 544. The chartered Colonies were Massachusetts, Rhode Island, and Connecticut. The Provinces were New Hampshire, New Jersey, Virginia, the two Carolinas, and Georgia. The Proprietaries were Maryland, Pennsylvania, Delaware, and New York. 1 Curtis, Const. 425.

² *Jackson v. Hart*, 12 Johns. 81; *Commonwealth v. Roxbury*, 9 Gray, 478.

³ See *Johnson v. M'Intosh*, 8 Wheat. 543; *Worcester v. Georgia*, 6 Pet. 548.

of Louisiana and Florida, and the acquisitions of territory by cession from Mexico. All this public domain became, from time to time, subject to the power of the general government to grant and dispose of as it saw fit; while so much of the lands as the several States acquired as successors to the Colonies, or by cession from the general government, and which had not been appropriated to the individual ownership of citizens, was subject to a like power on the part of those States respectively.¹

This sketch of the origin and character of the rights of property, and disposal of the public domain of the United States and that of the several States, will serve to explain the systems which have been adopted for the rights and the principles of legislation and adjudication to which they have given rise. No examination, however, will be attempted beyond the briefest possible notice, from the extent of the inquiry opened, in undertaking to treat of them in detail. A volume recently published, compiled by Mr. Lester of the Department of the Interior at Washington, contains, in one part, the several laws, public and private, passed by Congress upon the subject of the sale and disposition of the public lands, amounting in all to three hundred and sixty; while the decided cases contained in the reports of the courts of the United States and of the several States may be counted by hundreds.

11. In the examination of the subject, the mode of granting

¹ *Terrett v. Taylor*, 9 Cranch, 50. The Confederation of the Colonies was formed in 1777; but some of the smaller ones hesitated to come into it. One obstacle in the way was the claim of Virginia, New York, and some of the other Colonies, to what were called the crown lands, that had not been located and settled, though within what was claimed to be their charter limits. The indefinite terms in which the crown grants were made to several of these Colonies were sources of conflict among them, and gave rise to claims of an almost unlimited extent beyond the actual settlements. The smaller Colonies who were excluded from these territorial claims insisted that these lands ought to be deemed public domain, and held by the Confederacy for public purposes; and Maryland refused to become a party to the Confederacy until 1781. In the mean time, New York had taken steps towards ceding the lands claimed by her, and was followed by Virginia, Massachusetts, Connecticut, South Carolina, North Carolina, and Georgia; and these lands were finally ceded "to be disposed of for the common benefit of the United States." Kent, 259; 1 Story, Const. 215.

lands adopted by the United States will be principally considered; though the analogy between that and the forms in use in many of the States is very close, except as to the character * of the surveys and divisions of the [*520] land. The system which has been in operation for the last half-century provides, in the first place, for surveys of the public lands, and a division of the same into townships and sections, and a subdivision into halves, quarters, and eighths of sections, the townships consisting of 23,040 acres, and each section of 640 acres.¹ In disposing of these lands, various modes have been adopted. Many of them have been disposed of by public sale, others by private *entry*, as it is called, upon the records of certain officers within the districts where the lands lie, by those wishing to purchase; while others are selected and designated by persons holding warrants from the government, given for meritorious services and other causes, which entitle the holders to choose and appropriate a certain number of acres; while, in some cases, these lands are disposed of by treaty or special acts of Congress which operate as grants.

12. The instrument which forms the evidence of title to lands acquired in either of these ways from the government is called a *patent*. It is signed by the President, or some one appointed to annex his signature, with the seal of the United States, and is designed to define the land intended to be granted,² and, when regularly and properly issued, becomes a complete evidence of title. In like manner, patents under the States derive their authenticity from the great seal of the State being annexed to the same.³ As certain preliminary measures are required in case of a purchase of lands from the government before issuing this patent, — namely, the entry of the land with the proper officer, designating the section, or part of section, to be conveyed, and payment of the purchase-money, — questions of conflicting claims have frequently arisen as to the validity of patents already issued, and as to priority of right in one or another to have a patent issued in his favor,

¹ Walk. Am. Law, 42, 43.

² Owens v. Jackson, 9 Cal. 322.

³ The People v. Livingston, 8 Barb. 253; Doe v. McKilvain, 14 Ga. 252; Hulick v. Scovil, 4 Gilm. 174.

which have been the subjects of adjudication of the [*521] courts of the United States. * And the same may be said of many of the more recent States, where a system of entry and issuing of patents has been adopted, similar in most respects to that of the United States. These general, and, in a measure, preliminary statements, will serve to explain the application of many of the doctrines laid down by the courts, without the necessity of giving a minute history of the several cases in which points of general interest have been decided.

13. In the first place, the fee of all the unsold lands in the United States is either in the United States, or in the States within which such lands are situated.¹ The Indian title, or that interest which originally belonged to the native tribes, was one of use or occupation only. It was, however, an interest which could only be divested by purchase or conquest. Accordingly, grants made by the State of Tennessee of the Cherokee lands, before the title of the tribe had been extinguished, were held to be void, and to pass no title to the grantee.² But this has reference to the source of title rather than to the capacity to hold lands; for a patent from the United States to an Indian makes him the owner of the ultimate title, and renders him, as such, liable to be taxed therefor.³

14. But it would seem that either the State or the United States, according as the one or the other owned the fee, may grant that, subject to such occupancy; but no possession can be taken until such right of occupancy is extinguished.⁴

15. But courts will not recognize a title to lands in the territory north-west of the Ohio River acquired by an individual by grant from an Indian tribe, on the ground that the nation making the discovery of the country has the exclusive right to acquire the title of the aboriginal inhabitants.⁵ A

¹ *Doe v. Beardsley*, 2 McLean, 412; *Johnson v. M'Intosh*, 8 Wheat. 543, 571, *et seq.*; *Worcester v. Georgia*, 6 Pet. 543; *Fletcher v. Peck*, 6 Cranch, 87.

² *Gillespie v. Cunningham*, 2 Humph. 19; *Commonwealth v. Roxbury*, 9 Gray, 478.

³ *Blue Jacket v. Commissioners, &c.*, 3 Kans. 349.

⁴ *Doe v. Beardsley*, 2 McLean, 412; *Stockton v. Williams*, 1 Dougl. (Mich.) 546; *Fletcher v. Peck*, 6 Cranch, 87.

⁵ *Johnson v. McIntosh*, 8 Wheat. 571, where the general subject of Indian title is fully examined. *Worcester v. Georgia*, 6 Pet. 543.

title, therefore, conveyed by an Indian tribe to any one other than the sovereignty, would be of no validity.¹

* 16. Although, as a general proposition, the title [*522] to and disposition of land are subject exclusively to the laws of the country where it lies,² yet all the lands in the Territories are, in the first instance, the exclusive property of the United States, to be disposed of to such persons, at such times, and in such mode, as well as by such titles, as the government may deem proper, independent of locality. And no Territory or State can interfere with the exercise of this control, nor affect the title of the United States by the exercise of the right of eminent domain.³

17. A State may by statute prescribe the remedies to be pursued in her courts, and may regulate the disposition of the property of her citizens, by descent, devise, or alienation. But where the United States has required a patent in order to pass a valid title of their lands to a purchaser, it is not competent for a State to declare that any thing less than that shall originally pass a good title, though the land be situate within the limits of such State. The law of the United States in such cases is paramount to the law of the State; and the question, whether a title in such case has passed from the United States, is to be determined by the law of the latter. But, as soon as the title shall have passed from the United States, it takes the character of other property within the State, and is subject to State legislation.⁴

18. Sovereignty over a territory can never be in abeyance. Consequently, upon the acquisition of the present territory of California from Mexico, the sovereignty as well as the fee in all the public lands within its limits, and a full right to

¹ *Doe v. Beardsley*, 2 McLean, 412; *Stockton v. Williams*, 1 Dougl. (Mich.) 546; *Jackson v. Porter*, Paine, C. C. 457; *Jackson v. Hudson*, 3 Johns. 375; *Jackson v. Wood*, 7 Johns. 290; *Marshall v. Clark*, 4 Call, 268; *Stevens v. Smith*, 2 Kans. 243.

² *United States v. Crosby*, 7 Cranch, 115; *Kerr v. Moon*, 9 Wheat. 565; *Darby v. Mayer*, 10 Wheat. 465; *Calloway v. Doe*, 1 Blackf. 372; *Cutler v. Davenport*, 1 Pick. 81; *Nims v. Palmer*, 6 Cal. 8.

³ *Irvine v. Marshall*, 20 How. 558; *Pratt v. Brown*, 3 Wis. 603.

⁴ *Wilcox v. Jackson*, 13 Pet. 516, 517; *Bagnell v. Broderick*, 13 Pet. 436; *Cannon v. White*, 16 La. An. 89.

dispose of them, passed at once to the United States as successors to the former sovereign. This sovereignty [*523] passed to the State * when she became clothed with State powers by a law of Congress to that effect;¹ and by this she holds the shores of the sea.²

19. Though the title to and sovereignty over the public lands in California passed from the crown of Spain to the government of Mexico, and through the latter to the United States, the ownership of the mines of gold and silver within the same was incident to the ownership of the soil, and not to the sovereignty of the government, and, therefore, did not pass to the State when it became such. Such mines consequently pass with the soil to patentees claiming under the United States, unless expressly reserved in the grant.³ Such lands as belong to the United States within the limits of California, since she became a State, are held by them as private proprietors, with the ordinary incidents of such ownership, except in the matter of taxation. The United States, therefore, could not prescribe rules of property, or modes of its disposition or tenure, in derogation of the rights of the local sovereign, the State, to govern the relations of the citizens of the State. Like any other proprietor, therefore, they can only exercise the rights to the mineral on private property, in subordination to such rules as the local sovereign may prescribe.⁴ So, when Alabama became a State, she acquired the shores of the navigable streams within the same by virtue of her sovereignty.⁵

20. Of the lands within the State of New York, not actually granted under the royal government, the people became the immediate successors to the crown ;⁶ and when the Revolution took place, the people of the several States acquired the absolute right to all their navigable waters, and to the soil under them.⁷

¹ *The People v. Folsom*, 5 Cal. 373 ; *Friedman v. Goodwin*, 1 McAll. Ch. 142.

² *People v. Morrill*, 26 Cal. 353.

³ *Moore v. Smaw*, 17 Cal. 199, 222, overruling *Hicks v. Bell*, 3 Cal. 219.

⁴ *Boggs v. Merced Co.*, 14 Cal. 375, 376. ⁵ *Pollard v. Hagan*, 3 How. 230

⁶ *The People v. Van Rensselaer*, 8 Barb. 189 ; *Van Rensselaer v. Hays*, 19 N. Y. 96.

⁷ *Martin v. Waddell*, 16 Pet. 367.

21. After the cession by Virginia to the United States of her military tract, she had nothing left for which she could issue a patent.¹

22. In Pennsylvania, the soil of the province as well as the *sovereignty, in absolute fee-simple, was [*524] in the proprietaries upon the original constitution of that Province.² In Massachusetts, the transition of title to the public lands, which, by the charter, was at first in the colonial government, was to that of the Province under the new charter, and from that to the Commonwealth at the Revolution. The fee of the soil, therefore, from that time, was in the Commonwealth, unless the government of the Colony or Province had aliened it.³ But the cession of territory from one sovereignty to another does not, by the law of nations, independent of treaty stipulations, impair the rights of private property. The cession passes only public property, and sovereignty over the territory.⁴

23. It is well known to most readers, that, in the early grants by the crown in the province of New York, large tracts of land were, in some cases, given to individuals with manorial rights attached thereto; and questions have arisen within a few years, how far it was competent for the crown to create new manors, after the passage of the act of *Quia Emptores* by the English Parliament in the 18 Edw. I.⁵ It has, however, been held that the grant of lands with such privileges was not void, and that that statute did not restrain the king from granting to his own tenants authority to grant lands, to be holden of such tenants instead of the king as superior lord; and that, even if the grant of the manorial privileges and franchises was void, it did not affect the validity of the grant of the land itself.⁶ But the courts of that State

¹ *Miller v. Lindsey*, 1 McLean, 32.

² *Penn v. Klyme*, 1 Wash. C. C. 297.

³ *Commonwealth v. Roxbury*, 9 Gray, 378.

⁴ *Teschemacher v. Thompson*, 18 Cal. 22; *United States v. Percheman*, 7 Peters, 87.

⁵ *Ante*, vol. 1, p. *30. The title of the holders of these manorial lands answered to the *emphyteusis* of the civil law. *Pomeroy's* Introd. 340; *Bouvier Du Emphyteusis*.

⁶ *The People v. Van Rensselaer*, 5 Seld. 291.

hold that the principles of the statute above mentioned have always been the law of that State, as well during its colonial condition as after it became an independent body politic.¹

24. In all questions of construction arising under grants between the government and the citizen, a different rule prevails, in one respect, from that adopted in questions between individuals. Between the latter, the construction, if doubtful, is always to be in favor of the grantee, and against the grantor; whereas, in the case of the government, the construction is always against the grantee, and in favor of the government. The act, in the latter case, is done by an agent; and nothing will be presumed beyond the letter of the grant.² Thus, where the government granted an estate upon condition which was broken, it was held at once to divest the title of the grantee without any entry or claim on the part of the grantors, as would have been necessary to defeat the estate if it had been a private grant.³ The government is not subject to estoppel by a grant, unless it be by the description contained in a valid grant; nor to an implied warranty.⁴ This strictness of construction in favor of the sovereign, and against the subject, applies only in cases where there is a real uncertainty or ambiguity in the terms of the grant. Nor, as it seems, is the rule applicable where the grant is for a valuable consideration. In such case, the rule of construction between the government and the subject is the same between private grantors and grantees. And the rule may be stated as a general one, in respect to legislative grants in this country, that such grants should be construed liberally in favor of the grantee, and in such a manner as to give them a full and liberal operation, so as to carry out the legislative intent, where that can be ascertained.⁵

¹ *Van Rensselaer v. Hays*, 19 N. Y. 72, 74, controlling *De Peyster v. Michael*, 2 Seld. 467.

² *Hagan v. Campbell*, 8 Port. 9; *Townsend v. Brown*, 4 Zab. 80; *Mayor, &c. v. Ohio & P. Railroad*, 26 Penn. St. 355; *Green's Estate*, 4 Md. Ch. Dec. 349; *Dubuque R. R. v. Litchfield*, 23 How. 88; *Gildart v. Gladstone*, 11 East, 685.

³ *Kennedy v. M'Cartney*, 4 Port. 141.

⁴ *Elmendorf v. Carmichael*, 3 Litt. 472; *Mayor, &c. v. Ohio & P. Railroad*, 26 Penn. St. 355; *State v. Crutchfield*, 3 Head, 113.

⁵ *Hyman v. Read*, 13 Cal. 444, 452, 455, 458; *Charles River Bridge v. Warren Bridge*, 11 Pet. 589, 596, 601; *Commonwealth v. Roxbury*, 9 Gray, 492; *Martin v. Waddell*, 16 Pet. 411.

* 25. A State cannot maintain an action of trespass [*525] to try the title to land, or an action of ejectment, because a State cannot be disseised. The remedy against a trespasser in such case, in favor of the State, is by information for intrusion.¹

26. A grant of land by the government is tantamount to a conveyance with livery of seisin.²

27. It has been held that Congress does not possess the power of granting the shore of tidal navigable waters, at least within the State of Alabama.³ But a State may grant the land adjacent to the shore and covered by the sea, subject to the right of navigation and fishing by the public in the waters of the sea. So it may grant an exclusive right of planting oysters, or erecting a wharf thereon.⁴

28. As a State cannot be disseised, so its rights cannot be barred by the statute of limitations, unless by express provision of some statute of its own.⁵

29. For the transfer by the United States, or by a State, of the title of land, no particular form is required. It may be done by special act of legislation, by a clause inserted in a treaty by the treaty-making power, or by a patent issued by one authorized to represent the sovereignty. And where the assent of the President is required to give effect to a grant, but no form for this is prescribed, it may be done in any mode he may see fit; and, when once given, it cannot be revoked.⁶ And the legislature may, by a subsequent statute, confirm a grant which was void at the time of making it, and thereby give it validity, if it be of public land. A grant may be made by law, as well as by a patent issued pursuant to law; and a

¹ *State v. Arledge*, 1 Bail. 551; *Jackson v. Winslow*, 2 Johns. 80.

² *Enfield v. Day*, 11 N. H. 520; *Enfield v. Permit*, 8 N. H. 512; *Bellows v. Copp*, 20 N. H. 492; *McConghal v. Ryan*, 27 Barb. 376; *Doe v. Craft*, 1 Kerr, N. B. 546; *Robinson v. Lake*, 14 Iowa, 424.

³ *Kemp v. Thorp*, 3 Ala. 291; *Mayor v. Eslava*, 9 Port. 577; *Pollard, Lessee, v. Hagan*, 3 How. 212; *Martin v. Waddell*, 16 Pet. 367.

⁴ *Phipps v. State*, 22 Md. 389.

⁵ *The People v. Van Rensselaer*, 8 Barb. 189; *Lindsey v. Miller*, 6 Pet. 666; *Jackson v. Winslow*, 2 Johns. 80; *Cary v. Whitney*, 48 Me. 516.

⁶ *Doe v. Beardsley*, 2 McLean, 412; *Stockton v. Williams*, 1 Doug. (Mich.) 546, 560; *Fletcher v. Peck*, 6 Cranch, 87; *Sargent v. Simpson*, 8 Me. 148; *Grignon v. Astor*, 2 How. 319.

confirmation by law is as fully, to all intents and purposes, a grant, as if it contained, in terms, a grant *de novo*. And such grant, or confirmation, vests an indefeasible and irrevocable title.¹ And where a grant was made by the State of Pennsylvania to one upon his paying a certain sum after a survey made, it was held, that upon a return of such survey, and payment having been made, the title and legal possession of the land vested at once in the grantee.²

[*526] * 30. As a general proposition, a patent is necessary in order to pass a perfect and consummate legal title to public lands, with one exception; namely, where an act of Congress grants lands with words of present grant. And this proposition applies as well to pre-emptions as to other purchases of public lands.³ So, in Kentucky, a patent is declared to be the completion of a legal title.⁴ So it is laid down that a patent is a title from its date, and conclusive against all those whose rights did not commence previous to its emanation.⁵ But when granted, a patent enures to the benefit of any one to whom the patentee is bound to convey the land, or for whose use he ought to hold it.⁶ And where two patents have issued for the same land, the elder is the best evidence of title, and is conclusive against the junior so long as it remains in force.⁷

31. And yet it has been laid down that the granting of the patent is a ministerial act,⁸ and that it does not pass the title, but is merely evidence that it has before passed, — a doctrine

¹ *Strother v. Lucas*, 12 Pet. 454; *Chouteau v. Eckhart*, 2 How. 372; *Challefoux v. Ducharme*, 8 Wis. 306; *Terrett v. Taylor*, 9 Cranch, 50; *Wilkinson v. Leland*, 2 Pet. 657; *Friedman v. Goodwin*, 1 McAll. Ch. 142; *Wilkinson v. Leland*, 2 Pet. 662.

² *Potts v. Gilbert*, 3 Wash. C. C. 475.

³ *Wilcox v. Jackson*, 13 Pet. 516; *Grignon v. Astor*, 2 How. 319.

⁴ *Green v. Liler*, 8 Cranch, 229.

⁵ *Hoofnagle v. Anderson*, 7 Wheat. 213; *Lindsey v. Miller*, 6 Pet. 677; *Stringer v. Young*, 3 Pet. 320; *Boardman v. Reed*, 6 Pet. 328; *Moore v. Wilkinson*, 13 Cal. 478, 487.

⁶ *Hennen v. Wood*, 16 La. An. 263.

⁷ *Gallipot v. Manlove*, 1 Scamm. 156.

⁸ *Stoddard v. Chambers*, 2 How. 284; *Hunter v. Hemphill*, 6 Mo. 106; *Innerarity v. Mims*, 1 Ala. 660, where a condition appended to a patent which was not authorized by law was held to be void.

which gives¹ to the entry and payment of the purchase-money, virtually, the effect of creating the title to lands purchased.¹

32. Accordingly, it was held, that where a patent had issued for lands which were, by law, reserved from sale, it was void;² and so when made of land which had already been granted by treaty³ or otherwise.⁴

33. It is held, that a certificate of the register of the land-office, that a purchase had been made of lands, is of as high a nature as a patent itself.⁵ But the issuing of a patent is always presumptive evidence in itself that the previous proceedings have been regular, unless it can be shown that the land to * which it relates had been expressly [*527] reserved from sale.⁶ Where, therefore, a patent and a certificate of payment for the same tract of land conflicted with each other, having been issued to different persons, the court intimate that the grantee of the United States by patent would be preferred over the one who only held a certificate of payment.⁷

34. So it is held that a patent is a better legal title to land than an entry with the register and a survey,⁸ and that a patent is a conveyance from the primitive owner of the soil, its recitals being evidence against one who claims under him by a subsequent conveyance, or does not pretend to claim under him at all; and in an action of ejectment, a patent issued to the plaintiff is of itself evidence of title, which it is incumbent upon his adversary to rebut.⁹

35. So, unless letters-patent for land are void upon their face, or the issuing of them is without authority, or is prohibited by law, they cannot be impeached collaterally, in a court of law, upon the trial of an ejectment; and the same is true of

¹ *Goodlet v. Smithson*, 5 Port. 243; *Waterman v. Smith*, 13 Cal. 419.

² *Stoddard v. Chambers*, 2 How. 284; *Hunter v. Hemphill*, 6 Mo. 106.

³ *Stockton v. Williams*, 1 Doug. (Mich.) 560; *Fletcher v. Peck*, 6 Cranch, 87.

⁴ *Mayor v. De Armas*, 9 Pet. 223.

⁵ *Jackson v. Wilcox*, 1 Scamm. 344; *Jennings v. Whitaker*, 4 Mon. 50.

⁶ *Barry v. Gamble*, 8 Mo. 88; *Stringer v. Young*, 3 Pet. 320; *Boardman v. Reed*, 6 Pet. 328; *Winter v. Crommelin*, 18 How. 87.

⁷ *Goodlet v. Smithson*, 5 Port. 243.

⁸ *Griffith v. Deerfelt*, 17 Mo. 31.

⁹ *Steiner v. Coxe*, 4 Penn. St. 28; *Bagnell v. Broderick*, 13 Pet. 436; *Hill v. Miller*, 36 Mo. 182.

a grant.¹ The survey and patent, under the laws of the United States, are conclusive evidence of the title to the land embraced within their description. And where there had been two confirmations of the same land, the elder of these prevailed.² A patent, moreover, relates back to the original land-office certificate, and the purchaser's title dates from that time.³

36. On the other hand, it has been held, that a purchaser from the United States, by the act of entry and payment, acquires an inchoate legal title which may be aliened, [*528] will descend, and * may be divested in the same manner as any other legal title; that an estate held by one, after certificate of final payment made, may be taken on execution before the patent has issued;⁴ that land held by entry descends to heirs, or may be devised;⁵ and that, if one entitled to a certificate or patent under the law of Congress dies, the certificate or patent issues to his heirs.⁶ In another case it was held, that a certificate of final payment was such evidence of a legal title, that an ejectment could be maintained upon it.⁷

37. And yet the fee of the land remains in the United States until the patent has actually issued; and this is a better legal title than a prior entry.⁸

38. A patent obtained by fraud, or against law, or for reserved lands, does not carry the legal title, nor affect a subsequent patent.⁹ And a purchaser, who has done all that the law requires of him to entitle him to a patent of land, cannot be affected by the ignorance, negligence, or want of fidelity, of the government officers.¹⁰ And if a register of the land-

¹ *The People v. Livingston*, 8 Barb. 253; *Curle v. Barrell*, 2 Sneed, 68; *Parker v. Claiborne*, 2 Swan, 565; *Stringer v. Young*, 3 Pet. 320; *Boardman v. Reed*, 6 Pet. 328; *Moore v. Wilkinson*, 13 Cal. 478, 487.

² *Willot v. Sandford*, 19 How. 79.

³ *Cavender v. Smith*, 8 Iowa, 360.

⁴ *Goodlet v. Smithson*, 5 Port. 243, *Wright v. Swan*, 6 Port. 84.

⁵ *Adams v. Logan*, 6 Mon. 175.

⁶ *Shanks v. Lucas*, 4 Blackf. 476; *Forsythe v. Ballance*, 6 McLean, 562. See *post*, p. *531.

⁷ *Bullock v. Wilson*, 2 Port. 436. See also *Copley v. Riddle*, 2 Wash. C. C. 354; *Vanhorn v. Chestnut*, *Id.* 160.

⁸ *Carman v. Johnson*, 20 Mo. 108.

⁹ *Wright v. Rutgers*, 14 Mo. 585.

¹⁰ *Nelson v. Sims*, 23 Miss. 383.

office has duly admitted the location of land, and granted a certificate thereof, a subsequent sale of the same land is void, although to a *bona fide* purchaser without notice.¹

39. So an entry and purchase of land from the United States made *bona fide* will prevail over a subsequent location and survey confirmed by act of Congress.²

40. It may seem somewhat difficult to reconcile these various rulings, and principles of construction; but it is apprehended that an explanation may be found, partly in the character of the parties engaged in the suits in which the questions arose, and *partly from the courts not [*529] carefully discriminating between the legal and equitable title which the purchaser acquires upon payment of his purchase-money, and before actually receiving his deed, whereby alone his legal title becomes complete. Where the ejectment has been brought against a stranger without title, the courts have been inclined to consider the equitable right to possession in the plaintiff as so far identical with his legal title, as to allow him to recover in a suit at law in his own name. This subject has arisen in different forms in the courts; and, from the opinions to which they have given rise, the explanation here made seems to be fully sustained. Thus it was held, that neither the entry nor the survey was a *legal* appropriation of the land; the claimant, in such case, being only vested with the equitable estate until his entry and survey have been carried out by a grant.³ But it was also held, that by entry, and payment of the purchase-money, the purchaser of land from the United States acquires an inchoate legal title which may be aliened, descend, or be divested in the same manner as any other legal title.⁴ The court, in the last case, cite a case from the United States Court for the District of Pennsylvania to show that the payment of the purchase-money and a survey, though unaccompanied by a patent, give a legal right of entry. In that case, one became entitled to land before the Revolution, under the king's proclamation: after the peace, Virginia ordered the warrant to issue to the assignee of the right under which the land was located, "by

¹ Moyer v. McCullough, 1 Ind. 339.

² Waller v. Von Phul, 14 Mo. 84.

³ Lindsey v. Miller, 6 Pet. 666.

⁴ Goodlet v. Smithson, 5 Port. 243.

which means," say the court, "Sims acquired a complete equitable title, and one which only needed a *patent* of confirmation to render it a complete legal title." The court say further: "In which State (Pennsylvania), payment and a survey, though unaccompanied by a patent, give a *legal right of entry*, which is sufficient in ejectment. Why they have been adjudged to give such right, whether from a defect of chancery powers, or for other reasons of policy or justice, is not now material." And Iredell, J., in the case cited, says: [*530] "A warrant * and survey, where no money remained to be paid, and a patent was only to ascertain that all previous requisites had been complied with, have been uniformly deemed a legal title, as opposed to an equitable one, and have all the consequences as such."¹ But, in the United States courts, nothing short of a valid legal title will enable a plaintiff to recover in ejectment.² In a case in Kentucky, the court say: "An entry or survey for lands is an inchoate and incomplete legal title: they will descend, may be devised, or aliened, and they vest such legal interest, as, under the provisions of the act, may be sold by virtue of execution."³ If a further suggestion might be ventured by way of explaining, and, in part at least, reconciling the seeming discrepancies which are found in the various decisions which are to be found in the books, it would be, that while in equity a purchaser acquires a good title to lands which he may have entered and actually paid for, and for which he holds the certificate from the proper officer, in order to prevail in a court of law he must have a title by a patent. Thus it is held in Iowa, that, after the purchase from the United States, the purchaser acquires all the property which the United States had in the land; that the equitable and legal title passes from the United States, which only retains the formal technical legal title in trust for the purchaser until the patent issues. And in Illinois it is held, that the oldest patent carries the title in fee, and leaves nothing upon which a second patent can operate.⁴ But even this strong language recognizes the

¹ *Sims v. Irvine*, 3 Dall. 456, 465.

² *Fenn v. Holme*, 21 How. 481; *Bagnell v. Broderick*, 13 Peters, 436.

³ *Thomas v. Marshall*, 1 Hard. 19.

⁴ *Grantham v. Atkins*, 63 Ill. 359.

legal title as only passing out of the United States to the purchaser by the delivery of the patent. So, in the United States courts, it has been held, that, where land has been bought and paid for, a certificate to that effect makes it as much the land of the purchaser as the patent itself. "Lands which have been sold by the United States can, in no sense, be called the property of the United States. They are no more the lands of the United States than lands patented." But what follows explains the sense in which this language is used: "When sold, the government, until the patent shall issue, holds the mere *legal* title for the land in trust for the purchaser, and any second purchaser would take the land charged with the trust." This doctrine is recognized by the courts of Iowa and Missouri, who hold that the patent does not invest the purchaser with any additional property in the land. It only gave him *better legal evidence* of the title which he first acquired by certificate. He could, in the mean time, sell and convey the land as completely before he obtained the patent as he could after. The patent is not to be considered in conflict with this right, but rather contributes to its support and confirmation.¹ While regarded as evidence of legal title in a court of law, the patent is held by all the courts as the best, and, in fact, the only *conclusive* mode of establishing the fact of title, and is deemed conclusive until avoided by fraud or evident mistake in the issuance of the same. Thus it is held that a patent issued by government is evidence of title, not to be defeated but by showing an equitable or legal title which could not be defeated by the action of the land department. And in other cases it has been held, that a patent for land, emanating from the government of the United States, is the highest evidence of title, and in courts of law is evidence of the due performance of every prerequisite to its issuance, and cannot be questioned, either in courts of law or equity, except upon ground of fraud or mistake; and if not

¹ Cavender v. Smith, 5 Clarke (Iowa), 189; s. c. 3 Greene, 349; Arnold v. Grimes, 2 Clarke (Iowa), 1; Carroll v. Safford, 3 How. 460; Morton v. Blankenship, 5 Mo. 346; Carman v. Johnson, 29 Mo. 94; Dickinson v. Brown, 9 Sm. & M. 180; Sweatt v. Corcoran, 37 Miss. 516; Bagnell v. Broderick, 18 Pet. 450; Forbes v. Hall, 34 Ill. 167; McDowell v. Morgan, 28 Ill. 532; Frisbie v. Whitney, 9 Wall. 187; Hutchings v. Low, 15 Wall. 88.

assailed for fraud or mistake, it is conclusive evidence of title. Besides, in order to annul a grant of the government, the fraud must be actual and positive in fact, committed by the grantee in obtaining the grant.¹

This subject has recently been considered by the court of California, and the effect to be given to a patent stated by the Chief Justice in the following language: "The patent, which is the final document issued by the government, is conclusive evidence of the validity of the original grant, and of its recognition and confirmation, and of the survey and its conformity with the confirmation, and of the relinquishment to the patentee of all interest of the United States in the land." "Individuals can resist the conclusiveness of the patent only by showing that it conflicts with prior rights vested in them."² In this he is fully sustained by the case of *Jackson v. Lawton*, in an opinion by Kent, C. J.: "The patent granted to the lessor of the plaintiff, being the elder patent, is the highest evidence of title. As long as it remains in force, it is conclusive as against a junior patent for the same lands."³ And accordingly it was held, that, to annul a patent absolutely, proceedings can only be taken by the government or some individual in its name, and that by *scire facias*, or by bill or information. Individuals can maintain no proceedings to that effect, the question being one exclusively between the sovereignty issuing the patent and the patentee.⁴

[*531] *41. The relation of lands thus situated is, perhaps, as well stated as can be by the judge, McLean, in *Astrom v. Hammond*: "Until the patent is issued, the purchaser has not the legal title; but having made his entry of the land, and paid for it, the government can no more dispose

¹ *Leblanc v. Ludrique*, 14 La. An. 772; *Sweat v. Corcoran*, *sup.*; *Bledsoe v. Little*, 4 How. (Miss.) 13; *Carter v. Spencer*, Id. 42; *Harris v. McKissack*, 34 Miss. 464; *Maxey v. O'Connor*, 23 Texas, 238; *Dickinson v. Brown*, 9 Sm. & M. 130. For what mistakes a patent will be avoided, see *Brush v. Ware*, 15 Pet. 93.

² *Boggs v. Merced Co.*, 14 Cal. 361, 362; *Luse v. Clark*, 18 Cal. 535; *Waterman v. Smith*, 13 Cal. 419.

³ 10 Johns. 24.

⁴ *Boggs v. Merced Co.*, 14 Cal. 365; *Jackson v. Lawton*, 10 Johns. 24; *Field v. Seabury*, 19 How. 332.

of the land to another person than if the patent had been issued. The final certificate, obtained on payment of the money, is as binding on the government as the patent. Lands thus purchased go to the heirs, and not to the administrators, and, in some States, are liable to be sold on execution before the patent issues. When the patent issues, it relates back to the entry, and makes good any conveyance which the purchaser may have made."¹

42. A prior certificate of entry, where no patent has issued, gives a better title in equity than a patent issued upon a subsequent entry, and the patent will be set aside on a process for that purpose.² So where a patent was dated February, 1822, of land which had been granted by the United States, and the grant accepted in December, 1821, it was held that the title was in the grantee in preference to the patentee.³ But ejectment will not lie upon an entry in a land-office: it will only lie upon a patent.⁴

43. Under the United States system of disposing of the public lands, it is not competent for the surveyor-general to divide a fractional part of a section by arbitrary lines, so as to prevent a regular quarter section from being taken up by entry, if the fraction will admit of such a division; ⁵ and it is always deemed a sufficient description of land to refer to it by the range, township, and section, as contained in the public surveys.⁶

44. If, in making a grant, there be a condition subsequent annexed which becomes impossible by act of the grantor, the estate becomes absolute.⁷

* 45. Different rules have been adopted by different [*532] courts, in case of the decease of a person entitled to the benefit of an entry and purchase of land before any patent

¹ *Astrom v. Hammond*, 3 McLean, 107. See also *Mix v. Smith*, 7 Penn. St. 75; *Garretson v. Cole*, 2 Harr. & M'H. 459; *West v. Hughes*, 1 Harr. & J. 6; *Blackw. Tax Titles*, 453; *Cavender v. Smith*, 5 Iowa, 189; *Carman v. Johnson*, 29 Mo. 94.

² *Hester v. Kembrough*, 12 S. & M. 659; *Warren v. Shuman*, 5 Tex. 441; *Hunt v. Wickliffe*, 2 Pet. 201.

³ *Cabunne v. Lindell*, 12 Mo. 184.

⁴ *Hooper v. Scheimer*, 23 How. 235.

⁵ *Brown v. Clements*, 3 How. 650.

⁶ *Bledsoe v. Doe*, 4 How. (Miss.) 13.

⁷ *United States v. Arredondo*, 6 Pet. 691.

has issued, some of which have already been stated.¹ In one case, a patent which had issued to a person then deceased was held to enure to the benefit of his heirs in the same manner as if it had issued in his lifetime;² in another, such patent was held to be void;³ while in another it was held that an entry and survey in the name of a dead man is void, though he held a warrant therefor in his lifetime.⁴

46. An entry under a land warrant can only be made in the name of the person to whom it was issued, or that of his assignee.⁵ And a patent issued to a fictitious person conveys no title to the land therein described.⁶

47. It may be stated, that, in some of the States, land warrants are not regarded as real estate in the settlement and distribution of estates in the probate-office.⁷ But a different doctrine is held in Virginia and Ohio, in respect to land, where one who is entitled to a patent dies before it is issued. The right, unless devised, goes to his heirs.⁸

48. In addition to the interests in public lands, and the modes of acquiring the same under the several acts of the United States, there is a "right of pre-emption," so called, secured by law to actual settlers upon lands, who have entered upon and occupied the same without title, whereby such settler may secure to himself a title to a quarter section at the minimum price fixed by law to be paid for such lands, by entering the same in the proper office and making payment therefor, thereby excluding all other persons from entering and purchasing the same lands. This right cannot be exercised in respect to any lands of which the Indian right of occupancy has not been extinguished.⁹ This right gives no title, in fact, to the land, so that one can convey [*533] or encumber it. It is a mere right to acquire *the legal title at a certain price, in preference to others.¹⁰

¹ *Ante*, p. *527.

² *Schedda v. Sawyer*, 4 McLean, 181.

³ *Wood v. Ferguson*, 7 Ohio St. 288; *Galloway v. Finley*, 12 Pet. 264.

⁴ *Price v. Johnston*, 1 Ohio St. 390.

⁵ *Galt v. Galloway*, 4 Pet. 332.

⁶ *Thomas v. Wyatt*, 25 Mo. 24; *Thomas v. Boerner*, Id. 27.

⁷ *Moody v. Hutchinson*, 44 Me. 57.

⁸ *Brush v. Ware*, 15 Pet. 98; *Reeder v. Barr*, 4 Ohio, 458.

⁹ *Russell v. Beebe*, 1 Hempst. 704.

Craig v. Tappin, 2 Sandf. Ch. 78; *Brown v. Throckmorton*, 11 Ill. 529.

And though it was held, in Illinois, that it was a right which might be transferred by deed as property, it gave merely a right of occupancy, and a right to acquire the legal title.¹ A pre-emptive right confers no title until the holder of it makes an entry and pays for the land.² But when one, having such right, conveyed it with covenants in his deed, that, if he should acquire a title, it should enure to the benefit of the grantee, it bound by estoppel all persons claiming through the grantor with a knowledge of the deed.³ The object and meaning of these pre-emption laws, which have been numerous at different times, are thus explained: the pre-emption law gives a preference to the actual settler, excluding the rights of all others so long as this preference can be claimed. It constitutes an equity in favor of the occupant located upon and identified and attached to the particular quarter section occupied and cultivated by the claimant. The act of Congress was an appropriation of all land so occupied; and during the time prescribed by statute, the occupant had a right to make an entry to the exclusion of all other entries. A patent issuing to such a one is superior in a court of equity to a prior patent issuing upon a mere entry, although the latter patent is prior in date to the former one based upon a senior pre-emption right. The patent relates to the inception of title; and, in a court of equity, the person who has first appropriated the land has the best title.⁴ And when, under a pre-emption right, the entry was made in the name of "the heirs," without naming them individually, it was held to be a valid entry.⁵ The pre-emptive right to enter lands, which has been acquired by an intestate, descends to his heirs.⁶

49. The subject would obviously be incomplete without *noticing more at length the titles which have [*534] been acquired by public grant in some, if not all, of

¹ *Delaunay v. Burnett*, 4 Gilm. 454.

² *PHELPS v. KELLOGG*, 15 Ill. 181; *Hutchings v. Low*, 15 Wall. 77, 94; *Frisbie v. Whitney*, 9 Wall. 187.

³ *Ibid.*

⁴ *McAfee v. Keirn*, 7 S. & M. 780; *Pettigrew v. Shirley*, 9 Mo. 683; *United States v. Fitzgerald*, 15 Pet. 407.

⁵ *Hunt v. Wickliffe*, 2 Pet. 201.

⁶ *Johnson v. Collins*, 12 Ala. 322.

the New-England States, under a system which had grown up while they were colonies.

King James I. made a grant of all that part of America lying between the fortieth and forty-eighth degrees of latitude, "and in length of, and within all the breadth aforesaid, throughout all the main lands from sea to sea," to the Plymouth Company in England. In 1629, this corporation granted the territory of the Colony of New Plymouth to Bradford and his associates, who had for years been in possession thereof, and exercised the power of disposing of the lands therein. The same company, by deed or charter, conveyed to Sir Henry Roswell and others the territory of the Colony of Massachusetts Bay in 1627; and a patent, incorporating the grantees as a government, was made to them by King Charles in 1628. This government assumed the right to divide out and grant the lands in the colony, independent of any other authority. And in this way the territory of many townships had been granted to proprietors, or companies of proprietors, who were made corporations for the purpose of managing such territory, and was regulated and controlled by the legislation of the colony, in which both the soil and the sovereignty of the territory were united. These legislative grants vested in the grantees and their heirs estates in common; and such is the rule of construction in respect to all grants made to two or more persons by virtue of acts or resolutions of the legislature.¹ Thus, among other acts, authority was given, in 1636, to the freemen of every town to dispose of their lands.² A simple act of incorporation, however, without words of grant of the soil, would vest no part of the property of the government in such town.³ It is said besides, that no formal act of incorporation of any of these towns was passed during the continuance of the colonial charter.⁴ There was a practice, after the establishment of the provincial government by the charter of 1692, to grant a

¹ Higbee v. Rice, 5 Mass. 350.

² Rogers v. Goodwin, 2 Mass. 475; Commonwealth v. Roxbury, 9 Gray, 479; Sulliv. Land, Tit. 37, 48, 49; Mass. Col. Law, 195; Commonwealth v. Alger, 7 Cush. 53, 66.

³ Commonwealth v. Roxbury, 9 Gray, 494, 500.

⁴ Id. 485 et seq. 511

tract of land or township to a body of individuals named, constituting them proprietors and tenants in common, with a view to their incorporation afterwards as a town. But then they took the fee in the land by force of the act of incorporation when once passed.^{1*} It is apprehended, that not only had extensive grants been made by the colony, by means of legislative acts, under its first charter, but that the titles of individuals were, in numerous instances, mere grants from towns or proprietaries, evidenced by no other act or instrument than the votes adopted and recorded by those bodies corporate. But, upon the dissolution of the charter under which these titles had taken their rise, one of the first measures of Andros, the new governor, was to treat them as of no validity, and to require the proprietors to take out new grants and patents from the crown. The mischief threatened by such a sweeping overthrow of titles was obviated by the forcible deposition of the governor, and the grant of a *new [*535] charter in 1692, embracing Plymouth and Massachusetts, with the Province of Maine, Sagadahoc, Nantucket, and Martha's Vineyard, by which the land was granted to the inhabitants of the Province, and the former grants already made were ratified and confirmed; and the General Court, with the approbation of the governor, had authority to make new grants. At the Revolution, the State became successor to the Province, with all its rights as to lands then undisposed of.² In disposing of these lands, the General Court still continued to proceed by way of grants by legislative acts, and to create proprietaries who managed their business as corporations by means of recorded votes.† It has accordingly been

* NOTE. — For a further account of the charter and its history, see 9 Gray, 505 *et seq.*

† NOTE. — In some cases, grants of a million or more acres were made, as in the case of the Kennebec, Pejepsent, and Wāldo Patents. In 1712, proprietors of common lands were, by law, authorized to organize themselves and act as corporations, and to manage their lands by corporate votes. This general power of proprietors of wharves, common lands, &c., to act as corporations, still subsists; though it is apprehended it is no longer competent for such pro-

¹ *Id.* 500, 501.

² *Sulliv. Land Tit.* 55, 57; 1 *Barry, Hist. Mass.* 493–495; *Washb. Jud. Hist.* 112.

held, that the government may grant the lands of the Commonwealth without any deed. And where the General Court granted lands to proprietors by vote, which bounded upon the sea, in 1640, it was held that their subsequent ordinance of 1647, annexing the flats adjacent to upland so as to pass with that, enured to the benefit of these first-mentioned proprietors.¹ And the doctrine that a State may grant its lands by a resolve of its legislature is adopted both in Maine and California, and may be effectual without a deed or a patent.² But where the legislative resolve contains no words of grant, but simply authorizes a public officer to convey land to the person named, the title will not pass till such deed is executed and delivered.³ In grants of townships in Massachusetts, the fee of the land vested in the proprietors, who might grant their lands to individuals; and, among other things, they might grant the waters of the ponds therein, and rights of control over these. But, after the ordinances of 1641 and 1647, "great ponds were to be held for the public use of the inhabitants thereof, for fishing, fowling, bathing, and the use of the waters for washing, watering cattle, &c." The cutting of ice is one of these uses; so is boating, skating, or riding on the ice; and all these are free and lawful to all persons who can obtain lawful access to them over their own lands, or those of others without being trespassers. But they are not to be used by any so as to interfere with the reasonable use of these ponds by others.⁴ It has been done by resolve; and, since the adoption of the Constitution, committees of the legislature have given deeds setting forth the authority under which they acted, and affixing their own seals.⁵ In construing legislative conveyances, great liberality was applied in carrying out the intention of the grants, giving to these votes the effect of limiting a fee with-
propriaries to convey their lands by vote. 4 Dane, Abr. 120; Gen. Stat. c. 67. See *Higbee v. Rice*, 5 Mass. 350.

¹ *Tappan v. Burnham*, 8 Allen, 72; *Commonwealth v. Roxbury*, 9 Gray, 498.

² *Cary v. Whitney*, 48 Me. 526; *Megerle v. Ashe*, 27 Cal. 327; *Kernan v. Griffith*, 27 Cal. 89. See also *Mayo v. Libby*, 12 Mass. 339.

³ *Cary v. Whitney*, *sup.*; *Thorndike v. Richards*, 13 Me. 430.

⁴ *Berry v. Roddin*, 11 Allen, 577; *West Roxbury v. Stoddard*, 7 Allen, 158, 171.

⁵ *Ward v. Bartholomew*, 6 Pick. 414.

out words of succession or inheritance when necessary.¹ Such grants made the grantees tenants in common.² And when, in 1651, an act of the legislature required that "heirs" should be inserted in the *habendum* of deeds, in order to carry a fee, grants by towns were excepted.³

Probably, therefore, a very large proportion of the early estates in Massachusetts and Maine were held by no better title than a vote of the legislature, or that of proprietaries acting as ordinary corporations. Originally, it seems, it was supposed that this power of towns and other proprietaries to dispose of their lands by votes of majorities was intended only to apply to a partition of them into shares among themselves. But it soon grew to be a customary mode of making grants of lands to others, and the titles thus created have been recognized as valid by the courts.⁴ But it is said by the court of New Hampshire, that "towns cannot now pass the title to real estate by a vote."⁵ This doctrine of legislative grant has been adopted also in New Hampshire; and, in applying it, their courts hold, that no particular terms are necessary to constitute a grant by the legislature; and, where they have fixed a particular line as the line of a township, the State is estopped to say that the title of the proprietors of the township does not extend to such line, and that a State may be estopped by the acts of its legislature.⁶ In a case in Maine, Massachusetts, before their separation, in order to quiet the title of certain lands to the settlers in the town, authorized a committee to execute releases to these settlers respectively of the interest

¹ *Baker v. Fales*, 16 Mass. 497.

² *Higbee v. Rice*, 5 Mass. 350. See *Hyman v. Read*, 13 Cal. 444, 455; *Fooffees of Grammar School, &c. v. Andrews*, 8 Met. 591.

³ 4 Dane, Abr. 61.

⁴ *Rogers v. Goodwin*, 2 Mass. 475, 477; *Anc. Chart.* 402, 403; *Codman v. Winslow*, 10 Mass. 146, 150; *Adams v. Frothingham*, 3 Mass. 352; *Commonwealth v. Roxbury*, 9 Gray, 479; *Plymouth*, Col. Laws, 29, 30, 198; *Decker v. Freeman*, 3 Me. 388; *Pike v. Dyke*, 2 Me. 213; *Thomas v. Marshfield*, 10 Pick. 367; *Springfield v. Miller*, 12 Mass. 417; *Bachelor v. Wakefield*, 8 Cush. 247; *Green v. Putnam*, 8 Cush. 25; *Shrewsbury v. Smith*, 14 Pick. 297; *Higbee v. Rice*, 5 Mass. 350; *Gloucester v. Gaffney*, 8 Allen, 11; *Cary v. Whitney*, 48 Me. 526. And a vote of proprietors authorizing a committee to sell lands empowers the committee to make deeds in the name of the proprietors. *Thorndike v. Barrett*, 3 Me. 380.

⁵ *Cofran v. Cockran*, 5 N. H. 461.

⁶ *Enfield v. Permit*, 5 N. H. 280

of the Commonwealth in the land. The occasion for [*536] doing this was, that *the Commonwealth, while a Province, had granted the township, when, by the terms of the charter of 1692, it was necessary for the king to approve of the grant in order to its validity. This had never been done; and consequently nothing had passed by such former grant, and, as successors to the Province, the Commonwealth might claim the land. Nor was the State disseised, though there were persons in possession of the lands claiming them. The committee, instead of executing a deed of release, made one by which the interest of the State was granted, sold, and quitclaimed; and a question arose, whether this was a valid exercise of the power delegated to them. But it was held that the deed, as given, might be construed as a deed of release, and that it was competent for the Commonwealth, in the exercise of its legislative power, to prescribe any form they might deem expedient, and that the same would be effectual, though, if used by an individual or a corporation, it would have been inoperative.¹ And in a similar case it was held, that, whether the deed was in proper form or not, the resolve itself, authorizing the release to be made, was itself virtually a grant.² In closing this subject, it is only necessary to add, that it was always competent for the State or proprietaries to make grants by means of deeds executed by agents or committees chosen and appointed for that purpose, and that such is the mode which has been adopted for many years in disposing of the public lands.³

50. Since the publication of the first edition, circumstances have unfortunately occurred which render it proper to briefly refer to one other mode of changing the title to lands by the action of the government; and that is by confiscation. In doing this, it will only relate to an earlier period of history than the present. It was a measure resorted to by the governments of Massachusetts, Maryland, New York, Georgia, and probably of the other Colonies, against those who contin-

¹ *Hill v. Dyer*, 3 Me. 441.

² *Sargent v. Simpson*, 8 Me. 143, 148. See *Lambert v. Carr*, 9 Mass. 185.

³ See *Church v. Gilman*, 15 Wend. 656. And such deed must be proved to have been delivered as any other deed. *Hulick v. Scovil*, 4 Gilm. 174.

ued to adhere to the crown at the time of the Revolution. They were regarded as conspirators against the government. In Massachusetts, the legislature at first, by special acts, declared that certain persons by name were conspirators and absentees, and that their estates should escheat to the Commonwealth. Out of these, provision was made for the payment of their debts, and for the wives of such as remained within the government. But no trial or judicial proceedings were required before the escheat was to take effect. By a subsequent act, 1779, a general provision was made whereby the estates of such as had levied war or conspired to do so against any of the Colonies or the United States were declared to be escheated. But before any estate could be adjudged, forfeited, and confiscated, it required judicial proceedings to be had. These proceedings were commenced and carried on by the public prosecuting officer; and, upon an adjudication had, commissioners, of whom there were a certain number appointed in each county, proceeded to sell and pass deeds to convey the same in the name of the Commonwealth, which were valid if executed by a major part of such commissioners. It was usual, upon such proceedings of escheat, for the court to issue a writ of *habere facias*. But it was decided that this formality was not necessary in order to perfect the title in the purchaser, the judgment being conclusive of the right, and the deed perfecting the title. In New York, the proceedings seem to have been by a simple legislative act of attainder, whereby the estate of the delinquent was declared forfeited to the State, and was then disposed of by commissions of forfeitures.¹ It may be added, that confiscation under the constitution and laws of the United States extend only to the life-estate of the person who suffers it. If, therefore, one enters under such a title, and holds after the death of the original owner, he does not hold adversely to the heirs of the deceased, unless there has been a clear, positive, and continued disclaimer and disavowal of the title of the heir, which has been brought home to his knowledge.²

¹ 4 Dane, Abr. 77, 703, 707; *M'Neil v. Bright*, 4 Mass. 282; *Gilbert v. Bell*, 15 Mass. 44; *Higginson v. Mein*, 4 Cranch, 415; *Jackson v. Catlin*, 2 Johns. 248, 260; *McGregor v. Comstock*, 17 N. Y. 164.

² *Dewey v. McLane*, 7 Kans. 126.

SECTION II.

TITLE BY OFFICE GRANT.

1. What conveyances are included in this term.
2. Of modes of applying lands of debtor to pay debts.
3. Of sales by executors and administrators.
4. Of sales by guardians.
5. Of the limits of the power of legislation in transferring title.
6. Of sales by decrees of courts of chancery.
7. Effect of a decree, on title, before deed made.
8. Of sales made under builder's liens, &c.
9. Of sales for payment of taxes.
10. Power of taxation incident to government itself.
11. Lands held under public grant liable to tax.
12. Power to sell for taxes a naked one.
13. Recitals in a tax-deed no evidence against original owner.
14. Purchaser under tax-sale to see that proceedings are correct.
15. What a purchaser under tax-sale must prove as to title.
16. No power of sale attaches till prerequisites are complied with.
17. A tax-deed not of itself evidence of a compliance with the statute.
18. Exceptions by which such deeds are *prima facie* evidence of title.
19. Requisites of such deeds as to form.
20. Tax-deed must be delivered to be valid.
21. How far the deed must recite the power by which it is made.
22. The deed must be to the one who bids off the land.
23. How far necessary to record a tax-deed.
24. Effect of the death of original owner, and what deed is null.
25. Of the redemption of lands sold for taxes.
26. Of selling lands of proprietaries for assessments.
27. General considerations as to titles by official grants.
28. How far the original judgment, decree, &c., are open to inquiry.
29. How far competent to deny the allegations of an officer as to his own act.
30. The official return of the doings of a ministerial officer conclusive.

1. THERE are several modes and forms of divesting the title of one owner to lands, and creating a title to the same in another, which derive their force and effect from [*537] statute provisions, * whereby conveyances are made by some officer of the law to effect certain purposes where the owner is either unwilling or unable to execute the requisite deeds to pass the title. Among these are levies or sales to satisfy execution creditors; sales by order or decree of a court of chancery; sales by orders or licenses of courts, or by special acts of the legislature, for the payment of the debts

of persons deceased, or the investment of funds for infants, and the like ; and sales made under the provisions of the statutes of the several States for the enforcement of the payment of taxes, or of special liens thereon.

This mode of creating title, which, for convenience, may be called *title by office grant*, would open too extensive and varied a field of inquiry to consider in detail ; and the examination is, therefore, confined to limits more suitable to a work like the present. To carry the purposes of such levy or sale into effect implies the execution of a statute power, varying according to the subject-matter upon which it is exercised. The subject of levies and sales of land upon execution was spoken of in a former part of this work.¹ The reader will also find it treated of by Chancellor Kent in the fourth volume of his Commentaries ;² and to these he is referred, with what may be hereafter said of the requisite formalities to be observed in the terms and execution of such and similar deeds.

2. But it may be observed, that whatever is the form prescribed by statute, whereby the land of a debtor is appropriated by act of law to the payment of a judgment creditor, the title thereby acquired is, to all intents, as valid and effectual, with few if any exceptions, as if it had been conveyed by the debtor himself by a deed in the proper and requisite form. It is the policy of the law, in all the States, to give to creditors a right to avail themselves of the property of their debtors, with certain limitations and restrictions, and which is to apply as well to the case of deceased as living debtors ; and the law, accordingly, provides means for carrying out this policy.

* In case of persons dying intestate, provision is [*538] made whereby courts are authorized to empower their administrators to sell and convey the lands of the deceased, and thereby to pass a good title to the same. The same is true in respect to testate estates of persons indebted, whose executors are not empowered by their wills to make sale of their lands.

¹ Vol. 1, p. *464 *et seq.*

² 4 Kent, Com. 428 *et seq.*

3. In these cases, as the executor or administrator acts solely under a power conferred by statute, he must, in order to render the sale effectual, comply with the various requirements of the statute; and, regularly, the deed by which it is attempted to pass the title to a purchaser should show, upon its face, a recital of the steps which have been taken in consummating the sale, as well as a statement of the authority by which it is executed; though it would, probably, be sufficient if the deed in any part of it showed the capacity in which, and the power under which, the person executing it acted in making the conveyance.¹ If a will, under which an executor acts, authorizes him to sell testator's lands, there is no need of a surrogate's order to make his sale effectual.² But in order to the receiving of an executor's deed as valid and effectual, it must be shown, preliminary thereto, that the statutory requirements have been complied with, or that an express power was given in the will under which he acts.³ There are cases where the law will presume that an act required by law to be done is done, as where it is imposed upon one as a duty, and a failure to perform the act would make him guilty of a criminal neglect of such duty. So the regularity of official proceedings will often be presumed after a long lapse of time. Thirty years have been held sufficient.⁴

4. Much and perhaps all that has been said of sales of estates of deceased persons would apply to sales by guardians of minors, spendthrifts, lunatic persons, &c., when made by

¹ *Kingsbury v. Wild*, 3 N. H. 30; *Griswold v. Bigelow*, 6 Conn. 258; *Lockwood v. Sturtevant*, 6 Conn. 373; *Planters' Bank v. Johnson*, 7 Smedes & M. 449; *Campbell v. Knights*, 26 Me. 224; *Jarvis v. Russick*, 12 Mo. 63; *Worthy v. Johnson*, 8 Ga. 236; *Sheldon v. Wright*, 1 Seld. 497; *Jones v. Taylor*, 7 Tex. 240; *Doolittle v. Holton*, 28 Vt. 819; *Longworth v. Bank of United States*, 6 Ohio, 536. If land is regularly sold on execution, a reversal of the judgment afterwards will not divest the title of the purchaser. *Feger v. Keefer*, 6 Watts, 297. But a sale by a sheriff, of land not belonging to the judgment debtor, gives no title or right of entry to the purchaser. *Smith v. Steele*, 17 Penn. St. 30. A sale on execution relates back to the time when the judgment became a lien, cutting off intermediate interests. *Fell v. Price*, 3 Gilm. 190. See *Boyd v. Longworth*, 11 Ohio, 252; *Alexander v. Merry*, 9 Mo. 514.

² *Payne v. Payne*, 18 Cal. 291.

³ *White v. Moses*, 21 Cal. 44.

⁴ *Williams v. East India Co.*, 3 E. 192, and cases illustrating this on pp. 199, 200; *Hartwell v. Root*, 19 Johns. 347; *King v. Hawkins*, 10 E. 211; 1 Greenl. Ev. § 80; *Ib.* § 20.

license and authority of courts under the statutory provisions of the several States. These statutes prescribe the requisite steps to be taken and formalities to be observed to give effect to such sales; and it is necessary that these should be substantially, and often strictly, complied with, in order to give validity to any deed which may be executed under such power. But it would occupy space which can be better employed upon other topics to undertake to give the statutes of the several States *regulating these and [*539] sales by executors or administrators, or any considerable number of the cases upon the subject which are scattered through the volumes of reports.

5. The same may be said of any attempt to define the power of the legislature, by special laws, to authorize sales or to ratify imperfect sales made by persons acting officially, or to transfer the title of lands from one person to another, such as the special act, in one case, where an executor of a will, made and proved in New Hampshire, sold lands in Rhode Island, without authority, to pay debts of the deceased, and the title was confirmed by the legislature of Rhode Island.¹ This opens an interesting inquiry upon a subject which has often been before the courts, but upon which their decisions have not been uniform. It is not proposed to consider these decisions in detail; and it may be remarked, that very little aid in furnishing a guide by which to determine the questions involved can be derived from the action of the British Parliament, to whose power there is no such limitation as is provided in the American constitutions, and the checks which courts are thereby authorized to interpose to the action of the legislature. As a general proposition, a legislature may do any thing not inhibited by the constitution. Beyond that it is omnipotent.² But a law so passed as to depend upon a vote of the people whether it shall take effect or not, if it be

¹ *Wilkinson v. Leland*, 2 Pet. 627; s. c. 10 Pet. 294. But see *Jones v. Perry*, 10 Yerg. 59; *Lane v. Dorman*, 3 Scam. 238; *Blackw. Tax Titles*, 30, 31; *Bott v. Perley*, 11 Mass. 169, 174. See also *Price v. Huey*, 22 Ind. 25; *Florentine v. Bartou*, 2 Wall. U. S. 210.

² *Chicago v. Larned*, 34 Ill. 280; *Clarke v. Rochester*, 24 Barb. 470, 480, 489; *Wellington v. Petitioners, &c.*, 16 Pick. 95; *Merrill v. Sherburne*, 1 N. H. 199.

a general one, is not a valid act of legislation.¹ The government has a right to provide the mode in which existing rights may be forfeited; but it cannot transfer or deprive the citizen of them, except for an offence against the laws of the government.² A legislature cannot pass a retrospective act which shall impair vested rights. But this does not apply to remedial statutes, provided they do not impair contracts, but only go to confirm rights already existing, or provide a remedy to cure defects.³ Thus a statute giving validity to deeds made by married women, defectively executed, was held good.⁴ In respect to the right to take private property, by the exercise of what is called eminent domain in the State, there is little that needs to be said. It can only be done for public uses, and that upon making a just compensation to the owner for the same. To that extent, it is a power inherent in the sovereignty of every State, and is based upon the idea that private interests must yield to public necessity.⁵ The only restriction upon this power is, that it should provide for compensation being made.⁶ But no one but the owner can object that provision has not been made to satisfy the party whose property has been taken; and if he assents to it, no other one can object.⁷ But this power does not imply any right on the part of the State to take the property of one citizen and give it to another, whether with or without compensation.⁸ An act taking the estate of A, and giving it to B,

¹ *Clarke v. Rochester, sup.*; *Barto v. Himrod*, 4 Seld. 483.

² *Russell v. Rumsey*, 35 Ill. 374.

³ *Dentzel v. Waldie*, 30 Cal. 144; 1 Kent, 455.

⁴ *Chesnut v. Shane*, 15 Ohio, 599; *Mercer v. Watson*, 1 Watts, 355; *Watson v. Mercer*, 8 Peters, 108; *Tate v. Stooltzfoos*, 16 S. & R. 35.

⁵ See *Commissioners, &c. v. Withers*, 29 Miss. 21, as to appropriating waters of public streams, &c., for public use. *Heyward v. Mayor N. Y.*, 3 Seld. 324; *Taylor v. Porter*, 4 Hill, 143; *Buffalo R. R. v. Brainard*, 5 Seld. 108; *Carson v. Coleman*, 3 Stockt. Ch. 108; *Chicago v. Larned*, 34 Ill. 276; *Clarke v. Rochester*, 24 Barb. 481; *Moale v. Baltimore*, 5 Md. 314.

⁶ *East Tenn. & V. Railroad v. Love*, 3 Head, 64.

⁷ *Haskell v. New Bedford*, 108 Mass. 214.

⁸ *Varick v. Smith*, 5 Paige, 159; *Arrowsmith v. Burlingim*, 4 McLean, 495; *Powers v. Bergen*, 2 Seld. 358; *People v. Mayor, &c.*, 4 Comst. 422; *Commonwealth v. Alger*, 7 Cush. 53, 85; *Gillan v. Hutchinson*, 16 Cal. 156; *Adams v. Palmer*, 51 Me. 494, 495.

was held void, though passed while the State was a Colony.¹ This power can be exercised by the direct action of the legislature, or by creating corporations with authority to take lands where it is for a public use, like the construction of rail roads, canals, and like public works.²

5 *a.* Among the decisions bearing upon the foregoing propositions, the following may be mentioned: Towns cannot lay out ways for the private use of individuals over the lands of others;³ a State cannot deprive a joint-tenant of his right of survivorship by an act passed after such right has vested;⁴ nor can a State take private land for a lighthouse, since that belongs to the United States alone, who alone have the power to take it for such purposes. All that a State can do in such cases is, to cede jurisdiction to the United States over the land taken.⁵ But a State may authorize the United States to exercise the right of eminent domain by taking land for the site of a post-office and treasury.⁶ So it may authorize a public corporation, like one to construct a canal, created by the government of another State, to take lands for the use of such corporation.⁷

In attempting to define the cases in which a legislature may, by special act, change the ownership of land, or authorize one man to transfer the interest of another in lands, there are certain principles which may be regarded as elementary, which will serve as tests to be applied to the questions as they arise. And, in the first place, the power to do this does not depend upon its being by a general law or special act.⁸ In

¹ *Bowman v. Middleton*, 1 Bay, 252; *Den v. Singleton*, Martin, N. C. 49, Quincy, Rep. 529, 530, note, and cases cited.

² *Buffalo R. R. v. Brainard*, 5 Seld. 100; *Bloodgood v. Mohawk & H. Railroad*, 18 Wend. 9; *Hooker v. N. H. & N. Co.*, 14 Conn. 146; *Cushman v. Smith*, 34 Me. 247, where the point is examined, how far this can be lawfully exercised before payment or provision for ascertaining and payment of damages shall have been made. See also the cases there collected.

³ *Flagg v. Flagg*, 16 Gray, 180; *Wild v. Deig*, 43 Ind. 455; *vid.* 13 Am. Rep. 404, note.

⁴ *Greer v. Blanchard*, 40 Cal. 198.

⁵ *People v. Humphrey*, 23 Mich. 471; *Burt v. Merchants' Ins. Co.*, 106 Mass. 360.

⁶ *Burt v. Merchants' Ins. Co.*, 106 Mass. 356, 363; *Reddall v. Bryan*, 14 Md. 444; *Gilmer v. Lime Point*, 18 Cal. 229. See *Orr v. Quimby*, 54 N. H. 590.

⁷ *Matter of Townshend*, 39 N. Y. 171.

⁸ *Edwards v. Pope*, 3 Scam. 473; *Klby v. Chitwood*, 4 Mon. 95; *Sohier v. Mass. Gen. Hospital*, 3 Cush. 483.

the next place, wherever the act is based upon the assumption or exercise of judicial power, it is void, since legislatures are prohibited from the exercise of such powers.¹ In the next place, a legislative act cannot authorize the property of a citizen to be taken from him through the instrumentality of a sale or otherwise, so long as he is under no legal disability to manage his own affairs, where the effect is, not to convert it to the use of the government, but to transfer it from the original owner to a third person. The cases under this head are numerous, and the proposition can be best illustrated by referring to some of them. The language of Story, J., in *Wilkinson v. Leland*,² is, "We know no case in which a legislative act to transfer the property of A to B, without his consent, has ever been held a constitutional exercise of legislative power in any State of the Union." So an act compelling the owner of a ground rent irredeemable to accept from the ground owner a sum of money in extinction thereof is void, as being unconstitutional.³ Bronson, J., in *Taylor v. Porter*, above cited,⁴ says: "When a man wants the property of another, I mean to say that the legislature cannot help him in making the acquisition." And the language of the court of Ohio, in one case, was, "The legislature may cure the title to property, but cannot create it."⁵ In New York, the legislature, by a special act, discontinued an ancient street in a city, and gave the soil of it to the city. It was held void so far as it undertook to dispose of the soil, as that belonged to private persons.⁶ So the court of Pennsylvania took the distinction above alluded to between the act of the legislature affecting lands whose owner is under a disability, and one where he is not. Thus, in one case, lands had been given to trustees to be held during the life of a son, for his support, and, after his death, to be divided among heirs; and an act of the legislature authorized the sale of this land, and the invest-

¹ *Edwards v. Pope, sup.*; *Lane v. Dorman*, 3 Scam. 238; *Rice v. Parkman*, 16 Mass. 326; *Jones v. Perry*, 10 Yerg. 59.

² 2 Pet. 658; *Heyward v. Mayor*, 3 Seld. 324; *Adams v. Palmer*, 51 Me. 494.

³ *Palairit's Appeal*, 67 Penn. 479.

⁴ 4 Hill, 147.

⁵ *Good v. Zercher*, 12 Ohio, 368.

⁶ *Matter of Albany Street*, 11 Wend. 149, 152; *John and Cherry Streets*, 19 Wend. 676.

ing the proceeds to the same uses as the land itself was held ; but the reversioners, having been adults at the time of this being done, objected to the sale, and it was held to be void.¹ So in Massachusetts, where devisees for life sold the land in fee, and the legislature by special act confirmed the title, it was held void as to the reversioners, in depriving them of their estate without their consent, and without compensation made.² And where a testator signed a wrong paper as his last will, under a mistake, it was held that it was not competent for the legislature to authorize the courts to try the question, and reform his will, since it would be divesting his legal heirs of the estate which had, in the mean time, descended to them.³ In Illinois, a special act authorizing J. L. to sell the land of a deceased person, and out of the proceeds to pay himself and J. B. a certain sum advanced by them on account of the estate, it was held to be unconstitutional and void : 1st. Because the legislature was not a competent body to determine what sum was due ; and 2d. Because the sale was not for the benefit of the general creditors of the estate, but for a part only of them.⁴ The case of *Powers v. Bergen* was, in some respects, like those above mentioned. In that case there was a special act authorizing executors to sell lands in fee, the use of which was given to certain tenants for life, with a remainder over, and held to be void, as it was authorizing the sale of one man's estate to another, without any agency on the part of the owner, or any reasons given for creating the power. The court say : "If the legislature should pass an act to take private property for a purpose not of a public nature, as if it should provide, through certain forms to be observed, to take the property of one and give or sell it, which is the same thing in principle, to another, the law would be clearly unconstitutional and void."⁵ The cases in which it has been held that a legislative act may avail in creating a good title to land seem to be of three classes, and the authority to pass such acts seems to be limited to these : 1st. In

¹ *Ervine's Appeal*, 16 Penn. St. 256.

² *Sohier v. Mass. Gen. Hospital*, 3 Cush. 483, 492.

³ *Alter's Appeal*, 67 Penn. St. 341. ⁴ *Lane v. Dorman*, 3 Scam. 238.

⁵ 2 Seld. 358. See also *Chesnut v. Shane's Lessee*, 16 Ohio, 599 ; *Jackson v. Catlin*, 2 Johns. 263.

confirming a title, where the proceedings or sale, by which it has been attempted to convey land, have proved to be defective or incomplete for informality; 2d. Where the owners of the land to be conveyed have been under a disability, like that of infancy, lunacy, or the like, where the State acts as a kind of *parens patriæ* in taking care of the property of its subjects incapable of managing their own affairs; 3d. Where the sale is made for the purpose of satisfying the debts of a person deceased. Among the cases under the first class was an act confirming the title to lands, the deed to which was defective in form, by reason of the acknowledgment of the wife not having been properly certified.¹ But a legislative act cannot make a defective tax-title good.² In another case, where commissioners, in order to make partition of lands, were authorized to sell them, but instead of making deeds to the purchasers, as they should have done, made them to others, who had purchased of the first purchasers, an act confirmatory of the title was held valid.³ In another, an executor, under a license of court to sell lands, omitted to publish notice of his petition for leave to sell, and the legislature confirmed the title to lands sold by him, the children of the testator having assented to the sale.⁴ But where the devise was of real estate to a charity, with power in the managers to rent, but not to sell, it was held that the legislature could not empower these managers to sell the land, and convert it into money.⁵

The second class is much more comprehensive in the subjects to which it applies; and the law, in respect to them, rests upon the general idea that the State is bound to take care of the interests of its citizens who are incapacitated to act for themselves; and, for that purpose, powers adequate are delegated to the Legislature.⁶ Among the cases illustrative

¹ *Watson v. Mercer*, 8 Pet. 88; *Chesnut v. Shane's Lessee*, 16 Ohio, 599; *contra*, *Good v. Zercher*, 12 Ohio, 364; *Adams v. Palmer*, 51 Me. 494.

² *Conway v. Cable*, 37 Ill. 82, 90. ³ *Kearney v. Taylor*, 15 How. 494.

⁴ *Sohier v. Mass. Gen. Hospital*, 3 Cush. 483.

⁵ *Tharp v. Fleming*, 1 Houst. 592.

⁶ *Sohier v. Mass. Gen. Hospital*, 3 Cush. 483, 497; *Rice v. Parkman*, 16 Mass. 326; *Davison v. Johonnot*, 7 Met. 395; *Estep v. Hutchman*, 14 S. & R. 435, 438; *Clarke v. Van Surlay*, 15 Wend. 436, 445; *Powers v. Bergen*, 2 Seld. 358, 366; *Clarke v. Hayes*, 9 Gray, 426.

of this is one put in *Sohier v. Massachusetts General Hospital*, above cited, where an act authorized the sale of land of which there was a life-estate, with a reversion in persons who could not be ascertained, but were represented by trustees. It was not, in fact, depriving a party of his property, but authorizing a change in its form. So in *Rice v. Parkman*, cited also, the act authorized a father to sell the land of his minor children, and convert the same into money for investment. "This power," say the court, "must rest in the legislature of this Commonwealth, that body being alone competent to act as the general guardian and protector of those who are disabled to act for themselves."¹ And in *Sohier v. Massachusetts General Hospital*, the court say, it goes upon the necessity of the legislature having the power to authorize the sale of estates of infants, idiots, insane persons, and persons not known or not in being, who cannot act for themselves. In such cases, the legislature, as *parens patriæ*, can disentangle and unfetter the estates by authorizing a sale, taking precaution that the substantial rights of all are protected and secured.² In *Davison v. Johonnot*, the act authorized a guardian of an insane person to sell his land, and the court sustained it, as being the exercise of a proper *tutorial* power in such cases, although one purpose of making the sale was to raise money to pay off an incumbrance upon another part of the ward's estate.³ In *Doe v. Douglass*, the act authorized an administrator of an intestate estate to sell the real estate of the deceased upon such terms as he should deem most advantageous, the proceeds of the sale to be in his hands, to be disposed of according to law, the heirs of the intestate being minor children.⁴ In another case, the act gave a guardian of a minor authority to sell his ward's lands for his maintenance and education.⁵ And in still another, it authorized a guardian of minors to convey their estate to a particular person to whom their father had bargained it in his lifetime.⁶ The doctrine of some of the above cases is contro-

¹ 16 Mass. 326, 329. See *Blagge v. Miles*, 1 Story, 426.

² 3 Cush. 483, 497.

³ 7 Met. 395.

⁴ 8 Blackf. 10.

⁵ *Cochran v. Van Surlay*, 20 Wend. 365; s. c. 15 Wend. 436, 445.

⁶ *Estep v. Hutchman*, 14 S. & R. 435.

verted by Green, J., in *Jones v. Perry*;¹ while the court, in *Rice v. Parkman*, held that it was no objection to the legislature acting specially upon these cases, that they had delegated a like power to tribunals which were created by a general law.² The third class of legislative powers in respect to the disposal of private estates by special acts rests upon the idea, that, upon the decease of a debtor leaving property, his creditors have a paramount claim to so much of it as is necessary to satisfy their debts; and that an act of legislation which accomplishes this idea will be valid, though the form in which it is done may vary from the general law. The leading case upon this part of the subject is that of *Wilkinson v. Leland*, where an executor, appointed in New Hampshire, sold land in Rhode Island, without having the will approved there, for the payment of the debts of the testator. After this, the legislature of Rhode Island, by a special act, confirmed the sale. It was held to make a good title, although utterly void until thus confirmed.³ In another case, the act authorized one of two administrators to convey the land of the intestate directly to his creditors, they taking the same at twenty-five per cent discount from the appraised value thereof. The act was permissive, and not compulsory.⁴ In Kentucky, the validity of acts have been sustained by which the lands of a deceased debtor were sold for the payment of his debts, although the mode of doing it was variant from that required by the general statute upon the subject.⁵ So in Alabama, an act authorizing an administratrix of an intestate debtor, who died there, to sell his lands for the payment of his debts, either by herself or her attorney, was held good, and a sale made by her attorney valid, although she was a resident in Massachusetts.⁶

6. Sales under and by virtue of decrees of courts of chancery stand upon somewhat different ground. The subject is treated of, in its practical application, in Mr. Daniell's Chan-

¹ 10 Yerg. 59.

² *Kibby v. Chitwood*, 4 Mon. 95; *Shehan v. Barnett*, 6 Mon. 594.

³ 2 Pet. 627.

⁴ *Langdon v. Strong*, 2 Vt. 234.

⁵ *Kibby v. Chitwood*, *sup.*; *Shehan v. Barnett*, *sup.*

⁶ *Watkins v. Holman*, 16 Pet. 50. Upon the point of granting to trustees of churches, cemeteries, &c., leave to sell the same, see *Sohier v. Trinity Church*, 109 Mass. 1-23.

cery Practice. Such sales are usually made through the agency of a master, who ordinarily is required to make the sale by public auction to the highest bidder, but sometimes is authorized to do it by private contract. But the duty of the master seems to be merely to make the contract. He then reports his proceedings to the court, who thereupon require of the parties to execute the proper deeds; the master being a kind of agent to bring about, by means of the court, a conveyance by deed from the vendor to the purchaser.¹ But the powers and duties of courts of chancery, in the matter of making sales in the several States, will be found to be very various. Such are the authorizing of sales of mortgaged estates for purposes of foreclosure,² or to satisfy a vendor's lien,³ the appointment of special trustees to sell the estate of deceased persons for payment of their debts,⁴ and the like; in all which cases, it is believed, courts empower the trustee, commissioner, or master, as *he may be [*540] named, to make the sale and execute the deed, in most if not all respects in like manner as these are done in making sales by sheriffs or other officers. The deeds, in such case, ought regularly to show the grounds and purposes of sale, and the authority by which the act is done.⁵ But where a trustee was authorized to sell trust-property if he deemed it necessary, and he conveyed it by a deed wherein he was neither named as trustee, nor was there any recital of a sale being deemed necessary, it was held to be a valid and effectual deed.⁶ A sale by a master is a judicial sale, and binds all the parties to the suit who have right or claim.⁷ And where the sale is made under a decree of a court of equity, it is competent for the court to put the purchaser in possession. Such would be the case where a sale of the premises is made to foreclose a mortgage.⁸ In some cases, if the judgment

¹ Daniell, Chanc. Pract. 1447, 1459.

² *Kershaw v. Thompson*, 4 Johns. Ch. 609; *Creighton v. Paine*, 2 Ala. 158. See *Denning v. Smith*, 3 Johns. Ch. 344.

³ *Jones v. Froman*, 6 Mon. 127.

⁴ *Shriver v. Lynn*, 2 How. 57, 58.

⁵ *Wood v. Mann*, 3 Sumn. 318; *Tooley v. Kane*, 1 Smedes & M. Ch. 518; *Atkins v. Kinnan*, 20 Wend. 241.

⁶ *Hamilton v. Crosby*, 32 Conn. 347.

⁷ *Sands v. Codwise*, 4 Johns. 602

⁸ *Kershaw v. Thompson*, 4 Johns. Ch. 609; *Schenck v. Conover*, 2 Beasley, 220.

under which a judicial sale has been had is reversed, the title acquired by a purchaser at such sale will fail; as where such judgment was reversed for irregularity in the proceedings upon which it was rendered, and the purchaser, at a sale under it, was the attorney in the suit, it was held that he must be taken to have purchased with a knowledge of the defects in the proceedings, and his title was avoided by such reversal.¹ The same rule would apply if the plaintiff in the original suit had been the purchaser; but if, in such sale, the purchaser is a stranger without notice, and he has paid the purchase-money for a legal estate, and has an officer's deed for the same, his title would not be affected by a reversal of the judgment under which the sale is made.² The same rule applies in Missouri, and extends to protect a title gained under such sale by a person, *bona fide*, who is a stranger to the proceedings upon which the reversal rests; and a similar doctrine prevails in Illinois.³ But in Massachusetts, if a judgment is reversed which has been satisfied by a levy on the debtor's land, he may recover it with the rents and profits in a writ of entry against the levying creditor, or such creditor's grantee.⁴

7. A decree for a conveyance does not operate as a conveyance.⁵ It has no effect upon the position of the parties in respect to the land until it has been executed.⁶ But a deed made to carry out a sale under a decree in chancery is evidence of title in the grantee against all the world.⁷ If the deed be not executed within the time limited, it still operates as a conveyance, subject, as between the parties, to have the title revert if the decree is reversed; but if the decree is executed in good faith, a reversal of it will not divest the title of the purchaser.⁸

8. There is another class of sales and conveyances of real estate unknown to the common law, provided for by the statutes of many of the States, whereby a mechanic who does

¹ Galpin v. Page, 18 Wall. 350, 373. ² Reynolds v. Horris, 14 Cal. 667, 680.

³ Gott v. Powell, 41 Mo. 416; McJilton v. Love, 18 Ill. 495; Jackson v. Cadwell, 1 Cowen, 641.

⁴ Delano v. Wilde, 11 Gray, 17.

⁵ Ryder v. Innerarity, 4 Stew. & P. 14.

⁶ Sheppard v. Comm'rs of Ross Co., 7 Ohio, 271.

⁷ Mummy v. Johnston, 3 A. K. Marsh. 220.

⁸ Taylor v. Boyd, 3 Ohio, 337.

labor, or furnishes materials in erecting buildings, on lands, acquires a lien upon the buildings, and the land on which they stand, by virtue of which, upon judicial proceedings had, courts are authorized to cause the same to be sold by an officer duly empowered, who, upon sale made, executes a deed or deeds thereof to the purchaser. Laws of a similar character exist in a majority of the States; but their nature and effect may be illustrated by the statute of a single State. Thus, in Massachusetts, the statute provides for filing a statement of the lien which is claimed in the clerk's office of the town or city, and for commencing a suit for enforcing the same, and for a joinder therein of the several persons having liens on the same building. The court are to ascertain the amounts due, and thereupon to order a sale of the property to be made by any * officer authorized to [*541] serve civil process. The mode of proceeding in making such sale is prescribed and pointed out, and how the proceeds are to be distributed and applied, giving the debtor a right to redeem the estate from such sale within certain limits as to time. It will be perceived that the lien here spoken of is itself no title to the land, but merely furnishes the basis for proceedings, under which, by means of a statute power, a title is created in whoever becomes the purchaser of such estate.¹

9. It only remains to notice the sales of land by officers for the payment of taxes before reaching the main subject of title by grant, or that of conveyances by deed from one individual to another. The subject of Tax Titles has been somewhat prolific in cases and decisions under the various statutes of the several States, in determining which no aid can be borrowed from the common law; and a work of seven hundred and fifty-two pages, on the power to sell lands for the non-payment of taxes, has been published by Mr. Blackwell, of the Illinois bar. But it can only be briefly treated of in the present work, though the number of decided cases is said to exceed a thousand; and one reason is, that these, from the nature of the case, must be principally local in their bear-

¹ 2 Kent, Com. 828, 8th ed. note; Mass. Gen. Stat. c. 150; Clark v. Kingsley, 8 Allen, 548.

ing and operation. The work of Mr. Blackwell is so exhaustive of the subject, that it has been freely used in the preparation of what is here collected.

10. The power of taxation is inherent in the very existence of government, like that of eminent domain, whereby the property of the citizen may be taken for public uses. But both are limited, and can only be exercised on the principle of equality and uniformity.¹ But it is unlike the latter power, since it does not consist in taking the property of one, and making him compensation therefor, out of the general property of the body politic, but in taking from each and all the citizens a proportionate sum for defraying the expenses incident to government. It is a power always incident [*542] to sovereignty, essential to the maintenance of * government, and operates on all the persons and property belonging to the body politic.²

11. Nor would this right be restricted in respect to land of which the State itself had granted the title to the party who is taxed; for it has its foundations in society itself, and what shall be the portion which any individual shall contribute to the public burdens is to be determined by the legislature alone.³ It is to the statute law alone that reference must be had for the power of selling lands for the non-payment of taxes assessed upon them, since it is neither a common-law nor civil-law remedy or principle.⁴

12. This power to sell lands for the payment of taxes is a naked one, not coupled with any interest in the land in the officer who effects it; and in order that the deed which he executes should give even a *prima facie* evidence of title, unless a different effect is given to it by statute, it is necessary to show, affirmatively, that the prerequisites required by law have been complied with. As the collector has a power to sell only in particular cases described in the act, it must

¹ *Chicago v. Larned*, 34 Ill. 279.

² *Blackw. Tax Titles*, 8; *Providence Bank v. Billings*, 4 Pet. 561; *Doe v. Deavors*, 11 Ga. 79; *M'Culloch v. Maryland*, 4 Wheat. 428; *People v. Mayor, &c.*, 4 Comst. 422, 424; *Clarke v. Rochester*, 24 Barb. 482, 484, 489; *Moale v. Baltimore*, 5 Md. 314.

³ *Providence Bank v. Billings*, 4 Pet. 563; *Blackw. Tax Titles*, 37.

⁴ *Blackw. Tax Titles*, 39.

appear that such a case has arisen to authorize the exercise of the power. Indeed, it is required as a condition precedent to passing a good title by such a sale, that all the proceedings of the several officers who have any act to do preliminary to such sale, such as *listing*, and valuation of the land, laying or collecting the tax, advertising and selling the land, the making of proper returns, and the filing or recording of the proceedings, whether the acts are to be performed before or after the sale, must be shown to have been done in strict compliance with the statute authorizing the sale.¹ And the proof of the regularity of these *several proceedings [*543] devolves upon the person who claims title under the collector's sale.² Such sales are not regarded as judicial sales, nor are the presumptions which exist in favor of the latter extended to sales by collectors.³

13. Consequently, the recitals in a tax-deed or deed of an officer are not evidence against the owner of the property. The facts recited must be proved by evidence *aliunde*. Nor is the formal conveyance itself even *prima facie* evidence that the officers of the law, upon the regularity of whose acts its validity depends, have complied with the requisite forms in their proceedings.⁴ To make a good tax-title, the one claiming under it must show the authority by which it was granted, and the proceedings of the officer are to be construed strictly. Parol evidence is not admitted to explain a latent ambiguity in the description of the granted premises, or to locate the land; and if the description by the officer be not so certain and complete as not to require the aid of extrinsic evidence, the deed will be inoperative.⁵ This principle of the common law, however, is modified by the statutes of several of the

¹ Williams v. Peyton, 4 Wheat. 78, 79; Ronkendorff v. Taylor, 4 Pet. 349; Morton v. Reeds, 6 Mo. 64; Blackw. Tax Titles, 47, and cases cited; Thatcher v. Powell, 6 Wheat. 119; Alvord v. Collin, 20 Pick. 418, 421; Minor v. President of Natchez, 4 S. & M. 627; Jackson v. Shepard, 7 Cow. 88; Weyand v. Tipton, 5 S. & R. 332; Harrington v. Worcester, 6 Allen, 576; Abell v. Cross, 17 Iowa, 176; Conway v. Cable, 37 Ill. 88.

² Ronkendorff v. Taylor, 4 Pet. 349. ³ Beatty v. Mason, 30 Md. 409.

⁴ Blackw. Tax Titles, 93, 94, 104, and cases cited; Jackson v. Shepard, 7 Cow. 88; Weyand v. Tipton, 5 S. & R. 332.

⁵ Wofford v. McKinna, 23 Tex. 43; Erwin v. Helme, 13 S. & R. 151; Ballance v. Forsyth, 13 How. 23.

States so far as to give to the deed of a collector the effect of *prima facie* evidence of title.

14. The ground upon which this doctrine rests seems to be, that the purchaser knows, in the first place, that the one who sells and attempts to convey has no personal interest to part with; that he is a public officer, acting under the provisions and subject to the requirements of a public law, which are known or presumed to be known to the purchaser; and he is therefore put upon his inquiry to ascertain whether these requirements have been complied with; for it is a principle of law, that a purchaser is chargeable with notice of all defects apparent upon the face of his muniments of title.¹ And, accordingly, it has been held in Ohio, that, in order to have a tax-sale and deed received as evidence of title, there must be preliminary evidence submitted to the court that the land was properly *listed*, taxed, and advertised, and that all other prerequisites were complied with.² And one who relies upon a tax-sale is bound to show, not only the existence of an assessment, but its legality also.³

15. How far the party claiming under such a deed must go in making out his proof, that is, to what extent of minuteness and accuracy of detail he must show a compliance on the part of the several officers with the requirements of the statute, is spoken of in different terms by different courts. [*544] Thus, in *Langdon v. Poor, the judge, in giving the opinion of the court, says: "It has sometimes been said that a *literal* compliance with the statute provisions, by all the officers connected with the proceedings, is a condition precedent to the passing of any title. Perhaps the term *literal*, in its confined sense, is rather too strong. A clear and strict compliance has always been held indispensable, even in regard to matters which, but for the statute, could appear to be of no importance."⁴ And the language of C. J. Marshall,

¹ Blackw. Tax Titles, 67, 85; Denning v. Smith, 3 Johns. Ch. 344.

² Games v. Stiles, 14 Pet. 322; Holt v. Hemphill, 3 Ohio, 232. See also Tolman v. Emerson, 4 Pick. 162.

³ Sutton v. Calhoun, 14 La. An. 209.

⁴ Langdon v. Poor, 20 Vt. 15. In one case, where the statute required the sale to be made *before the court-house door*, and it was made inside of it, it was held void. Rubey v. Huntsman, 32 Mo. 501.

in *Thatcher v. Powell*, is: "In summary proceedings, where the court exercises an extraordinary power under a special statute prescribing its course, we think that course ought to be *exactly* observed, and those facts especially which give jurisdiction ought to appear, in order to show that its proceedings are *coram judice*." ¹

16. Indeed, it is uniformly held, that the power of sale does not attach until after every prerequisite of the law has been complied with.² And the stringency of the law in this respect, as well as the great liability there is that some step will be omitted in the process by which alone a title can be gained under a collector's sale for taxes, seems to justify the remark of Sewall, J., in *Colman v. Anderson*, "The title under which the tenant has been permitted to succeed, so far as to obtain a verdict in support of it, is of that kind almost proverbially denominated a *collector's title*;" ³ or even the declaration ascribed to the Superior Court of New Hampshire, "That a tax-collector's deed was, *prima facie*, void."⁴ But still, if all the requirements of the law have been strictly complied with so as to confer on the officer a power to sell, and the conveyance be in regular form, it will vest a good title in the purchaser.⁵

17. And when the form and effect of such a deed are considered, Blackwell seems to be sustained when he says: "The operative character of the deed depends upon the regularity of the anterior proceedings. The deed is not the title itself, nor even evidence of it. Its recitals bind no one. It creates no estoppel upon the former owner. No presumption arises from * the mere production of the deed, that [*545] the facts upon which it is based had any existence. When it is shown, however, that the ministerial officers of the law have performed every duty which the law imposed upon them, and every condition essential to its character, then the

¹ *Thatcher v. Powell*, 6 Wheat. 127. See also *Keene v. Houghton*, 19 Me. 369; *Minor v. President of Natchez*, 4 S. & M. 627.

² *Minor v. President of Natchez*, 4 S. & M. 627.

³ *Colman v. Anderson*, 10 Mass. 105, 111.

⁴ *Minor v. President of Natchez*, 4 S. & M. 628.

⁵ *Wofford v. McKinna*, 23 Tex. 43; *Harding v. Tibbils*, 15 Wis. 282.

deed becomes conclusive evidence of title in the grantee according to its extent and purport.”¹ By a doctrine of the common law, whoever claims a title under a tax-deed must show affirmatively that the requirements of the statute have been, from the first to the last, complied with strictly.² Nor will a court of chancery reform a tax-deed. If it is a title at all, it is *stricti juris*, and depends upon a *strict* compliance with the statute.³ And yet possession under such a deed is, as has been before said, under color of title.⁴ Nor will any recitals in such tax-deed raise any presumption in favor of such compliance, unless they are made so by some legislative act. “Without such an act, the burden of proof in making out a compliance with the requisitions is, in all things, upon the claimant. The only exception to this is where the deed is an ancient one, accompanied by a long-continued, uninterrupted possession.”⁵ In California and Arkansas, such a deed is *prima facie* evidence of the recitals therein being true, and is made so by statute. But if any essential fact be omitted in such recital, and especially if the recitals show the omission of an important requirement, the deed will be void.⁶ In Michigan and Wisconsin, a collector’s deed is by statute to be taken as *prima facie* evidence of the legality of the proceedings up to the date of the deed, and, after two years, is declared to be conclusive evidence of this. But while the first part of the statute is sustained by the courts, the second is held by them to be unconstitutional.⁷

18. Exceptions to this, where they exist, are created by statute, making such deed *prima facie* evidence of the facts recited, and, in some cases, of a compliance by the officers with the requirements of the law. But even in such cases,

¹ Blackw. Tax Titles, 430.

² Ferris v. Coover, 10 Cal. 589; Lane v. Bommelmann, 21 Ill. 143; Gaylord v. Scarff, 6 Clarke (Iowa), 179; McGahen v. Carr, Ib. 331; Worthing v. Webster, 45 Me. 270.

³ Attes v. Hinckler, 36 Ill. 267.

⁴ Dillingham v. Brown, 38 Ala. 311.

⁵ Worthing v. Webster, *sup.*; Ferris v. Coover, *sup.*; Kelsey v. Abbott, 13 Cal. 609.

⁶ Ferris v. Coover, *sup.*; Kelsey v. Abbott, *sup.*; Pillow v. Roberts, 13 How. 475.

⁷ Stewart v. McSweeney, 14 Wis. 472; Groesbeck v. Seeley, 13 Mich. 340; Wright v. Dunham, 13 Mich. 414; so in Iowa, M’Cready v. Saxton, 29 Iowa, 356

with the common law thus modified, if a non-compliance with any substantial prerequisite of the law is shown, all presumptions in favor of the deed are at once overthrown, and the rules of the common law prevail.¹

19. The deed must have certain requisites in itself to be valid as a deed. In the first place, it should come within what is meant as one "of conveyance," which requires it to be in writing, and under the seal of the officer.²

20. In the next place, it is not like a patent from government, which requires no formal delivery in order to its taking effect: the deed must, like other deeds, be delivered before it can be operative.³

21. It is a principle of law, that, on the execution of a power, the execution must have reference to the power itself, and that a person claiming under the execution takes under the deed by which the power is created; ⁴ and as it is not by the mere execution and delivery of a deed, but a deed based upon the necessary prerequisite acts by which it became lawful to sell the land which it conveys, that a title can alone be created in the purchaser, it seems to be requisite to the validity of a collector's deed, that it should recite the power under which it is made. And, in practice, it usually goes farther, and recites the act of * compliance with [*546] the statute which preceded the making of the deed. In some of the States, a form of deed is prescribed by statute in such cases; and it is hardly necessary to say, that, when such is the case, the form prescribed must be adopted and strictly adhered to.⁵ A tax-deed in Massachusetts is void if it omit to recite that the taxes were not paid within fourteen days after being demanded.⁶

22. The deed must be made to the one who bids off the land at the sale.⁷

23. In respect to the necessity of recording a collector's

¹ Blackw. Tax. Titles, 431.

² Blackw. Tax. Titles, 432; *Church v. Gilman*, 15 Wend. 658.

³ Blackw. Tax. Titles, 434.

⁴ *Robinson v. Hardcastle*, 2 T. R. 252; *ante*, pp. *304, *320.

⁵ Blackw. Tax. Titles, 434, 436; *Smith v. Hileman*, 1 Scam. 323; *Atkins v. Kinnan*, 20 Wend. 241, 247.

⁶ *Harrington v. Worcester*, 6 Allen, 576.

⁷ Blackw. Tax. Titles, 444.

deed, there are different rules in different States, dependent upon the statutory provisions upon the subject. In Massachusetts, recording is required; so in Vermont; while in Illinois a different rule is adopted.¹

24. If the owner of the land die between the time of the sale and the making and delivery of the deed, it does not affect the sale or impair the validity of the collector's deed afterwards given; but if the deed show upon its face the want of compliance, on the part of the officer, with any of the substantial requisitions of law, — as, for instance, that it is made to one who did not bid off the land, — it is a nullity.²

25. The peculiarity of a tax-title, by which the land is always subject to redemption by the original owner, upon paying the tax assessed, with such interest and charges as are prescribed by law, prevails in all the States, though the terms, and time of redemption, may not be uniform. Any one may redeem who has any right to the estate, whether in law or in equity, whether perfect or inchoate, in possession or in action, or in the nature of a charge or an incumbrance.³ In some States, the deed is not given until after the time of redemption has expired; and, during this time, the interest of the purchaser is an equity which he can assign, and thereby give to his assignee a right to claim the deed from the officer. In others, the deed is made at once, and the estate may then be redeemed by the owner; in which case the title of the purchaser is at an end, without any other act done or entry made on the part of the owner.⁴ But a deed made to one in possession to whom the tax is set, and who is in duty bound to pay it, would be void: his performing a duty in respect to the estate does not change the title to the same.⁵ And the same rule would apply in all cases where the one paying the tax is under moral or legal obligation to do so. If he suffers

¹ *Allen v. Everts*, 3 Vt. 10; *Tilson v. Thompson*, 10 Pick. 359, 362; *Blackw. Tax Titles*, 438.

² *Blackw. Tax Titles*, 449, 450.

³ *Rice v. Nelson*, 27 Iowa, 148. For the person, to whom a tender must be made in order to redeem from a tax-sale, see *Faxon v. Wallace*, 101 Mass. 444.

⁴ *Blackw. Tax Titles*, 445, 490; *Blight v. Banks*, 6 Mon. 206; *Taylor v. Steele*, 1 A. K. Marsh. 315; *Cooper v. Brockway*, 8 Watts, 162.

⁵ *McMinn v. Whelan*, 27 Cal. 319.

the estate to be sold, and buys it in, directly or indirectly, he gains no title thereby. But being in possession of an estate does not, of itself, preclude the right to buy at a tax-sale.¹

* 26. There was, under the colony laws of New [*547] England, a right in proprietaries to assess taxes upon their common lands, and sell them to enforce payment of such assessments; but it applied only to the lands which were retained by original proprietors, and did not extend to such as had been sold and conveyed to third persons to be held in severalty.²

27. In closing these brief sketches of the law relative to the acquisition of title by what has been called an office or official grant, there are one or two considerations to be presented, which apply, substantially, to all these modes which have been enumerated. Where land is conveyed under a special authority, that authority must be strictly pursued; and every purchaser is to be presumed to know that especial authority, where it is derived from an act of the legislature; and if he purchases where that special authority has not been pursued, he purchases at his peril.³ Where, therefore, the law required a guardian, upon making sale of land, to make return to the court, and, if approved by the court, it was to be recorded, and should "vest in the purchaser all the interest the ward had in the estate so sold," and a sale was made and deed given, but no return made to or accepted by the court, it was held that nothing passed by such deed.⁴ And this doctrine extends to all cases of involuntary alienations of lands belonging to persons other than those who make such alienation. Their validity depends upon a strict compliance with all the substantial requirements of the law by which such alienation is made. Such is the case where private property is taken for public use,⁵ and where land is taken by levy of execution

¹ *Moss v. Shear*, 25 Cal. 45; *Piatt v. St. Clair*, 6 Ohio, 227; *Choteau v. Jones*, 11 Ill. 322.

² *Bott v. Perley*, 11 Mass. 169.

³ *Denning v. Smith*, 3 Johns. Ch. 344; *Blackw. Tax Titles*, 52, 56, 57, 65.

⁴ *Young v. Keogh*, 11 Ill. 642.

⁵ *Flatbush Avenue*, 1 Barb. 286.

against the judgment debtor.¹ So with the sale of land by an administrator to pay debts of the deceased by order of court. And where the statute required such a deed to "set forth at large" the order of the court directing the sale, a recital merely of the substance of such order was held not [*548] to be a compliance with the act, *and ineffective as a deed.² And in case of sales for non-payment of taxes, "to make out a valid title under such sales, great strictness is to be required, and it must appear that the provisions of law preparatory to and authorizing such sales have been punctiliously complied with."³

28. And in establishing a claim to a title by virtue of a sale of or levy upon land under an execution, or of a sale by a guardian or administrator under order of court, or by a master or commissioner under a decree of a court of chancery, not only must the requirements of law have been complied with in all respects, but the judgment and execution, the order or decree, must be produced, unless, as has already been stated, some statute shall obviate the necessity of this, by raising presumptions in favor of the regularity of proceedings, under which a deed regular in form shall have been executed and delivered.⁴

29. But if, in the case of a sale by a sheriff, guardian, &c., a judgment and execution, or order or decree, and sale, be established, it is not competent to impeach the title by contradicting the deed, made in pursuance of the power thus vested in the officer, by evidence that he did not make it under that power, but some other, or that he did not intend to sell a part of what is conveyed.⁵

¹ *Metcalf v. Gillet*, 5 Conn. 400; *Wellington v. Gale*, 13 Mass. 483, 488; *Morton v. Edwin*, 19 Vt. 77; *Sargent v. Peirce*, 2 Met. 80.

² *Smith v. Hileman*, 1 Scam. 323; *Atkins v. Kimnan*, 20 Wend. 241.

³ *Brown v. Veazie*, 25 Me. 359; *Langdon v. Poor*, 20 Vt. 13.

⁴ *Hamilton v. Adams*, 1 Murph. 161; *Jackson v. Roberts*, 11 Wend. 425, *Minor v. President of Natchez*, 4 S. & M. 602; *Dunn v. Meriwether*, 1 A. K. Marsh. 158; *Weyand v. Tipton*, 5 Serg. & R. 332; *Ware v. Bradford*, 2 Ala. 676; *Bledsoe v. Doe*, 4 How. (Miss.) 25; *Den v. Wheeler*, 11 Ired. 288; *Doe v. Bedford*, 10 Ired. 198.

⁵ *Jackson v. Roberts*, 11 Wend. 425; *Snyder v. Snyder*, 6 Binn. 489; *Jackson v. Croy*, 12 Johns. 427; *Jackson v. Vanderheyden*, 17 Johns. 167. See *Minor v. President of Natchez*, 4 S. & M. 602; *Ware v. Bradford*, 2 Ala. 676.

30. And it may be added, that as a general proposition, where a statute requires a ministerial officer, like a sheriff, to make a return of his doings in making a levy, for instance, upon land, such return is conclusive evidence between the creditor and debtor in the execution, and all persons claiming under them respectively.¹

¹ *Bott v. Burnell*, 11 Mass. 163, 165; *Whitaker v. Sumner*, 7 Pick. 551, 555. See *Butts v. Francis*, 4 Conn. 424.

CHAPTER IV.

TITLE BY PRIVATE GRANT.

- SECT. 1. General Requisites of Grant by Deed.
 SECT. 2. Execution of Deeds.
 SECT. 3. Property conveyed by Deed.

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*SECTION I.

GENERAL REQUISITES OF GRANT BY DEED.

1. Origin and modes of alienating estates.
- 1 a. Of parol conveyances enforced in equity.
2. Division of the subject.
3. Transfer of estates governed by *lex loci*.
4. Deed defined.
5. Essentials of a good deed as given by Coke.
6. Must be written on paper or parchment.
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8. Effect of erasures and interlineations in a deed.
- 9, 10. Which party is to explain erasures, &c., in a deed.
11. How erasures, &c., should be noted.
12. After title passed, alterations in deeds of no effect.
13. Who may be parties to a deed.
14. Deeds of *femes covert*.
15. Deeds of persons *non sane*.
16. Deeds by infants.
- 17, 18. American law of conveyances by *femes covert*.
19. Effect of the husband's abjuring the realm.
20. How wife must join with husband in a deed.
21. How far *feme covert* may make an attorney.
22. How the wife may convey to her husband.
23. *Femes covert* not bound by covenants in deeds.
24. Of conveyances by aliens.
25. Effect of duress on deeds.
- 25 a. Of conveyances by one of joint-owners.
26. How far names are essential to deeds.
27. Grantor estopped to deny the name he uses.
28. Of the use of Christian names.
29. A deed in the alternative void.

- 30. No person not named can take a present estate.
- 31. Grantee need not be named if ascertained.
- 32, 33. When grantee must be shown to be a person *in esse*.
- *34. Capacity of grantees less restricted than that of grantors. [*550]
- 35. Of mortmain, and capacity of corporations to take.

1. **ALTHOUGH**, at the present day, the mode in universal use, by which one individual aliens or conveys his land to another, is by deed, it should not be forgotten that the requirements of a formal instrument in writing, in order to pass title to lands themselves, is as recent as Charles the Second, near seventy years after the first settlement of Virginia. It should be remembered too, as a part of the social and political history of the kingdom, whose subjects settled these Colonies, that, for more than two hundred years after the Norman conquest, the principle of free alienation of lands was ignored by the English law, and was only yielded, at last, to the imperative demands of a freer spirit and growing commerce among the people.*

Under the Saxon rule, lands were, substantially, free in their capacity of alienability, at least such parts of them as were held by charter, called *Boc-lands*, and had been allotted to individual * proprietors, who had not only [*552] an absolute title thereto, but also a purely allodial tenure. In making conveyances of these lands, no technical or set form was requisite; nor was it necessary that it should be done in writing, though it was usual to accompany the transfers of such land by a charter or *land-boc*. Sometimes the conveyance was made by a delivery of possession by symbol; but the symbol or the *boc* was regarded, not as the conveyance or transfer, but only as a mode of proof of its having been made.¹

* **NOTE.** — Barrington states that the oldest conveyance of which we have any account was that of the cave of Machpelah, from the sons of Heth to Abraham. He quotes from Genesis xxiii., and remarks, that it had many unnecessary and redundant words, though the parcels, in a modern conveyance, cannot well be more minutely particularized: "And the field of Ephron, which was in Machpelah, which was before Mamre, the field, and the cave which was therein, and all the trees that were in the field, that were in all the borders round about, were made sure unto Abraham." Barrington, Statutes, 4th ed. 175.

¹ Saxon deeds were short and simple. The conveying words were "*do et concedo*," "*dabo*," "*trado*," and the like, either in Latin or Saxon. A considera-

These *bocs* were usually deposited for safe-keeping in monasteries, and were the title-deeds of the great proprietors, which the conqueror was eager to seize upon and destroy, that all the lands in the kingdom might only be claimed through his own grant.¹ The change in the tenure of lands, and the obstructions interposed in the way of their free alienation under the first Norman kings of England, have been, perhaps, sufficiently referred to in a former part of this work.² And although charters, as evidence of title, had been common, there was no law which required a deed or other written instrument, as a means of conveying lands, prior to the statute of frauds, so called, 29 Charles II.; although the statute of *Quia Emptores* had made lands freely alienable, and the statute of uses had done away, substantially, with the form of livery of seisin or feofment known to the common law.³ The exceptions to this, however, were, first, in respect to the conveyance of interests in land which could not be evidenced and accompanied by formal livery of seisin, because of their being of an incorporeal nature, which, therefore, lay only in grant, and not in livery, and always required a deed as a means of transfer;⁴ and, second, the requirements of the act of enrolment, 27 Hen. VIII. c. 16, which rendered a deed indented and enrolled necessary in order to give effect to a conveyance by bargain and sale. But this did not apply to other deeds [*553] which took their rise under the statute of *uses, nor to deeds of feofment.⁵ The English statute of frauds

tion was inserted. The premises were briefly described with the particular boundaries of the land. The tenure, whether in perpetuity or for life, &c., then followed. The date was sometimes at the beginning, and sometimes at the end. The Saxon deeds had no wax seals: these were introduced after the Norman conquest. 2 Turner's Ang. Sax. 351, 352; 41 No. Law Mag. & Rev., 156. In the "Mirrour," the following is stated as an early ordinance of the realm: "None might alien but the fourth part of his inheritance, without the consent of his heirs; and that none might alien his lands by purchase from his heirs, if assigns were not specified in the deeds." — P. 11.

¹ 1 Spence, Eq. Jur. 8, 20, 22; 4 Kent, Com. 441, 442; Reeves, Hist. Eng. Law, 8.

² Vol. 1, c. 2. See Reeves, Hist. Eng. Law, 329, 335, 448. For a consideration of the subject of restraints upon the alienation and enjoyment of estates, see 18 Am. L. Reg., 393 *et seq.*

³ Roberts, Frauds, 270; Browne, Stat. Frauds, 3, 4; Wms. Real Prop., 126.

⁴ 1 Wood, Conv. 7, 8; 2 Bl. Com. 317.

⁵ Wms. Real Prop. 150.

has been followed, more or less exactly, by the statutes of the several United States, all of which require an instrument in writing in order to the conveyance of lands or any instrument therein. And, with the exception of three or four States, a deed under the hand and seal of the grantor is necessary, if the interest to be thereby transferred is a freehold one.¹ Accordingly, where one holding by a deed made a written agreement to convey to another upon being paid a certain sum, and the latter paid the same, but the owner refused to execute a deed, it was held that the bargainee could not maintain a real action to recover the land without first compelling the owner, by a bill in equity to enforce performance, to execute to him a deed of the premises.²

1 *a.* There is a class of cases which ought to be referred to in this connection, where, though no formal deed has been made, such proceedings have been had *in pais* between the parties as to lay the foundation for proceedings in a court of equity to enforce a conveyance by deed; as where, under a contract to convey land, acts have been done by the parties which are deemed to be a *part performance* of the contract, and the court is applied to to compel a complete specific performance of contract by giving a deed. These remarks, however, are not intended to apply to cases where the purchaser holds a written agreement from the vendor of the estate. Thus it has been held, that if, under a parol contract to convey, and, after part or full payment of the purchase-money is made, the possession of the estate is delivered to and taken by the purchaser, and he enters upon and occupies the estate, it takes it out of the statute of frauds, and the court will decree a specific performance "if vendor fraudulently withholds a conveyance, or, by so doing, he commits a fraud."³ Where a father gave wild land to his son and wife, to be theirs as long as they lived, and they went on and made

¹ *Stewart v. Clark*, 13 Met. 79; *Colvin v. Warford*, 20 Md. 396; *Underwood v. Campbell*, 14 N. H. 396.

² *Wilson v. Black*, 104 Mass. 406.

³ *Ryan v. Dox*, 34 N. Y. 312; *Phillips v. Thompson*, 1 Johns. Ch. 131, 149; *Wetmore v. White*, 2 Caines' Cas. 87; *Fonbl. Eq. Laussat's ed.* 150, 151; *Lowry v. Tew* 3 Barb. Ch. 407; *Parkhurst v. Van Cortland*, 14 Johns. 15, 36; s. c. 1 Johns. Ch. 284, 285; *De Wolf v. Pratt*, 42 Ill. 207.

expensive improvements upon the same, and paid part of the taxes, it was held that the donees could enforce the agreement in equity on the ground of part performance on the part of the donees, although the agreement to give the land was oral, and not in writing.¹ But equity will not enforce a specific performance against a man whose wife refuses to execute the deed, unless the vendee will pay the full purchase-money upon receiving the husband's deed without that of the wife.² The rule upon this subject, as applied in Pennsylvania, is understood to be this: Payment of the purchase-money is not enough; but if the parol contract be so far executed that it would work a fraud to rescind it, — that is, if what has been done under it is incapable of being compensated for at law, — an equitable title passes, notwithstanding the statute. There must be a delivery of possession. Thus a sale by a landlord to his tenant would not be sufficient, nor by one tenant in common to another, because the purchaser is already in possession. Nor is mere taking possession enough, unless followed by such improvements and arrangements as will not reasonably admit of a compensation in damages.³ In all these cases, it is apprehended, that, in order to have a court of equity interpose to compel a conveyance, there must be a definite specific agreement to sell and purchase proved. It must have been followed by acts of the parties, which, in their nature, form a part performance of such an agreement. If the vendor refuses to execute on his part, the vendee would be without an adequate remedy in damages by a suit at law, and a failure to perform works a fraud upon the party who seeks performance. There is, in Laussat's note to Fonblanque, a collection of cases upon the point of what amounts to a part performance; and these, with the other

¹ *Freeman v. Freeman*, 43 N. Y. 34; *Neale v. Neale*, 9 Wall. 1, case of parol gift where donee has made improvements, enforced by the U. S. court; *Dugan v. Gittings*, 3 Gill, 157, case of a gift of a house to a daughter in contemplation of marriage; *Syler v. Eckhart*, 1 Binny, 378, case of a parol gift of father to son, who took possession and made improvements; *Rhodes v. Rhodes*, 3 Sandf. Ch. 279, case of parol gift as a consideration for supporting the owner, which was performed by the donee; *King v. Thompson*, 9 Peters, 221; *Harsha v. Reid*, 45 N. Y. 419; *Peters v. Jones*, 35 Iowa, 512, 515.

² *Riesz's Appeal*, 73 Penn. St. 485.

³ *Hill v. Meyers*, 43 Penn. 170, 172, 173; *Glass v. Hulbert*, 102 Mass. 24. 43

cases cited above, it is believed, will sustain the other points as here stated.¹ But a court of equity has no jurisdiction over the legal rights of parties; nor could it settle a question of disputed boundary, unless some equity was superinduced by the acts of the parties.² In Mississippi, a decree for specific performance will not be rendered upon a parol agreement to convey lands, even where there has been a part performance.³ And where the grantee, under a covenant to purchase lands, entered upon them, and made expensive improvements, but declined to accept a deed because of an existing easement which affected the value of the estate, the court refused to compel him to execute his covenants as to that part which was not affected by this easement, but gave him a lien on the land for what he had expended until the owner reimbursed him therefor.⁴ And where the owner of land, having a dwelling-house upon it, contracted with another to sell the same, and the purchaser paid the purchase-money, but, before the deed was delivered, the house was burned, it was held, that the vendor could not enforce the contract against the vendee, and the vendee could recover back the money he had paid. The loss in such case falls upon the actual owner at the time it occurred.⁵ A case in Ohio may be referred to as showing how proceedings in equity in regard to the conveyance of lands may sometimes have effect, even though the court may not have jurisdiction over the subject-matter of the lands. Parties living in Kentucky were heirs to lands in Ohio which their ancestor had covenanted to convey to A B. He brought a bill in equity, in Kentucky, to enforce this contract, in which the heirs appeared, and a decree of specific performance was rendered. After that, the heirs brought an action at law, in Ohio, to recover these lands against A B, who set up this decree in defence on the

¹ Fonbl. Eq. Laussat's ed. 152, note, B. 1, c. 3, § 8; *Phillips v. Thompson*, 1 Johns. Ch. 131, 149; *Parkhurst v. Van Cortland*, 14 Johns. 36.

² *Tilmes v. Marsh*, 67 Penn. St. 511; *Norris's Appeal*, 64 Penn. St. 275.

³ *McGuire v. Stevens*, 42 Miss. 724, 732; *Beaman v. Buck*, 9 S. & M. 210; *Box v. Stanford*, 13 S. & M. 93.

⁴ *Gibert v. Peteler*, 88 N. Y. 165.

⁵ *Thompson v. Gould*, 20 Pick. 134; *Wells v. Calnan*, 107 Mass. 514; *Bacon v. Simpson*, 3 M. & W. 78.

ground, that, in Ohio, an equitable defence may be availed of in a suit at common law to recover land. The court held, that, although no judgment or decree in one State can operate upon lands in another, it was binding upon the parties, and might be enforced by attachment in Kentucky, and, as such, might be used as an equitable defence in Ohio.¹

2. In carrying out the plan of this work, it is proposed, first, to consider what constitutes a deed, and what are the requisites necessary to give effect to a deed as a means of conveyance of real property; and, second, what are the several essential parts of such a deed.

3. It may be assumed as a preliminary maxim, that title to lands can only be acquired or lost according to the laws of the State in which they are situate.² "No man has any vested right to dispose of any property, by whatever title he holds, in any way other than that by which the law prescribes."³ A qualification, more seeming than real, to the above propositions, formerly consisted in the provisions of the United States revenue-laws which required stamps on every "instrument" which any person should make or sign, declaring that "such instrument, not being stamped according to law, shall be deemed invalid and of no effect;" and forbidding the recording of any instrument required by law to be stamped, unless the same should have been stamped accordingly.⁴ For it has been held that it is not competent for Congress to prescribe the mode of transferring real estate, or what shall be instruments of evidence within the States; and that requiring a stamp to give validity to a deed is not within the province of the United States government.⁵ The rule as stated in Maryland, which seems to be confirmed by the United States

¹ *Burnley v. Stevenson*, 24 Ohio St. 474; *Massie v. Watts*, 6 Cranch, 148.

² *Clark v. Graham*, 6 Wheat. 577; *Doe v. Nelson*, 3 McLean, 383. By statute in Illinois, a deed good in the State where made will convey lands in Illinois; and the same is the law in Michigan. *Root v. Brotherson*, 4 McLean, 230; *Butterfield v. Beall*, 3 Ind. 203.

³ *Lies v. De Diablar*, 12 Cal. 330.

⁴ If no actual consideration was paid upon the conveyance of an estate, the stamp to be annexed to the deed is regulated by the value of the estate conveyed. *Groesbeck v. Seeley*, 13 Mich. 345.

⁵ *Craig v. Dimock*, 47 Ill. 308, 316; *Moore v. Moore*, 47 N. Y. 468. See *Cagger v. Lansing*, 57 Barb. 428.

court, is, that the absence of a stamp does not affect the validity of an instrument, unless intentionally and fraudulently omitted.¹

4. A deed is defined to be a writing containing a contract sealed and delivered by the party thereto. This is Lord Coke's definition, and does not embrace the *signing* of the instrument, which, at common law, was not necessary, as will appear more fully hereafter. In most of the States, however, a signing is required; and, in all, it is uniformly practised. But a deed, under all circumstances, implies and requires a seal; and without something answering to a seal according to the law of the State where the land lies, it cannot be a deed.²

5. In considering the character and qualities of a deed, reference is had to the materials of which it is composed, and the manner of making it, and the requisite forms to be observed to give it validity, and these preliminary to the consideration of its parts, its construction, or its effect. This order is intended to be substantially adopted in the present chapter. Lord Coke considers ten things essential to a valid deed of *conveyance: *first*, writing; and [*554] printed words in a deed are a part of it, to the same effect as if written;³ *second*, parchment or paper; *third*, a person able to contract; *fourth*, a sufficient name; *fifth*, a person able to be contracted with; *sixth*, a sufficient name; *seventh*, a thing to be contracted for; *eighth*, apt words required by law; *ninth*, sealing; *tenth*, delivery.⁴

6. It will not be necessary to consider each of these requisites in detail. It may be stated, generally, that writers upon the subject, and courts in their opinions, adopt the dogma, that, in order to be a deed, the materials on which its contents are written must be parchment or paper; and the reason given places the rule upon the ground of policy, that writing upon

¹ Carson v. Phelps, 23 Am. L. Reg. 101; Black v. Woodrow, 39 Md. 194; Campbell v. Wilcox, 10 Wall. 422; Morgan v. Graham, 35 Iowa, 217; Mitchell v. Home Ins. Co., 32 Iowa, 421.

² Co. Lit. 171 b; Wms. Real Prop. 123; Shep. Touch. 50; 1 Wood, Conv. 129; Van Santwood v. Sandford, 12 Johns. 198; Hammond v. Alexander, 1 Bibb, 333; Taylor v. Morton, 5 Dana, 365. See Hutchins v. Byrnes, 9 Gray, 367.

³ Wallworth v. Derby, 40 Ill. 530.

⁴ Co. Lit. 35 b; 1 Wood, Conv. 125; Shep. Touch. 54.

such materials is less likely to be altered, vitiated, or corrupted; though it is not entirely obvious why a deed written upon cloth of a suitable texture and substance, or the skins of animals properly prepared, though not manufactured into parchment, if susceptible of showing what is written upon them, might not be of equal validity with instruments written on paper or proper parchment. But the rule seems to be otherwise.¹* The law, fortunately, is far from being strict in requiring any great accuracy or precision in respect to what is written, so far as the rules of grammar or orthography are concerned, or as to the chirography or evenness of the page, or the straightness of the lines. False Latin, though it be very bad, will not avoid a deed.²

7. The writing upon the deed must all be completed before the same is consummated by delivery; what is added [*555] afterwards * being of no avail;³ though there are some authorities which sustain the doctrine, that blanks existing at the time of the delivery of a bond under seal may be filled by an agent afterwards.⁴

Nor is it easy to reconcile the cases, some of which may be found cited below; though it would seem to turn in some, if not in all of them, upon whether the blanks were filled before or after the *delivery* of the deed. Thus, where a wife signed and sealed a blank deed, and handed it to her husband to fill in the name of the grantee, the description and the release of her dower, which he did, and then executed it, and informed

* NOTE. — Chancellor Kent cites, from the October No., 1840, of the “North American Review,” the notice of a deed having been recently discovered by the side of a mummy, in a tomb in Upper Egypt, written upon papyrus, 106 years B. C., in the Greek language, *sealed* by the grantor, and certified to have been *recorded*, conveying land in Thebes, Egypt; and adds, “It is one of the most curious, instructive, and interesting legal documents that has been rescued from the ruins of remote antiquity.” 4 Kent, Com. 462.

¹ Co. Lit. 35 b; 1 Wood, Conv. 126; Shep. Touch. 50, 54; 2 Bl. Com. 297; Warren v. Lynch, 5 Johns. 246.

² Shrewsbury's case, 9 Rep. 48; Shep. Touch. 55; 1 Wood, Conv. 125; Perkins, § 123; Walters v. Bredin, 70 Penn. St. 237.

³ 1 Wood, Conv. 125; Shep. Touch. 541; Duncan v. Hodges, 4 M'Cord, 239; Perminter v. M'Daniel, 1 Hill (S. C.), 267. See American cases collected in the note to 6 M. & W. 216, Am. ed. Burns v. Lynde, 6 Allen, 305, fully sustains the text, and is opposed to Texira v. Evans.

⁴ Texira v. Evans, cited 1 Anstr. 228.

her, and she assented, but the deed was not present, and had been delivered, it was held not to be her deed, though it would have been effectual if she had delivered it after it had been filled up.¹ And the same court, in another case, held, that where a deed was executed by husband and wife, with a blank left for the grantee's name, and the covenants which it contained were qualified, but she, by parol, expressly authorized him to insert the name and strike out the qualification of the covenant, and he did so before he delivered it, which was known to the grantee, but not to her, this avoided the deed as to her. The alteration and filling of the blank, to be effectual, must have been done by some one acting under a power of attorney under seal, or by a delivery by her after these changes had been made.² Accordingly, where one signed, sealed, and acknowledged a blank deed, and afterwards inserted the grantee's name, and a description of the premises intended to be granted, and then delivered it, it was held to bind him as a valid deed.³ The case of *Texira*, cited below, was that of a bond which the maker signed, leaving the sum blank, and handed it to an agent to take it to the obligee and fill up with the sum he should be willing to loan. This was done, and the bond held good. The court in Iowa examine this case carefully, and hold that a sealed instrument executed and delivered with blanks in the material parts would be void, though afterwards filled up. And in this they agree with the Virginia courts, who held that where A and B signed a bond, leaving the obligee's name a blank, intending to apply to F for the money, B took the bond, and F, declining to loan the money, obtained it of H, and filled in his name as obligee in the absence of A: it was held not to be the bond of A; "when the writing left the hands of A, it was not a deed."⁴ But if filled up before delivery, it would be good.⁵ In a case in New York, a mortgage with the mortgagee's name in blank

¹ *Burns v. Lynde*, 6 Allen, 305; *Vose v. Dolan*, 108 Mass. 159.

² *Basford v. Pearson*, 9 Allen, 388; *Drury v. Foster*, 2 Wall. U. S. 24; *ante*, vol. 1, p. *201.

³ *Conover v. Porter*, 14 Ohio, 450.

⁴ *Preston v. Hull*, 23 Gratt. 605.

⁵ *Simms v. Harvey*, 19 Iowa, 290-296. See also *People v. Organ*, 27 Ill. 29; *Gilbert v. Anthony*, 1 Yerg. 69; *Wynne v. Governor*, *Ib.* 149.

was held void, even in a *bona fide* holder's hands. But two of the judges thought it might have been filled by parol authority of the maker, and have been valid.¹ In one case in the Exchequer, it was held that a deed of stock, under seal, with the name of the purchaser in blank, was void, the names having being inserted after delivery, denying *Texira v. Evans* to be law.² Some of the cases have turned upon the point, whether a parol authority by the grantor in a deed to one to fill material blanks would be sufficient to bind him; though probably, if this were done before it was delivered, any knowledge or presumed assent on the part of the grantor might give effect to such act of the attorney. The language of the court in *Drury v. Foster*, cited above, seems to favor the notion, that if one hand a deed, duly executed, with parol authority to fill blanks, and this is done, he is estopped to deny its validity. Nelson, J., says: "The better opinion at this day is, that the power is sufficient." And the court in Maine say: "It seems to be now settled, that where a party executes a deed or bond, and delivers the same to another in an imperfect state, and gives authority to that person to fill up the blanks, and thus perfect the instrument, and he does so, its validity cannot be controverted. This authority may be by parol; it may be implied from the facts proved, when those facts, fairly considered, justify the inference."³

7 *a.* In California, where a grantor made a deed, leaving the grantee's name blank, which was afterwards filled in by an agent of the grantor acting under *parol* authority, it was held to be of no validity or effect.⁴ A like rule has been settled in England, where a deed was executed, leaving a blank

¹ *Chauncey v. Arnold*, 24 N. Y. 330.

² *Hibblewhite v. M'Morine*, 6 M. & W. 200; Com. Dig. *Fait*, A. 1, reaffirmed by *Parke, B.*, in *Davidson v. Cooper*, 11 M. & W. 794; Perk. § 118; Touch. 54.

³ *Inhabitants, &c. v. Huntress*, 53 Me. 90. See also *Wiley v. Moor*, 17 S. & R. 438; *McDonald v. Eggleston*, 26 Vt. 161, 162. See also 1 U. S. Dig. 433, pl 10; 6 M. & W., Am. ed. 216, note.

⁴ *Upton v. Archer*, 41 Cal. 85. The following cases go to sustain the doctrine of the court of California: *Viser v. Rice*, 33 Texas, 130; *Cross v. State Bank*, 5 Ark. 525; *Mans v. Worthing*, 3 Ill. 26; *Ingram v. Little*, 14 Geo. 174; *Cummings v. Cassily*, 5 B. Mon 74; *Burns v. Lynde*, 6 Allen, 305; *Basford v. Pearson*, 9 Allen, 387; *Williams v. Crutcher*, 5 How. (Miss.) 71, 10 Am. Rep. 267, note.

for a description of the granted premises, which was afterwards filled, in the absence of the grantor, by another to whom it had been handed. It was held void; and it is there said, the execution of instruments in blank being binding applies only to negotiable paper.¹ But in some of the States a different rule has been applied. Thus, in Missouri, a deed was executed, all but the name of the grantee, which was left blank. It was then handed to another, with verbal authority to fill the blank and deliver the deed, which he did, and it was held to make a valid deed.² So in Wisconsin, a mortgage executed with a blank in the name of the mortgagee, who was not ascertained at the time, and the same was handed to one with verbal authority to procure the loan and fill the blank and deliver the deed, was held to be a valid mortgage when this had been done.³ In Iowa, a deed was executed with a blank in the name of the grantee, and handed to him, and he filled the blank with his own name. The grantor afterwards sued for the consideration, and it was held to ratify the act of the grantee to give validity to the deed.⁴ In another case, a deed was executed with a blank in the grantee's name, and sent to a person to sell the land, and insert the grantee's name, which he did; and it was held to pass a valid title as to all persons not cognizant of the circumstances.⁵ But in a still later case, a deed was made to a copartnership, with an intent for them to sell the same, and in the deed the grantees' names were left blank. One of the partners, being a creditor of the firm, by consent of one of the other two partners filled the blank with his own name. It was held, that, by the purchase, the partners acquired an equitable title to the land, which they could convey, and under which a conveyance could be enforced, and that this right passed to the partner by the insertion of his name as grantee. But the case does not affirm that such a deed would convey the legal title to the land.⁶

8. This rule leads to the inquiry, how far alterations, era-

¹ *Swan v. Australian Co.*, 2 H. & Colt. 175, 185.

² *Field v. Stagg*, 52 Mo. 534.

³ *Van Etta v. Evanson*, 28 Wisc. 33

⁴ *Devin v. Himer*, 29 Iowa, 301.

⁵ *Owen v. Perry*, 25 Iowa, 412.

⁶ *Clark v. Allen*, 34 Iowa, 190, 192.

tures, or interlineations, in the writing of a deed, affect its validity. To give the instrument the effect designed by such alterations, this must be made before the delivery of the deed.¹ Where A made a deed of one-half undivided of a lot, and two years afterwards sold the other half to the same grantee, whose former deed had not been recorded, and he took the deed and struck out "one undivided half," and *delivered* it again, it was held to convey the entire estate.² If made afterwards, it either avoids the instrument altogether, or is treated as of no effect. If the contract thereby evidenced is an executory one, any material alteration made by the holder or a stranger will avoid it, unless done by consent of the maker, or without the knowledge and assent of the holder.³ If the alterations be in an unimportant matter, and made by a stranger, it will not affect the instrument.⁴ Thus, where the lessee, after the lessor's death, altered the words "E. Street" to "W. Street," it was held not to be a material alteration, because other parts of the lease showed that the original should have been W. Street.⁵ And a like doctrine was applied to the interlineation of an important clause in one part of a deed, from the circumstance that the same clause was found in another part of the deed.⁶

9. In these cases, therefore, it becomes exceedingly important to settle, as a rule of law, upon which party lies the burden of proof to determine the character of such alterations. If the law presumes them to have been made before the delivery of the instrument, then any apparent erasure, interlineation, or alteration, does not affect its validity, unless affirmatively shown to have been made after the delivery; otherwise it would be void, unless the contrary were established. The rules given by the books, and laid down by different courts, are singularly diverse and unsatisfactory. Thus in Wood's Conveyancing, Preston's edition of the Touch-

¹ 1 Wood, Conv. 126; Shep. Touch. 69.

² Bassett v. Bassett, 55 Me. 126, s. c. 131.

³ Shep. Touch. Prest. ed. 69; Com. Dig. Fait, F. 1; Deem v. Philips, 5 W. Va. 168.

⁴ Shep. Touch. 69; Com. Dig. Fait, F. 1, 11 M. & W. 803, note to Am. ed. and cases cited.

⁵ Jordan v. Stevens, 51 Me. 78.

⁶ Gordon v. Sizer, 39 Miss. 818

stone, and Perkins, it is treated as "greatly suspicious," if the erasure or alteration be material, if it is not proved to have been made before delivery.¹ Coke * says: [*556] "Of ancient time, if the deed appeared to be rased or interlined in places material, the judges adjudged, *upon their view*, the deed to be void. But of later times, the judges have left that to the jurors to try whether the rasing or interlining were before the delivery;"² while the court in Keble say, an interlineation, without any thing appearing against it, will be *presumed* to be at the time of the making the deed, and not after.³ But in Pennsylvania, the court in one case, in the language of McKean, C. J., say: "An interlineation, if made after the execution of a deed, will avoid it, though in an immaterial part: nor is it to be presumed to have been made before; the presumption is the contrary, unless proved."⁴

10. This subject is discussed by Mr. Greenleaf in his work on Evidence, and numerous cases are cited. The cases are also collected in the American edition of Smith's Leading Cases, cited below, to which the reader is referred.⁵ The modern doctrine, however, seems to be, that it would not be competent for the court, upon mere inspection of an instrument, to declare it void by reason of alterations or erasures apparent upon its face, nor for the jury to do so by mere inspection, and detecting that such alterations have been made; but that is a matter of evidence in which the presumptions are against the party holding and offering the instrument in evidence, and he is to be called on to explain them, as being exceedingly suspicious, especially if the alterations are found to be favorable to him on inspection of the whole instrument. Though, even in this respect, the rule is not uniform; that of the United States court seeming to be more stringent than that of many of the States. Thus, in *United States v. Linn*, the court remark: "But it is said, the law imposes upon the party who claims under the instrument the burden of explaining the alteration. This is the rule undoubtedly where the

¹ 1 Wood, Conv. 126; Perkins, §§ 125, 128; Shep. Touch. 55.

² Co. Lit. 225 b; Shep. Touch. 69.

³ *Trowell v. Castle*, 1 Kehle, 22.

⁴ *Morris v. Vanderen*, 1 Dall. 67.

⁵ 1 Greenl. Ev. § 564; 1 Smith, Lead. Cas., 5th Am. ed. 961 *et seq.*

alteration appears on the face of the instrument as an erasure, interlineation, and the like. In such case, the [*557] party * having the possession of the instrument, and claiming under it, ought to be called upon to explain it. It is presumed to have been done while in his possession."¹ But in Massachusetts the court say: "There is no such legal presumption (that the alterations were made before delivery). The burden is on the party offering the instrument to prove the genuineness of the instrument, and that the alterations apparent on the same were honestly and properly made. To what extent he shall be required to introduce evidence will depend upon the peculiar circumstances of each case. There is no presumption of law, either that the alterations and interlineations apparent on the face of the deed were made prior to the execution of the instrument, or that they were made subsequently: that question is to be settled by the jury upon all the evidence in the case."² The rule as given by the court of Missouri is perhaps as feasible as any: "As a general rule, if any presumption at all is indulged, the law will presume that the alteration was made before or at least contemporaneous with the signing of the writing, unless peculiar circumstances of suspicion are patent upon its face; and even then the whole question is one for the jury to settle upon the facts, when and where, and with what intent, the alteration was made."³

11. All writers agree that the only safe way in making such erasures or alterations is by noting them in some way upon the instrument itself, to show they were made before

¹ *United States v. Linn*, 1 How. 104; *Galland v. Jackman*, 26 Cal. 85, acc'dt.

² *Ely v. Ely*, 6 Gray, 439, 441. See *Hills v. Barnes*, 11 N. H. 395, rather favoring the rule of the United States court. *Knight v. Clements*, 8 A. & E. 215, favors the rule in Massachusetts. See also *Clifford v. Parker*, 2 Mann. & G. 909, which seems to incline to that of the United States court. *Wilde v. Armsby*, 6 Cush. 314, 318; *Wickes v. Caule*, 5 H. & J. 36; *Matthews v. Coalter*, 9 Mo. 705; *Beaman v. Russell*, 20 Vt. 205, — go to sustain the rule in Massachusetts. *Jackson v. Osborn*, 2 Wend. 555; *Herrick v. Malin*, 22 Wend. 388; *Waring v. Smyth*, 2 Barb. Ch. 133. See generally 1 Smith, Lead. Cas., 5th Am. ed. 962, 963; *Norwood v. Fairservice*, Quincy, 189; *Carpenter v. Fairservice*, Ib. 239; *Dow v. Jewell*, 18 N. H. 356, reaffirming *Hills v. Barnes*; *Comstock v. Smith*, 26 Mich. 306, 317.

³ *McCormick v. Fitzmorris*, 39 Mo. 34.

its delivery. The effect of such erasure or alteration is mainly important in respect to deeds which form the basis of an action, in which the authenticity of the instrument is necessary as a part of the legal proof; as where the grantee of land, with covenants, seeks to recover upon the covenants in his deed.¹

12. But where, by the making and delivery of the deed, the title passes, being, in effect, an act of conveyance, no subsequent alterations in the deed, or even its cancellation or destruction, will, of itself, defeat or divest the title which has once passed.² While it would not affect a title already acquired by it, such alteration would be fatal to an action brought upon the covenants in the deed.³ And it is said, that, if a deed were lost, equity might compel the grantor to give a new one.⁴ And if a deed of an incorporeal hereditament be lost, the grantor may supply the proof by parol evidence. But where one, holding a deed of a ground-rent, fraudulently altered or destroyed it, it was held that his claim and title were gone. He could not take advantage of his own wrong by introducing secondary evidence of the deed; and, without his deed, there would be no presumption of tenure implying any thing like a feudal liability for rent service.⁵ In one case, where a deed had been lost before being recorded, the court enjoined the heirs of the grantor, he being dead, from

¹ *Arrison v. Harmstead*, 2 Penn. St. 191; 1 *Smith*, Lead. Cas., 5th Am. ed. 960; *Davidson v. Cooper*, 11 M. & W. 800.

² *Arrison v. Harmstead*, 2 Penn. St. 191; *Miller v. Gilleland*, 19 Penn. St. 119, per *Gibson, J.*; *Davidson v. Cooper*, 11 M. & W. 800; *Shep. Touch. Prest.* ed. 69; *Leech v. Leech*, 2 Rep. in Chanc. 100; *Co. Lit.* 225 b, note, 136; *Com. Dig.*, Day's ed. *Fait*, F. 2, note; *Hatch v. Hatch*, 9 Mass. 367; *Jackson v. Chase*, 2 Johns. 84; *Bolton v. Carlisle*, 2 H. Bl. 263, 264; *Dana v. Newhall*, 13 Mass. 498; *Nicholson v. Halsey*, 1 Johns. Ch. 417; *Smith v. McGowan*, 3 Barb. 404; *Raynor v. Wilson*, 6 Hill, 469; *Schutt v. Large*, 6 Barb. 373; *Roe v. York*, 6 East, 86; *Miller v. Manwaring*, Cro. Car. 399; *Lewis v. Payn*, 8 Cow. 71; *Fletcher v. Mansur*, 5 Ind. 267, where grantee's Christian name was blank, and after the deed was delivered to him he inserted the name of his wife, it was held to be a void act, and to convey no title to her. *Vid.* 5 *Hurls. & N.* 94, Am. ed. note; *Chessman v. Whittemore*, 23 Pick. 231; *Rifener v. Bowman*, 53 Penn. St. 318; 1 *Greenl. Ev.* § 568; *Wood v. Hilderbrand*, 46 Mo. 284.

³ *Davidson v. Cooper*, 11 M. & W. 800; *Woods v. Hilderbrand*, 46 Mo. 284.

⁴ *King v. Gilson*, 32 Ill. 354.

⁵ *Wallace v. Harmstad*, 44 Penn. 492, 503.

conveying the estate, and passed a decree vesting the title of the estate in the purchaser.¹

[*558] * 13. The next requisite, in the order of Lord Coke, for a good deed, is a party competent to execute it, and thereby make a grant. There are but few persons who may not make a deed, which, either absolutely or qualifiedly, binds them. Many deeds, which, by the early law, would have been deemed void for want of capacity in the maker, are now held to be voidable only; the tendency in modern decisions being to regard a deed, if not absolutely binding, *voidable*, rather than *void*. Among those who formerly were held incapable of making a deed were infants, aliens, married women, and persons of non-sane memory; though, by an absurd rule of law, no man was admitted to stultify himself, and it was left for the heirs only of an insane man to avoid his deed.²

14. It may be laid down now as a general rule, that the deed of a *feme covert*, unless joined by her husband, or unless authorized by statute in respect to her sole property, is void;³ and for that reason, if, after becoming discovert, she again deliver a deed which she had delivered during coverture, it takes effect only from such second delivery.⁴

15. So a deed made by a person of non-sane mind, who has, for that cause, been placed under guardianship, will be void;⁵ and the same is true of the deed of a person under guardianship for incapacity to manage his affairs, though not in fact insane, even though done with the approbation of his guar-

¹ Shaumberg v. Wright, 39 Mo. 125.

² 1 Wood, Conv. 126, 138; Shep. Touch. 56; Den v. Clark, 2 Ired. 23, which states that the doctrine that a party may not stultify himself is wholly exploded. The law is the same in Tennessee. See Doe v. Dignowitty, 4 S. & M. 57; Dicken v. Johnson, 7 Ga. 484, for the degree of insanity which will avoid a deed.

³ Shep. Touch. Prest. ed. 56 and note; Zouch v. Parsons, 3 Burr. 1805; Perkins, § 154; 2 Bl. Com. 291, 292; Lefevre v. Murdock, Wright (Ohio), 205; Concord Bank v. Bellis, 10 Cush. 277; Lowell v. Daniels, 2 Gray, 161; Perrine v. Perriue, 3 Stockt. 144 (for the States where this rule is modified, see *ante*, vol. 1, *279); Cope v. Meeks, 3 Head, 388; Dow v. Jewell, 18 N. H. 355; Baxter v. Bodkin, 25 Ind. 172; Davis v. Andrews, 30 Vt. 681; Bressler v. Kent, 61 Ill. 426.

⁴ Goodright v. Straphan, Cowp. 201.

⁵ Wait v. Maxwell, 5 Pick. 217. See Pearl v. M'Dowell, 3 J. J. Marsh. 658.

dian.¹ But the deed of an idiot, or insane person not under guardianship, passes a seisin, and is only regarded as voidable, and not void.² While in New York and Pennsylvania the deed of a *non compos* is void, in New Jersey it is voidable only.³ And the acts and grants of infants and lunatics are regarded so far analogous to each other as to be governed by the same rules, and their deeds may be avoided as well against the grantees of their grantees as the grantees themselves.⁴ It is often very difficult to define what degree of capacity in a grantor is sufficient to enable him to give a valid and effectual deed. The subject is treated of in *Dennett v. Dennett*, where the court say: "The question, then, in all cases where incapacity to contract from defect of mind is alleged, is not whether a person's mind is impaired, nor if he is afflicted by any form of insanity, but whether the powers of his mind have been so far affected by his disease as to render him incapable of transacting business like that in question." "Weakness of understanding is not, of itself, any objection to the validity of a contract, if the capacity remains to see things in their true relations, and to form correct conclusions." "When it appears that a grantor has not strength of mind and reason to understand the nature and consequences of his act in making a deed, it may be avoided on the ground of insanity."⁵

* 16. So, as the law seems to have been settled [*559] since the case of *Zouch v. Parsons*, the deed of an infant, ordinarily, is not void, but merely voidable;⁶ although

¹ *Griswold v. Butler*, 3 Conn. 231.

² 2 Bl. Com. 291; *Wait v. Maxwell*, 5 Pick. 217; *Allis v. Billings*, 6 Met. 415; *Arnold v. Richmond Iron Works*, 1 Gray, 434; *Ingraham v. Baldwin*, 5 Seld. 45; *Breckenridge v. Ormsby*, 1 J. J. Marsh. 245; *Irvine v. Irvine*, 9 Wall. 626; *Howe v. Howe*, 99 Mass. 98.

³ *Van Deusen v. Sweet*, 51 N. Y. 384; *Matter of Desilver*, 5 Rawle, 111; *Eaton v. Eaton*, 8 Vroom.

⁴ *Hovey v. Hobson*, 53 Me. 451, 456; *Thompson v. Leach*, 3 Mod. 310; *Myers v. Sanders*, 7 Dana, 524; *Miles v. Lingerman*, 24 Ind. 387.

⁵ *Dennett v. Dennett*, 44 N. H. 538; *Doe v. Prettyman*, 1 Houst. 339.

⁶ *Zouch v. Parsons*, 8 Burr. 1794, 1805; *Perkins*, § 154; 2 Blackst. Comm. 291, 292; *Phillips v. Green*, 3 A. K. Marsh. 11, holding the deed of an infant *feme covert* voidable; *Tucker v. Moreland*, 10 Pet. 58; *Whitney v. Dutch*, 14 Mass. 457, 462; *Roof v. Stafford*, 7 Cow. 180; *Kendall v. Lawrence*, 22 Pick. 540; *Boston Bank v. Chamberlin*, 15 Mass. 220; *Breckenridge v. Ormsby*, 1 J. J.

Mr. Preston, in the *Touchstone*, insists that the decision of that case has not been generally followed; and the statement, in his note to the work, is, "Deeds executed by infants are sometimes void, and sometimes voidable."¹ The American cases, as a general thing, sustain the doctrine of the case of *Zouch v. Parsons*; and it is held, in several cases at least, that an infant, in order to avoid his deed, must do so within a reasonable time after coming of age."² But deeds, both of infants and *non compotes mentis*, may be ratified and established after coming of age, or being restored to reason, as the case may be. But the cases are not agreed as to what will, in any given case, amount to such a ratification. Their right of avoiding their deeds stands upon different ground from deeds obtained by fraud. In such cases, if the grantee in a fraudulent deed convey to an innocent purchaser, he holds by a good title; whereas, if they avoid their deeds, it defeats the title, even in a third person's hands. An insane person or infant need not restore the consideration before suing to recover back lands conveyed by him.³ But an infant cannot avoid a deed made by him while he remains an infant, nor can any one but himself or his heirs call the deed in question; and a second deed, made during his minority, is no disaffirmance of the first.⁴ What shall be deemed to be a ratification of a deed, after the grantor's disability is removed, is far from being a settled question. Courts have differed irreconcilably in this matter. Thus it was held to be a ratification that the tenant was suffered to occupy, cultivate, and enjoy the estate for six years.⁵ In another, doing this for nine years was held sufficient.⁶ In another case, an acquiescence for four years,

Marsh. 245; *Bool v. Mix*, 17 Wend. 119. Nor can he avoid it till he is of age: *quære*, how far silence may be construed to be a ratification of such a deed? See *Dearborn v. Eastman*, 4 N. H. 441; *Doe v. Abernathy*, 7 Blackf. 442; *Kline v. Beebe*, 6 Conn. 494; *Wheaton v. East*, 5 Yerg. 41; *Wallace v. Lewis*, 4 Harring. 75; *Drake v. Ramsey*, 5 Ohio, 252.

¹ *Shep. Touch. Prest. ed.* 7, 56, and notes; *Perkins*, § 12; *Co. Lit.* 380 b.

² 2 *Kent, Com.* 236; *Wallace v. Lewis*, 4 Harring. 75. See *Babcock v. Bowman*, 8 Ind. 110; *Richardson v. Boright*, 9 Vt. 368.

³ *Hovey v. Hobson*, 53 Me. 453, 457; *Gibson v. Soper*, 6 Gray, 279; *Cresinger v. Welch*, 15 Ohio, 156.

⁴ *Emmons v. Murray*, 16 N. H. 385.

⁵ *Emmons v. Murray, sup.*; *Robbins v. Eaton*, 10 N. H. 561.

⁶ *Jackson v. Carpenter*, 11 Johns. 539.

during which large improvements were made upon the premises without objection, was held to be a ratification.¹ It was held by the United States court that mere acquiescence by an infant, after coming of age, will not amount to an affirmance of a deed; yet there may be a ratification which will be an effectual affirmance, although it do not amount to as formal an act as is required to create a new title. And where the grantor, after coming of age, took a lease, as partner, of the land he had conveyed in his infancy, it was evidence from which a jury might find he intended to affirm his deed.² In Ohio, an entry suit or action, a subsequent conveyance, or any act unequivocally manifesting an intention to avoid a deed after coming of age, if done within the period of limitation of actions of ejectment, would disaffirm and avoid a deed made in infancy.³ In Vermont, it is held that the infant, if he would avoid his deed made in infancy, must do it within a reasonable time after coming of age.⁴ And in Connecticut, a neglect to disaffirm it within a reasonable time after coming of age is held to be sufficient evidence of ratification.⁵ In Missouri, a grantor, after coming of age, expressed himself satisfied with the sale, and promised to execute a confirmatory deed, but died before doing so, ten months after arriving at age. It was held to be a ratification.⁶ In New York, where a ward, whose lands had been sold by his guardian while a minor, lay by eighteen years without making objection to the sale, it was held to be an affirmance of it.⁷ Acquiescing thirteen years after arriving at age was held to confirm a sale made by an infant, although a female, and a part of the time under coverture, in Indiana.⁸ And the rule, as stated in Massachusetts, is, "Any distinct and decisive act of recognition as a valid and subsisting contract is competent evidence of a ratification of it: a new delivery of a deed would not be requisite, as it would be if the deed were void."⁹ On the other hand, it was held, in the following cases, that

¹ *Wallace v. Lewis*, 4 Harring. 76. See also *Wheaton v. East*, 5 Yerg. 41.

² *Irvine v. Irvine*, 9 Wall. 618.

³ *Drake v. Ramsey*, 5 Ohio, 253, 254.

⁴ *Richardson v. Boright*, 9 Vt. 371.

⁵ *Kline v. Beebe*, 6 Conn. 506.

⁶ *Ferguson v. Bell*, 17 Mo. 347.

⁷ *Bostwick v. Atkins*, 3 N. Y. 58.

⁸ *Hartman v. Kendal*, 4 Ind. 403.

⁹ *Howe v. Howe*, 99 Mass. 98.

mere silent acquiescence for any length of time short of the period of limitation would not ratify such a deed.¹ Though a deed made under the direct influence of an insane delusion would be invalid as a disposition of property, if, after becoming sane, the grantor were to accept the consideration for which he had made such deed, and this is done intelligently, it would be a ratification of the same.² One mode of disaffirming and avoiding a deed, after the disability of the grantor is removed, is by giving a new deed; and, if the same be recorded, no parol ratification of the first deed, subsequently made, can avail to give it precedence of the second deed.³ In some of the States, the deed of a married woman, if an infant, is void, although she join with her husband in executing it.⁴ In others it is voidable.⁵ And she may avoid it even against the grantee of the grantee named in her deed.⁶ She may disaffirm her grant even while yet an infant, and though her husband refuses to join in such disaffirmance. But her lying by, after coming of age, for ten years, she being still covert, was held not to be an affirmance of her deed, there having been no considerable improvements made upon the land in the mean time.⁷

17. The subject of the power of married women to make deeds deserves a more special notice. As already stated, the deed of a *feme covert* was, by the common law, void. Formerly, in England, she could only convey her lands by levying a fine, as it was called. But by the statute 3 and 4 Wm. IV., c. 74, she may now join with her husband in making a deed of her estate, she having acknowledged it to be her free act, after a privy examination before the proper officers.⁸ In this country, wherever the common law prevails, a

¹ *Hovey v. Hobson, sup.*; *Cresinger v. Welch*, 15 Ohio, 156.

² *Bond v. Bond*, 7 Allen, 1.

³ *Black v. Hills*, 36 Ill. 379; *Bond v. Bond*, 7 Allen, 1; *Jackson v. Burchin*, 14 Johns. 124; *Tucker v. Moreland*, 10 Peters, 75; *Jackson v. Carpenter*, 11 Johns. 541.

⁴ *Chandler v. McKinney*, 6 Mich. 217; *Adams v. Ross*, 1 Vroom, 513; *Schrader v. Decker*, 9 Penn. St. 14; *Cason v. Hubbard*, 38 Miss. 35. See *post*, 280, as to what is infancy in some States.

⁵ *Greenwood v. Coleman*, 34 Ala. 155.

⁶ *Miles v. Lingerman*, 24 Ind. 387; *Markham v. Merritt*, 7 How. (Miss.) 437.

⁷ *Miles v. Lingerman, sup.*

⁸ *Wms. Real Prop.* 188, 189.

separate deed by a *feme covert* is void, unless the same be authorized by some statute giving the power.¹ In Maine, a wife may convey her land as if she were unmarried, by virtue of a statute. The same is the law in Minnesota. And in England, it seems, in equity, a married woman has full power of alienation of her estate if held to her sole and separate use, free from control of her husband.² In equity, a wife may charge her separate estate. But separate estates mean equitable estates, created by deed, devise, or marriage settlement, where the character is impressed by the instrument creating it.³ But where the husband made a deed of land in right of his wife, which belonged to her, which was signed by her, and both acknowledged it, it was held not to convey her right. So, if they both join in conveying his right in an estate, it would not carry her separate estate in the premises, even though it contain covenants of title, since she is not bound by these, and is not estopped by them.⁴ Neither fines nor recoveries, as a mode of conveying the interests of married women in real estate, were ever in use in this country.⁵ The tendency of modern legislation in the States has been to clothe married women with a power, more or less qualified, to convey their separate estates as if they were sole. In Massachusetts, married women may make valid deeds to convey their estates, which will be effectual to all intents, except cutting off their husbands' rights by curtesy.⁶ In New York, a wife who owns land may dispose of it by deed or will; but if she do not, her husband will have curtesy.⁷ But unless executed according to the forms prescribed by statute, the

¹ *Lefevre v. Murdock*, Wright, Ohio, 205; *Harris v. Burton*, 4 Harring. 66; *Allen v. Hooper*, 50 Me. 374; *Hatch v. Bates*, 54 Me. 139; *Cope v. Meeks*, 3 Head, 388.

² *Brookings v. White*, 49 Me. 482; Minn. Rev. Stat. c. 86, § 2; *Hull v. Waterhouse*, 13 Am. L. Reg. 759, 760, and note.

³ *Bressler v. Kent*, 61 Ill. 426.

⁴ *Griffin v. Sheffield*, 38 Miss. 393; *Agricultural Bank v. Rice*, 4 How. (U. S.) 225.

⁵ *Durant v. Ritchie*, 4 Mason, 54; *Jackson v. Gilchrist*, 15 Johns. 115; *Albany Fire Ins. Co. v. Bay*, 4 Comst. 9; *Cope v. Meeks*, *sup.*

⁶ Stat. 1874, c. 184, § 1; *Beal v. Warren*, 2 Gray, 458; *Willard v. Eastham* 15 Gray, 334; *Campbell v. Bemis*, 16 Gray, 487.

⁷ *Hatfield v. Sneden*, 54 N. Y. 287; *Yale v. Dederer*, 22 N. Y. 460.

conveyance is void.¹ From an early period of her colonial history, it has been customary in Massachusetts for [*560] married women to convey their lands, or release * their interests in their husbands' lands, by joining with them in the execution of a deed in the common and usual form. Nor has it been deemed necessary for the wife to be examined separate and apart from her husband, when acknowledging the deed, in order to give it validity. This custom is expressly recognized and authorized by a provincial act of the legislature, and is incorporated into, and as a part of, the general statutes.² Whether, as some have supposed, the custom of married women conveying their lands by joining with their husband in a deed was borrowed from the usage above referred to or not, it has become the universal mode, in the several States where the common law prevails, for the conveyance of lands in which the wife is interested.³ The chief differences that are found between the systems of the different States consist in matters of form merely, and in the degree of stringency exercised in requiring an acknowledgment of the deed by the wife after a privy examination answering to what was required from her when joining in levying a fine at common law. In the matter, too, of her relinquishing her right of dower to the purchaser of her husband's estate, the law varies somewhat. In New Hampshire, Massachusetts, and Minnesota, she may do this by a separate deed, executed without her husband being joined.⁴

18. It would extend this subject disproportionately to attempt to give in detail the statute provisions and decisions of the several States in relation to it. A few only will [*561] be mentioned * by way of illustration. In Massachusetts, Maine, Minnesota, New Hampshire, and Con-

¹ *Morrison v. Wilson*, 13 Cal. 498; *Hepburn v. Dubois*, 12 Pet. 375; *Reaume v. Chambers*, 22 Mo. 36, 54.

² Opinion of Judge Trowbridge, 14 Am. Jur. 76; *Prov. Laws*, 308; *Mass. Gen. Stat. c. 108, § 2*; *Fowler v. Shearer*, 7 Mass. 14; *Plymouth Col. Laws*, 86. A similar custom prevailed in Pennsylvania from its first settlement. *Davey v. Turner*, 1 Dall. 11. See *Jackson v. Gilchrist*, 15 Johns. 110; *Lithgow v. Kavanaugh*, 9 Mass. 161, 172.

³ *Gordon v. Haywood*, 2 N. H. 402; 4 Kent, Com. 152, 154.

⁴ *Shepherd v. Howard*, 2 N. H. 507; *Mass. Gen. Stat. c. 90, § 8*; *Minn. Rev. Stat. c. 86, § 12*.

necticut,¹ it is sufficient that the wife acknowledged the deed without any privy or separate examination. But in most of the States, her personal examination, separate and apart from her husband, must be made by a prescribed officer, in order to his certifying her acknowledgment. In Ohio, not only must this be done, but it must appear in the certificate of the magistrate, in order to the deed being valid.² In Kentucky, there must be this examination; and the deed must, moreover, be recorded within eight months in order to be effectual.³ In North Carolina and Illinois, without this examination and acknowledgment, the wife's deed is utterly void;⁴ and the certificate, moreover, of the officer taking the acknowledgment, must show that the wife knew the contents of the deed, that she was known to the officer, and that she freely and voluntarily executed it.⁵ In Alabama, she may join title with her husband; or, if his deed is already recorded, she may make a separate deed, which, however, in order to pass her interest, must be acknowledged after a privy examination, of which there is to be a certificate and record.⁶ In Arkansas, both husband and wife must join, and her examination must be separate.⁷ So in California.⁸ And this can only be shown by the certificate of the officer taking the acknowledgment, which must conform to the statute requirement.⁹ In Delaware, a like rule prevails, except that her deed thus executed may be valid, though not recorded.¹⁰ In Florida, a wife may relinquish her dower by a

¹ 4 Greenl. Cruise, Dig. 19, note; *Lawver v. Slingerland*, 11 Minn. 458.

² Walk. Am. Law, 356. See *Doe v. Fridge*, 3 McLean, 245; *Barton v. Morris*, 5 Ohio, 408.

³ *Applegate v. Gracy*, 9 Dana, 214.

⁴ *Askew v. Daniel*, 5 Ired. Eq. 321; *Mariner v. Saunders*, 5 Gilm. 113; *Garrett v. Moss*, 22 Ill. 363.

⁵ *Lyon v. Kain*, 36 Ill. 370.

⁶ *Thornt. Conv.* 69. See *Dundas v. Hitchcock*, 12 How. 256.

⁷ *Thornt. Conv.* 83; *Elliott v. Pearce*, 20 Ark. 508.

⁸ *Wood*, Dig. Cal. Laws, 100; *Bours v. Zachariah*, 11 Cal. 281, 291. Not only must the acknowledgment be certified by the proper officer, and recorded, but, after such record, he cannot amend his certificate. It is sufficient if the wife executes the deed in proper form, and the husband assents to the same in writing upon the deed, though he do not join in its execution. *Ingoldsby v. Juan*, 12 Cal. 564.

⁹ *Landers v. Bolton*, 26 Cal. 408.

¹⁰ *Thornt. Conv.* 118.

separate deed from that of the husband, upon her making an acknowledgment thereof upon a privy examination; but she must join with him in conveying her own inheritance.¹ In

Illinois, she may, if eighteen years of age, grant her [*562] lands, or release her dower, by joining in * a deed with her husband, and acknowledging the same upon a privy examination.² The same is the law in Indiana and Iowa.³ The law of Virginia requires her to join with her husband, to be privily examined when acknowledging the deed, and her examination to be recorded.⁴ In Vermont, with similar provisions, it was not requisite to have the deed and certificate recorded in order to give effect to it; and now a separate examination of the wife is not required.⁵ It seems, that, in New York, the deed of a married woman may be good, although her husband do not join with her in making it, if she is examined separate and apart, and acknowledges the same, in analogy to the common-law power in a married woman to levy a fine. This was held by a divided court in the case of *Albany Fire Ins. Co. v. Bay*, decided in 1850.⁶ An unacknowledged deed of a *feme covert* passes no estate whatever.⁷

It is not deemed advisable to extend this examination, as, for whatever the reader might desire to know of the precise details of the law of any State upon the subject, he would still find it necessary to recur to statutes and decisions of such State for a safe or reliable guide.

¹ Thornt. Conv. 132, 133.

² *Lyon v. Kane*, 36 Ill. 370. But if under age, it must be executed within the State. *Hoyt v. Swar*, 53 Ill. 139.

³ Thornt. Conv. 189, 213; *Scott v. Purcell*, 7 Blackf. 66; 1 Ind. Rev. Stat. 264.

⁴ Thornt. Conv. 532, 533.

⁵ Thornt. Conv. 518; 2 Kent, Com. 8th ed. 151, note, citing Vt. Laws, 1851, p. 29; 1862, p. 448.

⁶ *Albany Fire Insurance Co. v. Bay*, 4 Comst. 9; s. c. 4 Barb. 407; Willard, Real Est. 392. See also 4 Greenl. Cruise, Dig. 18, note; 2 Kent, Com. 150-154. The work of Mr. Thornton, having been compared with the statutes referred to therein, is cited instead of the statutes themselves, as a matter of convenience to the reader. The reader will also find the rights of married women, in respect to interests in lands owned by them, considered, in a recent and elaborate treatise upon the legal and equitable rights of married women, with an abstract of the statutes of several of the States upon the subject, by Wm. H. Cord, Esq. See also 1 Bishop, Married Women, c. 26.

⁷ *Elwood v. Black*, 13 Barb. 50.

19. It seems that if a husband abjures the realm, as it is called, that is, remains out of the State, renouncing his connection with his wife, and residing abroad with an intention to * remain, and abandon his country, it gives [*563] the wife a capacity to act as a *feme sole* in respect to her own estate.¹

20. In respect to the form in which the wife must join with her husband in order to pass her estate by deed, it seems to be requisite that the deed should either contain proper words of grant, or declare the purposes for which she affixes her hand and seal. Thus a deed signed by a wife with her husband, without mentioning her therein as intending to grant or release any thing, was held to be wholly inoperative as to her. The usual recital at the close of the clause in the deed, declaring the grantor's purpose in signing the same, — such as, “And A B, wife of said grantor, in token of relinquishing her right of dower in the premises,” — would, if executed, be a sufficient release of dower, but would not pass her own estate without words of grant on her part.² If the land granted be hers, she must be joined with him in the operative words of the deed ;³ in which case the grant will be effectual, though the husband be an alien.⁴ And in New Hampshire and Mississippi, where the deed was of the wife's land, and made in her name, and signed by her as grantor, and was simply executed by the husband by annexing his signature and seal thereto and acknowledging the same, it was held to be a valid conveyance of her interest.⁵ So, under the Gen. Stat. of Massachusetts,

¹ 4 Greenl. Cruise, Dig. 20, and note; *Gregory v. Pierce*, 4 Met. 478; *Abbot v. Bayley*, 6 Pick. 89; *Boyce v. Owens*, 1 Hill (S. C.), 8.

² *Stearns v. Swift*, 8 Pick. 532; *Melvin v. Proprs. Locks and Canals*, 16 Pick. 137; *Lufkin v. Curtis*, 13 Mass. 223; *Bruce v. Wood*, 1 Met. 542; *Catlin v. Ware*, 9 Mass. 218; *Learned v. Cutler*, 18 Pick. 9; *Lithgow v. Kavenagh*, 9 Mass. 161; *Frost v. Deering*, 21 Me. 156; *Cox v. Wells*, 7 Blackf. 410; *Purcell v. Goshorn*, 17 Ohio, 105; *Dundas v. Hitchcock*, 12 How. 256; *Raymond v. Holden*, 2 Cush. 264; *Agricultural Bank v. Rice*, 4 How. 225; *Cincinnati v. Newhall*, 7 Ohio St. 37.

³ *Lithgow v. Kavenagh*, 9 Mass. 173; *Purcell v. Goshorn*, 17 Ohio, 105; *Dodge v. Nichols*, 5 Allen, 548; *Bartlett v. Bartlett*, 4 Allen, 440.

⁴ *Whiting v. Stevens*, 4 Conn. 44; *Agricultural Bank v. Rice*, 4 How. 225.

⁵ *Elliot v. Sleeper*, 2 N. H. 525; *Woodward v. Seaver*, 38 N. H. 29; *Stone v. Montgomery*, 35 Miss. 83. See also *Ingoldsby v. Juan*, 12 Cal. 564; *ante*, p. *561, n. as to California.

c. 108, § 3, a deed by a wife, of her estate, in her name, in the *testimonium* clause only of which the husband joined, and both executed it, was held to be a sufficient joining in the deed to make it effectual.¹ But where, in a deed of a wife's land, to which the husband was a party, there was a right of way over the husband's land appurtenant to hers mentioned in the deed, and a clause was inserted, "We convey all our right and title to said way," it was held to pass, on his part, the soil and freehold of the way, and on hers the easement of way.² It is sufficient in Massachusetts that the husband alone acknowledge the deed.³ But in Kentucky, a deed by husband and wife of the wife's estate is inoperative as to her altogether, unless she shall have acknowledged the same.⁴ In several of the States there are provisions, whereby married [*564] women may convey their *estates where their husbands have deserted them, or are incapable of executing deeds, or have been committed to the State prison.⁵

21. It is laid down unqualifiedly, in some of the States, that a married woman cannot make a valid power of attorney, even jointly with her husband, to make a deed of her interest.⁶ But it is difficult to perceive any reason for the rule where she can do the principal thing herself; and such a right is clearly recognized by statute in Massachusetts.⁷ A similar right is also recognized by statute in New York.⁸ In Delaware, she cannot execute a deed by attorney, although she was privately examined when she made and acknowledged the power.⁹ In Indiana, though the courts hold that she could not acknowl-

¹ Hills v. Barse, 9 Allen, 406.

² Needham v. Judson, 101 Mass. 161.

³ Catlin v. Ware, 9 Mass. 210.

⁴ McCann v. Edwards, 6 B. Mon. 208.

⁵ 4 Greenl. Cruise, 19, note.

⁶ Earle v. Earle, 1 Spence, 347; Sumner v. Conant, 10 Vt. 9; Kearney v. Macomb, 1 C. E. Green (N. Jersey), 189. It is said in Hardenburg v. Larkin, 47 N. Y. 113, that a married woman could not make a power of attorney, and Bacon, Abr. Attorney, B, is cited; and the power to do so was created by statute. It is said by Field, J., in Holladay v. Daily, "In most of the States a married woman cannot, in the absence of statutory authority, execute, either alone or in company with her husband, a valid power of attorney to convey her interest in real property." 19 Wall. 609.

⁷ Mass. Gen. Stat. c. 89, § 29. So in New York, Willard, Real Est. 269. See Koch v. Briggs, 14 Cal. 262. See Roarty v. Mitchell, 7 Gray, 243; ante, vol. 1, p. *201.

⁸ Willard, Real Est. 269.

⁹ Lewis v. Coxe, 5 Harring. 401.

edge a deed by attorney, they waive the question, whether she can, in connection with her husband, create an attorney with power to convey her land.¹ In a case in Iowa, upon a similar state of facts, no question was made as to the validity of such a power; and in a case in the United States court from Iowa, the court assume a deed as a valid one which was executed by a *feme covert*, a trustee, by her attorney.² In Wisconsin, she may, by statute, make an attorney, and may even constitute her husband as such.³ In Maine, the court seem to assume that she cannot make an attorney; though the case on which the opinion rests does not seem to warrant such a conclusion.⁴ By a recent statute in California, she may make an attorney, if her husband joins in the appointment; but, unless he does, it will be void. But, in executing it, it is doubtful if the attorney would have to sign the husband's name as well as the wife's.⁵ It seems to be well settled, that if a *feme sole* create an attorney, and then marry, it will revoke such power.⁶ Nor can a *feme covert* join with the attorney of her husband in executing a deed of her land, so as effectually to pass her title to the same.⁷

22. Although a married woman cannot convey directly to her husband, there does not seem to be any difficulty in her doing so by means of a conveyance to his use, if her husband join with her in the deed. Thus, where a husband and wife conveyed the wife's land to J. S., to the use of the husband and wife, their heirs and assigns, and the heirs and assigns of the longest liver of them, it was held to be a good feofment to their use as joint-tenants, and that the statute would execute the seisin in them accordingly.⁸ The wife may also do this by joining with her husband in a deed to a third person, and having a deed from such grantee made to the husband.⁹

¹ Dawson v. Shirley, 6 Blackf. 531.

² Wilkinson v. Getty, 13 Iowa, 137; Gridley v. Wynant, 23 How. 503.

³ Rev. Stat. c. 86; Weisbrod v. Chicago & N. W. Railroad, 18 Wis. 41.

⁴ Allen v. Hooper, 50 Me. 373, citing Whitmore v. Delano, 6 N. H. 543.

⁵ Dow v. Gould, 31 Cal. 646; Dentzel v. Waldie, 30 Cal. 145, 150.

⁶ Judson v. Sierra, 22 Texas, 365, 371; 2 Kent, Com. 645.

⁷ Toulmin v. Heidelberg, 32 Miss. 268.

⁸ Thatcher v. Omans, 3 Pick. 521.

⁹ Meriam v. Harsen, 2 Barb. Ch. 267 Jackson v Stevens, 16 Johns. 110
Trelld v. Wickliffe, 18 B. Mon. 866.

23. And, though perhaps not necessarily a part of the subject under consideration, it may be stated as a general proposition, that, although competent to join with her husband in executing a conveyance of her land, her covenants of warranty and of title, though in the same deed, are not binding upon her.¹ But her conveyance operates, nevertheless, to estop her as to the title thereby granted.²

24. Aliens, too, are embraced in the Touchstone, in the category of persons who cannot convey lands. But it [*565] seems to be * well settled, that, even at common law, an alien may purchase and hold land against all the world but the king, and may, with the same limitation, convey the same.³ And this disability is wholly removed in many of the States by statute.⁴

24 *a*. If one is induced, by the fraud of the grantee, to execute a deed, it is voidable, but not void. The grantor may, by restoring the consideration, rescind the contract, if done within a reasonable time after discovering the fraud, but not otherwise.⁵

25. If one makes a deed under duress of imprisonment, or fear from threats of personal injury, it is a voidable, but not a void, instrument.⁶ To constitute such a duress as will avoid a deed, there must be an apprehension of the loss of life or limb, or personal liberty. The fear of a battery, or having one's house burned, is not sufficient. Mere threatening a lawsuit is no duress.⁷ But in Minnesota, a wife was admitted to

¹ *Jackson v. Vanderheyden*, 17 Johns. 167; *Grout v. Townsend*, 2 Hill, 554. By statute, she may bind herself by covenants in a deed made jointly with her husband. *New Jersey, Pentz v. Simonson*, 13 N. J. 234. Only bound by way of estoppel in Tennessee. *Fletcher v. Coleman*, 2 Head, 384; *Perkins v. Richardson*, 11 Allen, 539. She is not bound in Vermont. Stat. 1862, p. 448.

² *Doane v. Willcut*, 5 Gray, 328, 332; *Colcord v. Swan*, 7 Mass. 291. But not as to any title subsequently acquired by her. *Schaffner v. Grutzmacher*, 6 Iowa, 137.

³ 2 Bl. Com. 293; *Shep. Touch.* 56; *Burk v. Brown*, 2 Atk. 399; 1 Wood, Conv. 138.

⁴ *Ante*, vol. 1, pp. *48, *49.

⁵ *Bassett v. Brown*, 105 Mass. 551.

⁶ 2 Bl. Com. 291, 292; *Worcester v. Eaton*, 13 Mass. 371; *Deputy v. Stapleford*, 19 Cal. 302; *Fisk v. Stubbs*, 30 Ala. 335, deed of wife set aside, which she executed under threat of husband.

⁷ *Evans v. Gale*, 18 N. H. 401.

show that she signed a deed under threats of her husband that he would abandon her if she did not do it, and would not support her; and thereby she was allowed to avoid her deed. Threats of personal injury would not be requisite.¹ The cases, however, do not agree upon the measure of intimidation which would avoid a deed. The civil law required that it should be such as is capable of making an impression upon a person of courage only. Pothier says regard should be had to the age, sex, and condition of the parties. In New York, it was held that a deed obtained from a wife by threats of a criminal prosecution against her husband, and of arresting and imprisoning him upon such a charge, by which she was greatly excited and alarmed, might be avoided.² The United States court state the rule thus: "Unlawful duress is a good defence, if it includes such a degree of constraint or danger, either actually inflicted or threatened and impending, as is sufficient in severity or apprehension to overcome the mind and will of a person of ordinary firmness."³ But a writer in the American Law Register insists that this rule is too restricted, and that each case should rest upon its own merits.⁴

25 *a*. There is a qualified disability to convey lands, on the part of joint-tenants and tenants in common, which it is proper to notice in this connection. As each owner, in such a case, is seised of an undivided share of every part, and has, moreover, as an incident to such an ownership, a right to have his own share set out from every other share by a process of partition, neither owner can convey his interest in any particular part of the common estate, if objected to by his co-tenant; for, if he may do so as to one, he may do so to an indefinite number, and thereby compel his co-tenant to become tenant in common of these several parcels with these several grantees, and to have a separate process of partition with each of these owners, thereby greatly reducing the value of his estate. Such a conveyance of the personal interest of a tenant, however, would be good as to all persons except his co-tenants, and, if not objected to by them, will be valid and

¹ Topley v. Topley, 10 Minn. 460.

² Eadie v. Slimmon, 26 N. Y. 12, 14.

³ United States v. Huckabee, 16 Wall. 432.

⁴ 28 Am. L. Reg. 206.

effectual to all intents. In some of the States, a different rule prevails, as may be seen by reference to a former part of this work, where the whole subject is treated of.¹ And in one other respect, such joint-tenant or tenant in common cannot, by his separate deed, affect the joint property belonging to him and his co-tenant; and that is by creating thereby a servitude upon the common property in favor of a stranger. A grant to that effect would be void so far as the rights of his co-tenant were concerned.² Nor can one of several trustees, in other than charity or public trusts, convey a separate or aliquot part of the estate held in trust. Such deed would be void.³ In respect to the right of one of several partners to convey partnership lands by a deed in the name of the company, but executed by himself alone, the common law seems to be clear, that it can only affect his own share and interest in such land, and will not pass the interest of his partners. Nor will any ratification subsequently made by them give effect to the deed, unless it be by an instrument of as high a nature as the deed itself.⁴ But the court of Iowa were inclined to regard a parol ratification, in such a case, as giving effect to the deed as to those who thus ratify it.⁵ It is hardly necessary to add, that corporations authorized to hold real estate are competent to convey the same; but, in so doing, they must conform to the mode pointed out by their charter and by-laws. It must be the act and deed of the corporation as an entity. A deed signed by every individual member of a corporation would not convey the corporate right or title to land.⁶ And it is laid down unqualifiedly, that, if a railroad

¹ *Ante*, vol. 1, p. *417; *Great Falls Co. v. Worster*, 15 N. H. 449; *Whitton v. Whitton*, 38 N. H. 127; *Smith v. Benson*, 9 Vt. 138; *McKey v. Welch*, 22 Texas, 390; *Porter v. Hill*, 9 Mass. 34; *Blossom v. Brightman*, 21 Pick. 284; *Phillips v. Tudor*, 10 Gray, 78; *Campau v. Godfrey*, 18 Mich. 27; *Butler v. Roys*, 25 Mich. 53; *Good v. Coombs*, 28 Texas, 51.

² *Collins v. Prentice*, 15 Conn. 423; *Marshall v. Trumbull*, 28 Conn. 183; *Wash. Easements*, 3d ed. 41.

³ *Chapin v. First Universalist Soc., &c.*, 8 Gray, 583.

⁴ *Story*, Part. §§ 119, 121; *Gow*, Part. 75, 76; *Parsons*, Part. 369.

⁵ *Haynes v. Seachrest*, 13 Iowa, 455.

⁶ *Wheelock v. Moulton*, 15 Vt. 519; *Pratt v. Bacon*, 10 Pick. 123; *Ang. & Ames, Corp.* § 221.

corporation acquire land by deed granting a fee, it may convey the same by deed.¹

26. The next requisite of a good deed named is, that it should contain the name of the grantor; and, as it is equally important that it should contain the name of the grantee, these will be considered together.

The object of names being merely to distinguish one person from another, it seems to be sufficient if this is effected, though the true name of the party be not used, or even no name at all. The general principle of law is, *id certum est quod certum reddi potest*; and a man may be described by his office or his relationship to a known person.² A deed to A or his heirs is good, because, if A is alive, he has no heirs; and, if dead, his heirs can be ascertained *aliunde*.³ So a deed to "A, B, and others, heirs of E F," is a good deed to all who answer to that description, though not named.⁴ A deed with the name *Edward* written in it as grantor, but signed *Edmond*, and acknowledged in the name of *Edward*, was held to be a good deed of Edward, who, at its date, was the owner of the estate.⁵ But a deed naming Hiram as grantor, and acknowledged, as appears by the certificate, by Hiram, but signed by Harmon, if unexplained, will not be considered as executed by the grantor.⁶ Where several persons were named as grantors in the deed, and one who was interested in the estate, but not named in the deed, signed it with the others, it was held not to be his deed or to bind him.⁷ Where an estate is given expressly in trust for some person or corporation, there is the same necessity of inserting the name of the *cestui que trust* as if the grant was intended to be to him.

¹ *Yates v. Van de Bogert*, 56 N. Y. 530.

² *Broom*, Max. 482; 1 *Wood*, Conv. 160, 164, 171; Co. Lit. 3 a; *Perkins*, §§ 36, 54, 55; *Dr. Ayray's case*, 11 Rep. 20, 21; *Counden v. Clerke*, Hob. 32 a; *Sir Moyle Finch's case*, 6 Rep. 65; *Hoffman v. Porter*, 2 Brock. 156, where a deed to P. H. & Son, they being partners, was held good to both; *Morse v. Carpenter*, 19 Vt. 613; *contra*, *Arthur v. Weston*, 22 Mo. 378, impugning *Hoffman v. Porter*; *Shaw v. Loud*, 12 Mass. 447; one "to heirs of A B" was held good, he being dead; *Boone v. Moore*, 14 Mo. 420.

³ *Ready v. Kearsley*, 14 Mich. 225; *Hogan v. Page*, 2 Wall. U. S. 607.

⁴ *Cook v. Sinnamon*, 47 Ill. 214.

⁵ *Middleton v. Findla*, 25 Cal. 80; *Tustin v. Faught*, 23 Cal. 237.

⁶ *Boothroyd v. Engles*, 23 Mich. 21.

⁷ *Peabody v. Hewett*, 52 Me. 50.

Thus a grant to A, B, and C, *trustees* of an unincorporated association, was held to be void, there being no such *cestui que trust* known to the law.¹ But a deed to A, B, and C, as officers of an unincorporated association, conveyed the estate to them. They alone can convey it, and the members of the association have no control over it.² And, in the following cases, a grant to A, B, and C, trustees of a society named, their heirs, &c., was held to be a grant to them individually.³ So a deed to the selectmen or overseers of the poor of a town, and their successors, is to them individually.⁴ A deed to L. B. and Company vests the estate in L. B. alone.⁵ But the partner named would, it seems, hold in trust for his co-partner as well as himself.⁶ If the intended grantee be not named, he should be ascertained by description, so as to be distinguished from all others; and any uncertainty in this respect will render the grant void. Thus a grant to the inhabitants of a neighborhood which is not defined with certainty and ascertained limits would be void; but if made to the inhabitants of a certain defined district who are not incorporated, and their successors, the same may create in the then actual residents there a life-estate in the thing granted, but nothing passes to their successors who may thereafter reside there.⁷ And where the Christian name of the grantee was left blank in a deed, it was held competent for him to show who was intended by proof *aliunde*, he being in possession of the deed.⁸ In the case before cited of *Morse v. Carpenter*, the deed was to M. & H., who were partners, but their surnames were omitted.⁹ And this applies also to corporations.¹⁰ Thus a grant to a corporation which has never been created or organized would be void for want of a grantee. It

¹ *German Association v. Scholler*, 10 Minn. 331.

² *Austin v. Shaw*, 10 Allen, 552.

³ *Towar v. Hale*, 46 Barb. 361; *Den v. Hay*, 1 Zab. 174; *Brown v. Combs*, 5 Dutch. 86.

⁴ *Norton v. Leonard*, 12 Pick. 158; *Newhall v. Wheeler*, 7 Mass. R. 189.

⁵ *Winter v. Stock*, 29 Cal. 411; *Gossett v. Kent*, 19 Ark. 607; *post*, *568.

⁶ *Arthur v. Weston*, *sup.*; *Jackson v. Sisson*, 2 Johns. Cas. 321; *Beaman v. Whitney*, 20 Me. 420.

⁷ *Thomas v. Marshfield*, 10 Pick. 367, 363.

⁸ *Fletcher v. Mansur*, 5 Ind. 269.

⁹ 19 Vt. 615.

¹⁰ *Dr. Ayray's case*, 11 Rep. 21.

might be different if the defect consisted simply in organizing the corporation.¹ It is sufficient if the person be described by the character ascribed to him by general repute, though this be not accurate in point of facts; as a grant to the wife of B, where the person intended to be designated lives with him, and is generally reputed his wife, though never lawfully married to him. So the name by which a man is habitually called is sufficient, though different from that of his baptism.² So calling the party the *senior*, when the *junior* of the same name, or *vice versa*, is intended.³ But a deed to a fictitious person would be simply * void.⁴ A grant by [*566] or to a person by a surname only, without something in the deed to show who is intended, would be void for uncertainty.⁵ And it may be laid down as a rule, that a grant, to be valid, must be to a corporation or some person certain named, who can take by force of the grant, and who can hold either in his own right or as a trustee.⁶

27. And if a man execute a deed, calling himself therein a certain name, he will not be admitted to take advantage of the fact that it is not his true name.⁷ So where there was a mistake in the names of lessees, and they enter under it, though they do not sign it, they would be estopped to deny that they were rightly named in the lease.⁸

28. The law knows but one Christian name; and the omission of a middle name, or its initial, does not affect the execution of a deed.⁹ So it is immaterial that there is a mistake in the Christian name, if the deed explains who is intended. A deed to Robert, Bishop of E., will be good, though his real name is Roland.¹⁰

¹ *Harriman v. Southam*, 16 Ind. 190; *Russell v. Topping*, 5 McLean, 202; *Jones v. Cincinnati Type Foundry*, 14 Ind. 89.

² *Counten v. Clerke*, Hob. 32 a; *Sir Moyle Finch's case*, 6 Rep. 65; 1 Wood, Conv. 160, 161.

³ 1 Wood, Conv. 161; *Perkins*, § 37.

⁴ *Muskingum Turnpike v. Ward*, 13 Ohio, 120.

⁵ 1 Wood, Conv. 162; *Shep. Touch.* 53; *Fanshaw's case*, F. Moore, 229.

⁶ *Jackson v. Corey*, 8 Johns. 388; *Hornbeck v. Westbrook*, 9 Johns. 74.

⁷ *Com. Dig. Fait*, B. 1.

⁸ *Felton v. Hamilton*, 6 Nevada, 196.

⁹ *Games v. Stiles*, 14 Pet. 322; *Franklin v. Talmadge*, 5 Johns. 84; *Dunn v. Games*, 1 McLean, 321.

¹⁰ 1 Wood, Conv. 172; *Perkins*, § 36.

29. But the deed itself must not create the uncertainty as to who is the grantee intended; as, if a grant be made to A B or C D, it would be void as to both.¹

30. So no person can take under a deed where the grant purports to be of a present estate, unless he is named in the deed as a party to it; though a remainder may be limited to one who is not a party to the deed, or even a person *in esse*.² And a deed to a person not then living, and his heirs, would be void, since, the word "heirs" being a word of *limitation*, and not of *purchase*, there is no person to take under it.³

31. It was once thought that the grantor should be named as such in the deed. But this does not seem to be necessary if the grantor signs it. Thus, where a deed purported to be that of a married woman, her name only appearing as grantor, but it was signed by her and her husband, who acknowledged it, it was held to be a good grant of the husband as well as the wife.⁴

32. There must be a person *in esse* to give as well as to receive a conveyance, in order to make a deed of an [*567] immediate * estate, by or to such person, good.⁵ And if there is any reasonable doubt of such person being *in esse* at the time of the delivery of the deed, it must be affirmatively shown that he was so, in order to give the deed validity.⁶

33. This principle does not apply to remainders, provided there is some ascertained person *in esse* to take the immediate particular estate which is to sustain the remainder till the person who is to take shall come *in esse*. But if the grant, *in præsenti*, be to a person not *in esse*, or not ascertained, and a remainder be limited to another not *in esse*, both will be void.⁷ So a grant *in præsenti* to the oldest son of J. S., who has no son when the deed is delivered, derives no validity from the subsequent birth of a son to J. S.⁸ So a deed to the heirs of

¹ 1 Wood, Conv. 171.

² Hornbeck v. Westbrook, 9 Johns. 73. ³ Hunter v. Watson, 12 Cal. 368.

⁴ Elliot v. Sleeper, 2 N. H. 525; Perkins, § 36; Co. Lit. 6 a; Lord Say and Seal's case, 10 Mod. 46. But see Catlin v. Ware, 9 Mass. 218.

⁵ 1 Wood, Conv. 161, 170; Miller v. Chittenden, 2 Iowa, 368. See also the same case as to how far grants to charitable uses form exceptions to this rule.

⁶ Hulick v. Scovil, 4 Ill. 191.

⁷ 1 Wood, Conv. 170, 172; Perkins, § 53.

⁸ 1 Wood, Conv. 170.

J. S., who is alive, would be void ;¹ unless there is something in the deed itself which shows that by "the heirs" was meant *the children* of the person named, when the grant may be good. But the court limit this to that of which livery may be made, and do not extend it to incorporeal hereditaments.²

34. The capacity to take as grantee is much less restricted than that required to make a grant. Persons *non compotes mentis*, married women, infants, corporations, and bodies politic, may take as grantees.³

35. There are, and from an early date have been, statutes in England, called those against mortmain, which prohibit corporations, without special authority, to hold lands. But, with the exception of Pennsylvania, it is believed that similar statutes have not been adopted in this country. It is usual, however, to insert a clause in acts creating corporations, limiting the amount of estate which they may hold. But if a corporation exceeds this prescribed amount by an original purchase, nobody but the State can interfere with its holding the property thus acquired ; and if its property, by its rise in value, comes to exceed the amount prescribed in its charter, its title will not thereby be impaired.⁴ And if a deed be made to several as * tenants in common, a part only of whom are [*568] competent to take by the deed, it will be good as to their respective shares to such as are competent, though void as to the others.⁵ A conveyance to "S. L. and Company" would vest the legal title in S. L. individually, but clothed with a trust for the benefit of the partnership of which he is a member.⁶ The subject of what may be granted, and by what words it shall be done, will be more properly noticed in another part of this chapter ; and, so far as the formal parts of a

¹ *Hall v. Leonard*, 1 Pick. 27 ; *Morris v. Stephens*, 46 Penn. St. 200.

² *Huss v. Stephens*, 51 Penn. St. 282. See *Lisle v. Gray*, 2 Levinz, 223.

³ 1 Wood, Conv. 165, 169 ; Perkins, § 51 ; Co. Lit. 2 b, 3 b. See *Sutton v. Cole*, 3 Pick. 332 ; *Concord Bank v. Bellis*, 10 Cush. 278 ; *vid. post*, p. *583, as to effect of husband dissenting to wife accepting deed, and *Doug. 452* ; *Melvin v. Prop., &c.*, 16 Pick. 167.

⁴ Kent, Com. 282, 283 ; *Bogardus v. Trinity Church*, 4 Sandf. Ch. 633, where, from £30 income per year, the property had grown to \$300,000 per annum.

⁵ *Shep. Touch. Prest. ed.* 71. See *Chamberlain v. Bussey*, 5 Me. 164.

⁶ *Moreau v. Safferans*, 3 Sneed, 595 ; *ante*, p. *565.

deed are concerned, it remains only to speak of what is necessary to its proper execution. This, as stated by Lord Coke, consists of *sealing* and *delivery*. And this was all that was required by the common law; though it was always deemed desirable that the deed should be signed, and the signature accompanied by the attestation of witnesses, both of which are specially required by the statutes of several of the States.

SECTION II.

EXECUTION OF DEEDS.

1. Mode of executing deeds among the Saxons, &c.
2. Signing unnecessary in deeds at common law.
3. How far signing is necessary in this country.
4. Sealing indispensable at common law.
5. Affixing a seal makes a deed.
6. Immaterial who affixes the seal.
7. Of sealing and executing deeds by corporations.
- 8, 9. What is a seal by the laws of different States.
- 10, 11. Of witnesses and attestation of deeds.
- 12, 13. Of the execution of deeds by attorney.
14. Public agents may use their own seals.
15. Of the requisite power by which an attorney acts.
16. Of certificate of payment of consideration.
17. Of the reading requisite to make a valid deed.
18. What a grantor is presumed to know of the deed.
19. Of the date of a deed.
- 20, 21. Of the delivery of a deed, — essential to its effect.
- 20 a. What amounts to a delivery of a deed.
22. A second delivery of no effect.
23. Deeds take effect from delivery, irrespective of date.
24. Deeds must have been executed to have their delivery good.
25. What will be the delivery of a deed.
26. Of delivery of a deed by a corporation.
- 27, 28. Of delivering deeds through the agency of others.
- 29, 30. Delivery not effectual till known and assented to by grantees.
31. Delivery presumed from possession by grantee.
32. When grantee must be shown to have been *in esse*.
33. Effect of possession of an executed deed.
- 34, 35. Presumption of intent from an act of delivery.
36. Of successive acts of delivery.
37. Of dissent by husband to delivery made to wife.
- 38, 39. Of accepting delivery by assent to act of others.
40. What is an escrow.
41. Deed never an escrow if delivered to grantee.
42. Deed delivered to a third person when not an escrow.
43. Form of delivery to make an escrow.
44. Escrow has no effect as a deed till condition performed.
45. Effect of second delivery in case of an escrow.
- 45 a. Effect of rescinding deeds.
46. What is equivalent to livery of seisin.
- 46 a. Of the doctrine of relation in deeds.
- 46 b. Of deeds of confirmation.
47. Of deeds-poll and indentures.

48. How far a party can be covenantor without signing deed.
49. Of the remedy against a party bound by deed-poll.
50. Of assigning words in indentures to the several parties.
51. Of the enrolment and registration of deeds.
52. To what time the date of record refers.
53. To whom the record of a deed is notice.
54. In what cases a recorded deed is notice.
55. Of the time within which a deed must be recorded.
56. When a certificate of acknowledgment is necessary.
57. In what States record of a deed is evidence of its validity.
58. How far knowledge of an unrecorded deed binds third persons.
- 59-61. Knowledge of a deed equivalent to its being recorded.
62. Certificate of acknowledgment, &c., conclusive.
63. Of what facts a purchaser's deed is implied notice.
64. Of deeds by persons out of seisin of land.
65. Deeds void or voidable.
66. Fraudulent conveyances.
67. Conveyances good in hands of innocent purchasers.

1. AMONG the Saxons, seals were not in general use ; and deeds were simply subscribed with a sign of the cross appended, and attested by witnesses. But when the Normans came in, signing was dispensed with, and sealing substituted ; though sealing did not come into general use in England until after the time of Edward III.¹

2. And, at common law, signing, as a part of the execution of a deed, is unnecessary, though always advisable.²

3. When the laws and usages of the different States in this respect are examined, they will be found to have varied from time to time. Thus the only requisites to a good conveyance of lands in Kentucky were, formerly, that it should be in writing, sealed and delivered ;³ though, in another case, [*569] signing was * recognized as a part of what constitutes a conveyance.⁴ But as the statute of frauds in that State requires certain instruments like leases to be signed,

¹ 1 Wood, Conv. 191, 192 ; 2 Bl. Com. 309. Seals are ascribed by Ram, for their origin, to an appeal to the memory through the sense of sight, by an act as solemn as that of affixing a seal to an instrument in the presence of those intended to be witnesses. Facts, 29.

² 1 Wood, Conv. 238 ; Termes de la Ley, "Fait ;" Com. Dig. Fait, B. 1 ; Wms. Real Prop. 126 ; Shep. Touch. Prest. ed. 56, and note, 60 ; *contra*, 2 Bl. Com. 306.

³ *Sicard v. Davis*, 6 Pet. 124 ; *Plummer v. Russell*, 2 Bibb, 174.

⁴ *Chiles v. Conley*, 2 Dana, 21.

and the statutes of 1843 and of 1860 dispense with seals in the conveyance of land, it is presumed signing would now be regarded as indispensable.¹ So far as this was once doubtful in New Hampshire, it is now made certain by a statute requiring deeds to be signed.² Signing is essential in Pennsylvania.³ And the same is true in Ohio and Michigan.⁴ By reference to the statutes of the several States as found in Thornton's Conveyancing, modified in some cases by more recent legislation, it appears that signing is requisite, in order to give validity to deeds, in all the States, with the exception of Florida, Mississippi, North Carolina, Tennessee, and Texas, where the statutes seem to recognize a common-law execution of a deed as sufficient to convey lands.⁵ Affixing a mark by the grantor against his name, though written by another, is a *signing*, although it do not appear that he could not write his own name.⁶

4. The sealing of deeds was indispensably necessary at common law, in order to their validity, at least after the time of Edward III.;⁷ and the same is believed to be true in every State, with the exception of Kentucky, Iowa, Alabama, Kansas, and Louisiana.⁸ * By *deeds*, as the word is here used,

* NOTE. — No seal was requisite under the civil law. Any instrument which contained the names of the parties, a designation or description of the property, the date of the transfer, and the price paid, was sufficient to pass the title. Per Field, J., *Stanley v. Green*, 12 Cal. 166. By the Mexican law, a *writing* coupled with *livery of seisin*, or delivery of possession, is sufficient to consummate a transfer of title to land. *Steinback v. Stewart*, 11 Wall. 578. And it may be added, that, under the civil law, seals were required in the execution of wills. *Warren v. Lyuch*, 5 Johns. 247. In Connecticut, it is provided that all deeds, conveyances, and other instruments intending and purporting to be specialties, but

¹ Thornt. Conv. 223; Ky. Rev. Stat. 1860, Stant. ed., c. 24, § 1, p. 278, 1873, p. 249.

² *Elliot v. Sleeper*, by Woodbury, J., 2 N. H. 529; Thornt. Conv. 364.

³ *M'Dill v. M'Dill*, 1 Dall. 64; Thornt. Conv. 438.

⁴ *Clark v. Graham*, 6 Wheat. 579; *Boothroyd v. Engles*, 23 Mich. 21.

⁵ See Mass. Gen. Stat. c. 89, §§ 1, 2; *Hutchins v. Byrnes*, 9 Gray, 367, 1 Rev. Stat. (Ind.) 257; *Brown's Stat. of Frauds*, Appendix; *Isham v. Bennington Iron Co.*, 19 Vt. 252.

⁶ *Truman v. Lore*, 14 Ohio St. 154; *Baker v. Dening*, 8 A. & El. 94.

⁷ 1 Wood, Conv. 192.

⁸ Thornt. Conv. 205, 224, 242; Ala. Code, 1852, § 2198; 1 Ky. Rev. Stat. 1860, Stant. ed., c. 24, § 1; 1873, p. 249; *Shelton v. Armor*, 13 Ala. 647; *Pierson v. Armstrong*, 1 Clarke (Iowa), 293; *Simpson v. Munde*, 3 Kans. 172.

are intended such as purport to convey a freehold interest.¹

Therefore, calling an instrument a deed, or deliver- [*570] ing it as such, or believing * or intending it to be such, will not make it a deed without a seal actually affixed thereto.²

5. On the other hand, if there be a seal affixed, it is a deed, though it want the usual recital that the party has set his seal thereto; or though the recital be that he has thereunto set his hand, without mentioning his seal,³ illustrating thereby the maxim, *In traditionibus chartarum non quod dictum sed quod factum est inspicitur.*⁴

6. It is immaterial who affixes the seal, whether a party to the deed, or the scrivener, or a stranger, provided it be done before the deed is delivered. By delivering it as his deed, the maker adopts the seal.⁵ And it is competent for any number of grantors to adopt and make use of one and the same seal, and thereby adopt it as the seal of each.⁶ If a

which have been executed without seal, shall have the same legal effect as though sealed. Stats. 1855, c. 47; and Stats. 1862, c. 48, § 2. And by a more recent statute, all instruments in writing executed by any person or corporation not having an official or corporate seal, purporting and intended to be a specialty or under-seal, and not otherwise sealed than by the addition of the word "seal," or the letters "L. S.," or in the case of an official or corporate seal, by an impression of such seal upon the paper or other material employed, shall be deemed in all respects as sealed instruments, and received in evidence as such. Gen. Stat. 1875, p. 438, § 17.

¹ *Cline v. Black*, 4 M'Cord, 431; *Blackw. Tax. Tit. 432*; *Jackson v. Wood*, 12 Johns. 73; *Jackson v. Wendell*, Id. 355; *McCabe v. Hunter*, 7 Mo. 355; *Underwood v. Campbell*, 14 N. H. 393; 2 Bl. Com. 297; Id. 312.

² *Warren v. Lynch*, 5 Johns. 239; *Taylor v. Glaser*, 2 Serg. & R. 502; *Wadsworth v. Wendell*, 5 Johns. Ch. 224; *Davis v. Brandon*, 1 How. (Miss.) 154; *Long v. Long*, 1 Mon. 43; *Deming v. Bullitt*, 1 Blackf. 241; *Davis v. Judd*, 6 Wis. 85; *Alexander v. Polk*, 39 Miss. 737.

³ 1 Wood, Conv. 192, 238; *Shep. Touch. 55*; *Com. Dig. Fait, A. 2, B. 3*; *Taylor v. Glaser*, 2 Serg. & R. 502; *Peters v. Field*, Hetl. 75; *Bradford v. Randall*, 5 Pick. 496; *Mill Dam Foundry v. Hovey*, 21 Pick. 417, 428.

⁴ *State v. Peck*, 53 Me. 299.

⁵ 1 Wood, Conv. 192; *Co. Lit. 6 a*; *Elwell v. Shaw*, 16 Mass. 42, 47; *Shep. Touch. Prest. ed. 54, 57*.

⁶ 1 Wood, Conv. 192; *Perkins*, § 134; *Com. Dig. Fait, A. 2*; *Shep. Touch. Prest. ed. 57*; *Warren v. Lynch*, 5 Johns. 239; *Mackay v. Bloodgood*, 9 Johns. 285; *Bradford v. Randall*, 5 Pick. 496; *Tasker v. Bartlett*, 5 Cush. 359, 364; *Lambden v. Sharp*, 9 Humpfr. 224; *Atlantic Dock Co. v. Leavett*. 54 N. Y. 35.

deed be prepared for several to execute, and only a part of them seal it, it will be good as their deed, but will not bind those who do not execute it,¹ provided it be properly delivered by such as have signed it.

7. A corporation ordinarily binds itself by its seal; and many if not all corporations are authorized to have and use a common seal. But a deed of a corporation may be good, though sealed with any seal other than their own common seal, if adopted and used by such corporation, and though it be not alleged in the executing clause of the deed that it is their common seal.² An impression made upon an instrument to be executed by a corporation, by a stamp, may be a good corporate seal, although no other substance is interposed to receive it.³ But a facsimile of a seal printed on a blank form of a deed of a corporation does not become a seal by filling up the deed.⁴ Signing as well as sealing is essential to the validity of a deed by a corporation, though held otherwise by some of the cases in New York as well as in England.⁵ And, as held by the United States court, not only must such deed be sealed with the corporate seal, but the seal must be placed there by some one duly authorized to affix it. And it is competent to impeach a deed bearing a corporate seal by showing that it was placed there by some person unauthorized to affix it.⁶

* 8. In respect to what will answer as a seal for a [*571] deed, a diversity exists. In some States, it is required to be some adhesive substance applied to the material on which the deed is written. In others, a scroll or figure made

¹ *Shep. Touch.* 71; *Scott v. Whipple*, 5 Me. 336; *Colton v. Seavy*, 22 Cal. 501; *Jackson v. Stanford*, 19 Ga. 14.

² 1 *Wood, Conv.* 192; *Com. Dig. Fait*, A. 2; *Shep. Touch.* 57; *Mill Dam Foundry v. Hovey*, 21 Pick. 417, 428; *Ang. & Am. Corp.* § 226. See *Stebbins v. Merritt*, 10 Cush. 27, 34, by which it would seem, that, if the corporation have adopted a common seal of a particular character or device, it should be used to make a valid deed. See also *Koehler v. Black River, &c. Co.*, 2 Black (U. S.), 715.

³ *Hendee v. Pinkerton*, 14 Allen, 381, 387; *Royal Bank v. Grand Junction*, 100 Mass. 444. See also *Gen. Stat.* c. 3, § 7, *divis.* 15.

⁴ *Bates v. Boston and N. Y. Cent. R. R.*, 10 Allen, 251.

⁵ *Isham v. Bennington Iron Co.*, 19 Vt. 252.

⁶ *Koehler v. Black River, &c. Co.*, 2 Black, 715.

with a pen upon such material by the one who signs such instrument is deemed to be a seal. But a seal, such as is known to the common law, is defined to be an impression upon wax or some tenacious substance capable of being impressed, "whether it be a wafer, or any other paste or matter sufficiently tenacious to adhere and receive an impression."¹ "It is required," according to Lord Coke, "that the deed, charter, or writing, must be sealed, that is, have some impression upon the wax; for *sigillum est cera impressa, quia cera sine impressione non est sigillum*, and no deed, charter, or writing, can have the force of a deed without a seal."² The subject is considered by the United States court in *Pillow v. Roberts*, where it was held, that an impression of a seal on paper would be a good sealing, at least of a public deed.³ In England, a scroll with a pen does not make a deed, though it does in Jamaica.⁴ But a deed sent out from England to Melbourne to be executed, with pieces of ribbon attached to the places where it was intended to have the seals, and it was executed all but annexing wax to those ribbons, and attested or signed and sealed, and also acknowledged, it was held to be *prima facie* evidence of a sufficient sealing of the deed.⁵ In Virginia it makes a deed, but not in New York;⁶ though, to give a scroll the effect of a seal, the maker must, in the instrument itself, declare that he sets his seal thereto;⁷ and a printed L. S., enclosed in brackets, in the usual place of a seal, is sufficient in Wisconsin.⁸

9. The scroll is adopted in Arkansas, Delaware, Florida, Michigan, Wisconsin, Minnesota, Oregon, Missouri, Ohio, Texas, Illinois, Mississippi, Georgia, Indiana, Maryland, North Carolina, Pennsylvania, South Carolina, and perhaps in one or

¹ *Warren v. Lynch*, 5 Johns. 239; *Bradford v. Randall*, 5 Pick. 496; *Tasker v. Bartlett*, 5 Cush. 359, 364.

² 3d Inst. 169.

³ *Pillow v. Roberts*, 18 How. 473.

⁴ *Adams v. Kerr*, 1 B. & P. 360.

⁵ *In re Sandiland*, L. R. 6 C. P. 411.

⁶ *Warren v. Lynch*, 5 Johns. 239.

⁷ *Cromwell v. Tate*, 7 Leigh, 301; *Ashwell v. Ayres*, 4 Gratt. 283, that it is sufficient if the signer acknowledge it as his deed. But in Mississippi and Florida it is sufficient if "seal" is written within the scroll. *McRaven v. McGuire*. 9 S. & M. 34; *Comerford v. Cobb*, 2 Fla. 418.

⁸ *Williams v. Starr*, 5 Wis. 549.

two other States; but, in the New-England States and New Jersey, the common-law seal is required.¹

10. In order to establish the fact that a deed has been executed by the party by whom it purports to have been done, it is necessary that there should be witnesses of the fact. It is customary to append to the deed a certificate to that effect, and that the witnesses subscribing the same attested such execution. * At common law, this attestation was [*572] not required in order to give validity to the deed,² nor is it necessary in several of the States;³ while in others a deed is invalid, unless attested by one or more witnesses, according to the statute requirements of the State in which the deed is executed or to take effect. In Mississippi and Maryland, one witness is sufficient.⁴ In New Hampshire, two are required; but a deed without a witness is good against the grantor.⁵ In Kentucky, two witnesses are required; but if not attested at all, the deed would be good between the parties.⁶ Two witnesses

¹ 2 Mich. Comp. Laws, 844, c. 38, § 39; 1871, vol. 2, c. 150, p. 1348; Wis. Rev. Stat. c. 86, § 239; Minn. Stat. 1873, c. 40, § 31; Oreg. Stat. 1858, p. 523, § 37; Comp. L. 1872, p. 258, § 742; 1 Mo. Rev. Stat. 1855, p. 352; 1872, vol. 1, p. 209; Ohio, Rev. Stat. c. 102, § 1; Cobb, New Dig. Ga. Stat. 1851, 274; Code, 1873, p. 3; Ark. Dig. Stat. 1858, c. 155, § 2; Oldham v. White, Dig. Tex. Laws, 1859; Paschal's Dig. 1866, p. 257; Thomps. Dig. Fla. Laws, 348. The present law simply requires a deed to be "sealed." Bush, Dig. 1872, p. 149; Ill. Comp. Stat. 1858, p. 240; 1874, p. 270, c. 29, § 1; Miss. Rev. Code, 355; Rev. Code, 1871, § 2227; Thornt. Conv. 105, 114, 184, 274, 281, 298, 364, 372, 410, 439, 454, 464; McRaven v. McGuire, 9 S. & M. 34. But see Bates v. B. & N. Y. Cent. R. R., 10 Allen, 254. And a piece of colored paper annexed by mutilage to a deed was held a valid seal in Missouri. Turner v. Field, 44 Mo. 382. And by statute 1866, p. 539, in Connecticut, a deed purporting to be sealed by adding "sealed" or "L. S." to the signature is regarded as a sealed instrument; and a deed of land in that State, executed in another State according to the forms in use in the latter, will be held valid in the former.

² 1 Wood, Conv. 239; 2 Bl. Com. 307; Com. Dig. Fait, B. 4; Dole v. Thurlow, 12 Met. 157, 166; 3 Dane, Abr. 354; Craig v. Pinson, Cheves, 273; Meuley v. Zeigler, 23 Texas, 88; Thacher v. Phinney, 7 Allen, 149.

³ Long v. Ramsey, 1 Serg. & R. 78; Ingram v. Hall, 1 Hayw. 205; Wiswall v. Ross, 4 Port. 321; Dole v. Thurlow, 12 Met. 157.

⁴ Wilkins v. Wells, 9 S. & M. 325; Shirley v. Fearne, 33 Miss. 653; Code, Maryland, 1860, p. 133.

⁵ Stone v. Ashley, 13 N. H. 38; Elliot v. Sleeper, 2 N. H. 529; French v. French, 3 N. H. 284; Kingsley v. Holbrook, 45 N. H. 320; Hastings v. Cutler 24 N. H. 481; ante, *148.

⁶ Fitzhugh v. Croghan, 2 J. J. Marsh 429

are required in Ohio,¹ Connecticut² (and these must be competent to testify at the time of attesting the deed),³ Vermont and Georgia,⁴ Michigan and Indiana,⁵ South Carolina,⁶ Delaware, Tennessee, and Minnesota.⁷ But in Vermont, if a deed have but one subscribing witness, it may be used in evidence in a court of equity in a process to compel the grantor to perform a specific contract to convey by a sufficient deed.⁸ But in Michigan, where two witnesses are required, a deed attested by one only would have no effect to convey the land.⁹ In some of the States, there is a necessity of an attestation or an acknowledgment of the deed by the grantor, before a proper officer, in order to its being used as evidence. This is the case in Indiana, New Jersey, Alabama, and Arkansas; and in New York there must be an acknowledgment or attestation by at least one witness to take effect against a purchaser or incumbrancer, and a like rule prevails in Texas.¹⁰

11. In order to a sufficient attestation of a deed by a witness, it is not necessary that he should have seen the party write his name. It is enough if the latter asks the witness to subscribe to the attesting clause, and he does so in [*573] the signer's presence.¹¹ * In thus enumerating the requisites of an instrument by which a freehold interest in lands may be conveyed, it may be proper to add, that the same requirements have been held essential in conveying a

¹ *Clark v. Graham*, 6 Wheat. 577; *Patterson v. Pease*, 5 Ohio, 119; *Shultz v. Moore*, 1 McLean, 520; *Rev. Stat. 1860*, p. 459, c. 34, § 1; *Richardson v. Bates*, 8 Ohio St. 261.

² *Merwin v. Camp*, 3 Conn. 35; *Coit v. Starkweather*, 8 Conn. 289, 293.

³ *Winsted Savings Bank, &c. v. Spencer*, 26 Conn. 195.

⁴ 2 *Greenl. Ev.* § 295, note; *Vt. Gen. Stat. 1863*, c. 65, § 18.

⁵ 4 *Kent, Com.* 457.

⁶ *Craig v. Pinson, Cheves*, 272; *Jones v. Crawford, McMull*, 373.

⁷ 4 *Kent, Com.* 457; *Comp. Stat.* 398; *Chandler v. Kent*, 8 *Minn.* 525, extending to leases for three years; *Ross v. Worthington*, 11 *Minn.* 443. But, if attested by one, it may be good in equity against a purchaser with notice. *Ib.* 438.

⁸ *Day v. Adams*, 42 *Vt.* 510.

⁹ *Crane v. Reeder*, 21 *Mich.* 24.

¹⁰ *Lalor, Real Est.* 238; *Thornt. Conv.* 187; *Id.* 66; *Id.* 161; *Id.* 373; *Cocke v. Brogan*, 5 *Ark.* 693. But see *Ark. Dig. Stat. 1848*, c. 37, § 12; *Genter v. Morrison*, 31 *Barb.* 155; *Menley v. Zeigler*, 23 *Tex.* 93; *O'Neal v. Robinson*, 45 *Ala.* 526; *Hudson v. White, Ala.*

¹¹ *Parke v. Mears*, 2 *B. & P.* 217; *Jackson v. Phillips*, 9 *Cowen*, 113.

fixture like a shingle-mill securely fixed in a saw-mill belonging to the owner of the freehold, if he sells it without severing it from the freehold.¹ It may be added, that the witnesses to a deed, according to Mr. Barrington when commenting upon the statute of York, were anciently a necessary part of the jury which was to try the validity of such an instrument. This statute provides, that if, upon being properly summoned, they do not appear, the jury might proceed without them.² But witnesses to deeds cannot, like those to wills, express opinions of the capacity of the signers: they can only testify to facts as other witnesses do.³

12. A deed may be executed by the grantor himself; or, as a general rule, he may do it through his agent or attorney. By "executed" is meant signing, sealing, and delivering a deed.⁴ But a power to execute a deed must itself be by an instrument under seal.⁵ In respect to the mode in which this must be done in order to its creating a deed which is valid and binding upon the principal, much seeming nicety has been observed by the courts. Without citing any considerable number of the multiplied cases in which the question has arisen, it is sufficient to say, that the deed, in order to bind the principal, must appear to be clearly his, and must be made in his name. The signing must be expressed to be his act, done by his agent or attorney. Consequently, both the names of the principal and the attorney must, substantially, appear in the execution of the deed, showing not only that the grant and seal were those of the principal, but by whom these acts were done. If the deed be the deed of the attorney, — as, for instance, if by it *he* grants, or *he* sets *his* seal, and the like, — it is void as to the principal.⁶ A deed by an attorney after the

¹ Trull v. Fuller, 28 Me. 545. But see Claffin v. Carpenter, 4 Met. 580, as to sale of growing trees, and *ante*, vol. 1, pp. 12-14; Judevine v. Goodrich, 35 Vt. 19.

² Barring. St., 4th ed. 175.

³ Dean v. Fuller, 40 Penn. St. 474.

⁴ Thorp v. Keokuk Co., 48 N. Y. 255.

⁵ Livingston v. Peru Iron Co., 9 Wend. 522.

⁶ Fowler v. Shearer, 7 Mass. 14, 19; Clarke v. Courtney, 5 Pet. 319; White v. Cuyler, 6 T. R. 176; Frontin v. Small, Ld. Raym. 1418; Pryor v. Coulter, 1 Bail. 517; Harper v. Hampton, 1 Harr. & J. 709; 3 Am. Jur. 82 *et seq.*, — a learned and elaborate article by the late Mr. David Hoffman; Barger v. Miller, 4 Wash. C. C. 280; Elwell v. Shaw, 16 Mass. 42; Shanks v. Lancaster, 5 Gratt.

death of his principal is void, though the death be not known at the time of executing it.¹*

[*574] *13. A few cases will serve to show the nice distinctions and seeming conflict of opinion which have prevailed at different times upon this subject. In *Wilkes v. Back*,² Grose, J., held, that executing a bond, "M. W. for J. B.," was as binding upon J. B. as if executed "J. B. by M. W." But this is altogether opposed to the doctrine advocated by Mr. Hoffman in the article above cited. And if it might avail as an execution of a bond, it is very much doubted whether it could if of a deed of conveyance; though, in *Jones v. Carter*,³ Judge Roane held, that where a deed was signed B. W., "attorney for R. C.," it was clearly a good execution of the deed. But in *Elwell v. Shaw*, cited above, the deed recited the power of attorney; after which followed "J. S., by virtue of the power aforesaid, hereby grant, &c. In witness whereof, I have set the name and seal of," — the principal. It was signed "J. S." with a seal, and was held not to be the deed of the principal. The case of *Barger v. Miller*, above cited, was substantially like that of *Elwell v. Shaw* in its facts and decisions. In the case of *Harper v. Hampton*, the granting part of the deed was "R. G. H., for and as attorney of J. R., and in pursuance of the above-mentioned power of attorney, hath granted, &c.;" and it was signed "R. G. H., attorney for J. R.;" and it was held to be the deed of the attorney, and not of the principal.⁴ In the case of *Wood v. Goodridge*, the attorney executed the deed

* NOTE. — This does not apply to cases where the power of the attorney is coupled with an interest where the power survives the death of the principal, as has heretofore been explained in former parts of this work. See vol. 1, p. *499, and cases cited; vol. 2, p. *324; *Varnum v. Meserve*, 8 Allen, 158.

110; *The State v. Jennings*, 10 Ark. 428; 1 Amer. Lead. Cas. 577 *et seq.*; *Brinley v. Shaw*, 2 Cush. 337; *McDonald v. Bear River, &c. Co.*, 13 Cal. 235; *Mussey v. Scott*, 7 Cush. 215; *Brinley v. Mann*, 2 Cush. 337.

¹ *Harper v. Little*, 2 Me. 14; *Stetson v. Patten*, Id. 358; *ante*, p. *324; *Ferris v. Irving*, 28 Cal. 648.

² *Wilkes v. Back*, 2 East, 142.

³ *Jones v. Carter*, 4 Hen. & M. 196.

⁴ *Elwell v. Shaw*, 16 Mass. 42; *Harper v. Hampton*, 1 Harr. & J. 709; *Barger v. Miller*, 4 Wash. C. C. 280; *Echols v. Cheney*, 28 Cal. 160 *acced't*; *Morrison v. Bowman*, 29 Cal. 352; *Townshend v. Corning*, 23 Wend. 439.

by signing the principal's name, but made no mention of its being done by the attorney; and it was held not to be an execution as to the principal.¹ But where the deed itself stated that it was executed by the grantor by his attorney W. M., and was simply signed M. H. (the principal's name), it was held a good execution.² In the case of *Thurman v. Cameron*,³ however, the court held that the attorney must use the name of his principal, * both in the body [*575] of the deed and by way of signature. It would probably be hopeless to attempt to reconcile the various cases which have arisen in the English and American courts upon the execution of deeds by attorney. The reader will find a large number of these collected and commented on by the editors of the *American Leading Cases*.⁴ The leading doctrine running through them, though not always applied alike, seems to be, that, to make such a deed valid, the instrument itself must, in terms, show that it is the deed of the principal, that he makes the grants and the covenants, and that the seal is his. The instrument, in some part, must also show that its execution by the principal was done by the attorney named. If this all appears clearly in any part of the instrument, the precise form or arrangement of the words does not seem to be essential.⁵

14. An exception has practically grown up in New Hampshire, and been in use at times in Massachusetts, in the execution of deeds by towns and other public bodies who act by attorney; it being there held to be sufficient that the deed is signed in behalf of the body represented by the attorney, but in the name and with the seal of the agent, though it seems rather to have been sustained on the ground that *communis error facit jus*.⁶

¹ *Wood v. Goodridge*, 6 Cush. 117.

² *Devinney v. Reynolds*, 1 Watts & S. 328.

³ *Thurman v. Cameron*, 24 Wend. 90.

⁴ 1 Am. Lead. Cas. 577 *et seq.*

⁵ See *Doe v. Blacker*, 27 Ga. 418; *Butterfield v. Beall*, 3 Ind. 203. For cases where equity grants relief when a deed has been sealed and delivered by mistake in the name of the attorney instead of the principal, see 1 Am. Lead. Cas. 585. See *Wilkinson v. Getty*, 13 Iowa, 157.

⁶ *Cofran v. Cockran*, 5 N. H. 488; *Ward v. Bartholomew*, 6 Pick. 409. See also the case of *Manufacturing Corporation in Connecticut*. *Magill v. Hinsdale*, 6 Conn. 465; *contra*, in Massachusetts. *Brinley v. Mann*, 2 Cush. 337.

15. The character of the power under which a deed may be executed by an agent for another depends upon the circumstance, whether the act of signing is done in the presence or absence of the principal. If done in his presence, an oral direction to do the act will be sufficient, it being theoretically the act of the principal himself.¹ But if the act is to be done in the absence of the principal, it must be given by an [*576] * instrument under the hand and seal of the principal.²

Nor would a subsequent acknowledgment, that the one acting as such was in fact the grantor's attorney, be sufficient. But where a wife, in the absence of her husband, signed his name to a deed, and he afterwards acknowledged the deed before a magistrate as his free act and deed, it ratified and made valid his signature.³ A power under seal is the only way one can be made an attorney to execute a deed ;⁴ and, in many of the States, the instrument must be acknowledged and recorded like the deed itself.⁵

16. It is customary in England to indorse upon the deed a receipt or certificate of payment of the consideration-money ; although this is commonly acknowledged in the premises of the deed, and this certificate is attested by witnesses. But this practice does not seem to have been adopted in this country.⁶

¹ *Ball v. Dunsterville*, 4 T. R. 313 ; *Gardner v. Gardner*, 5 Cush. 483 ; *Wood v. Goodridge*, 6 Cush. 117, 121 ; *King v. Longnor*, 4 B. & Ad. 647 ; *Shep. Touch.* 57 ; *Frost v. Deering*, 21 Me. 156, where the husband signed the wife's name in her presence and by her direction, which was held sufficient. *Burns v. Lynde*, 6 Allen, 309, 310 ; *Videau v. Griffin*, 21 Cal. 392 ; *Kime v. Brooks*, 9 Ired. 219 ; *McKay v. Bloodgood*, 9 Johns. 285.

² *Shep. Touch.* 57 ; *Plummer v. Russel*, 2 Bibb, 17 ; *Montgomery v. Dorion*, 6 N. H. 250 ; *Walk. Am. Law*, 365 ; *Stetson v. Patten*, 2 Me. 358. Nor will a subsequent parol adoption of the act make it valid. *Smith v. Dickenson*, 6 Humph. 261 ; *Tappan v. Redfield*, 1 Halst. Ch. 399 ; *Rhode v. Louthain*, 8 Blackf. 413 ; *Kime v. Brooks*, *sup.*

³ *Bartlett v. Drake*, 100 Mass. 175.

⁴ *Videau v. Griffin*, 21 Cal. 389 ; *Hanford v. McNair*, 9 Wend. 54.

⁵ *Montgomery v. Dorion*, 6 N. H. 250. But the deed will be good against the grantor and his heirs, and create a good title against strangers, though the power is not registered. *Mass. Gen. Stat. c. 89, § 29* ; *Walk. Am. Law*, 365. Acknowledging and recording are not necessary in Georgia or Indiana. *Doe v. Blacker*, 27 Ga. 418 ; *Moore v. Pendleton*, 16 Ind. 431. But see *Butterfield v. Beall*, 3 Ind. 203.

⁶ 1 *Wood*, Conv. 239.

17. It may be necessary, in order to make a valid deed, if the party to its execution is unable to read it, and requires this to be done, to read it to him as it is written. But if the party can read, it is not open to him, after executing it, to insist that the terms of the deed were different from what he supposed them to be when he signed it. Nor could one who is unable to read be admitted to object that he was misled in signing a deed, unless he had requested to hear it read, and this had not been done, or a false reading had been made to him, or its contents falsely stated.¹

18. A grantor is presumed to have known the contents of the deed he has executed, unless the contrary be affirmatively shown.² And one who executes a deed cannot avoid it on the ground of ignorance of its legal effect.³ The rule on this subject is thus stated: "A deed cannot be avoided in a court of law except for fraud in its execution, or other fraud or imposition practised upon the grantor in procuring his signature and seal,"—a fraud which goes to the question, whether the deed ever had any legal existence. The law does not reach the cases of deeds procured by undue influence over the grantor, if he be of legal capacity. The only relief in such cases is in equity.⁴

19. There is usually a date inserted in the deed, as indicating the time when the same was executed and delivered. And the law presumes that the deed was executed on that day.⁵ And this is so, even if the date do not agree with the date of the acknowledgment, for that may have been made after the delivery of the deed.⁶ In indentures, this is commonly at the beginning of the instrument; but in single deeds, or deeds-poll, it is generally inserted * at the close. But [*577] though a presumption would arise that the deed was

¹ 1 Wood, Conv. 237; Shep. Touch. 56; Manser's case, 2 Rep. 3; Henry Pigot's case, 11 Rep. 27 b; Jackson v. Croy, 12 Johns. 429; Hallenback v. Dewitt, 2 Johns. 404; Jackson v. Hayner, 12 Johns. 469; Taylor v. King, 6 Munf. 358; Com. Dig. Fait, B. 2; Souverbye v. Arden, 1 Johns. Ch. 252; Withington v. Warren, 10 Met. 434.

² Kimball v. Eaton, 8 N. H. 391.

³ 1 Wood, Conv. 238; 2 Rep. 3.

⁴ Truman v. Lore, 14 Ohio St. 155; Hartshorn v. Day, 19 How. 223.

⁵ Lyon v. McIlvain, 24 Iowa, 15; Savery v. Browning, 18 Iowa, 249; Anderson v. Weston, 6 Bing. N. C. 296; Oskey v. Hicks, Cro. Jac. 264.

⁶ People v. Snyder, 41 N. Y. 402; Darst v. Bates, 51 Ill. 439.

delivered and took effect on the day of its date, if there was nothing offered in evidence to control this, it is always competent to show that the date inserted was not the true date of its delivery. Besides, it is immaterial whether a deed has any date or not; nor would it be affected though the date was an impossible one, like the *thirtieth* of February. Dates have, however, been in general use since Edward II. and Edward III.¹

20. Passing over, for the present, the provisions in most of the States for acknowledging deeds before certain prescribed officers, it remains to speak of that ceremony indispensable to their validity, though all the other requisites have been complied with; namely, *delivery*. In this respect, all courts and writers agree. But, in applying the doctrine, they are not uniform in defining what constitutes such a delivery. That a delivery is essential to give effect to a deed, authorities might be multiplied indefinitely. Those cited below will be sufficient.² A delivery of a deed is as essential to the passing of an estate as the signing; and so long as the grantor retains the legal control of the instrument, the title cannot pass any more than if he had not signed the deed.³

20 *a.* Delivery being so essential to the giving effect to a deed, it becomes important to define, so far as can be by the language and rulings of courts, what amounts to such delivery under the various circumstances of the different cases. It is no deed, and has no effect till delivered, even if antedated for the very purpose of giving it effect before the time of the

¹ Co. Lit. 6 a; Perkins, § 145; Goddard's case, 2 Rep. 4 b; Com. Dig. Fait, B. 3; Shep. Touch. 52, 55, 58; Jackson v. Schoonmaker, 2 Johns. 234; Colquhoun v. Atkinson, 6 Munnf. 550; Lee v. Mass. Ins. Co., 6 Mass. 208, 219; M'Kinney v. Rhoades, 5 Watts, 343; M'Connell v. Brown, Litt. Sel. Cas. 459; 1 Wood, Conv. 195; Geiss v. Odenheimer, 4 Yeates, 278; Osborn v. Rider, Cro. Jac. 135; Thompson v. Thompson, 9 Ind. 333; Genter v. Morrison, 31 Barb. 155; Banning v. Edes, 6 Minn. 402; Swan v. Hodges, 3 Head, 254.

² 1 Wood, Conv. 193; Shep. Touch. 57; Co. Lit. 35 b; Goddard's case, 2 Rep. 4 b; Com. Dig. Fait, A. 3; Hulick v. Scovil, 4 Gilm. 175; Church v. Gilman, 15 Wend. 656, 658; Fairbanks v. Metcalf, 8 Mass. 230, 239; Stiles v. Brown, 16 Vt. 563; Fletcher v. Mansur, 5 Ind. 267.

³ Cook v. Brown, 34 N. H. 476; Johnson v. Farley, 45 N. H. 510; Overman v. Kerr, 17 Iowa, 486, 490; Fisher v. Hall, 41 N. Y. 421; Younge v. Guilbeau, 3 Wall. 641.

actual delivery.¹ The paper need not be actually delivered to the grantee to have that effect, if the grantor, when executing it, intends it as a delivery, and this is known and understood by the grantee, and he and the grantor go on and act as if the estate had actually passed thereby.² And in one case, where a trustee, being indebted to the trust-estate, in order to secure it made a deed to himself as trustee regularly executed, except recording it, and died, leaving the deed among his papers, it was held to bind his land effectually as a declaration of a trust, and to have been sufficiently delivered for that purpose.³ If a deed, duly executed in all respects but delivery, be stolen from the grantor, it passes no title even to a *bona fide* purchaser from the grantee named in the deed.⁴ In the first place, the grantor must give up control or dominion over the deed; and, in the second place, the grantee must actually or by implication have accepted the deed as his own, and the estate conveyed by it. In one case, a deed was made to a corporation which had been created by statute, but had not been organized. After it had been organized, the deed was put upon record; and it was held that the acceptance of the deed would be presumed as soon as the company were competent to receive it.⁵ Thus a delivery of a deed after the grantor's death is of no effect.⁶ A, being indebted to B, agreed to secure him by a deed of his land. He made a deed unknown to B, and had it recorded, and B died without any knowledge of its being made; and it was held not to be a sufficient acceptance to make it good.⁷ A deed voluntarily placed in the grantee's hands is never an escrow.⁸ Where the grantor made a deed, which the grantee saw, and the grantor agreed to put it on record, and did so, but in the

¹ *Xenos v. Wickham*, 14 C. B. n. s. 469; *Mitchell v. Bartlett*, 51 N. Y. 453.

² *Walker v. Walker*, 42 Ill. 311, case of a father and son; *Rogers v. Carey*, 47 Mo. 235.

³ *Carson v. Phelps*, 23 Am. L. Reg. 100, 102.

⁴ *Fisher v. Beckworth*, 30 Wis. 55.

⁵ *Rotch's Wharf v. Judd*, 108 Mass. 227.

⁶ *Jackson v. Leek*, 12 Wend. 107; *Fay v. Richardson*, 7 Pick. 91; *post*, pl. 30, *Fisher v. Hall*, 41 N. Y. 423.

⁷ *Jackson v. Phipps*, 12 Johns. 421; *Woodbury v. Fisher*, 20 Ind. 388.

⁸ *People v. Bostwick*, 32 N. Y. 445, 454; *Broman v. Bingham*, 26 N. Y. 483

absence of the grantee, and without any formal delivery to him, it was held to be a good delivery, the register being by such assent constituted the agent to accept the delivery.¹ The deed must pass under the power of the grantee, or some one for his use, with the grantor's consent.² If, after a deed is put on record for the grantee, he assents to or ratifies the act, it becomes a good delivery. But any lien or attachment laid upon the land or the property of the grantor, before such assent, would hold.³ Many of the cases hold, that a delivery of a deed to a stranger passes the title, upon the ground that the law presumes an assent and acceptance on the part of the grantee. But the same cases hold, that, if the grantee does dissent, the title does not pass.⁴ Thus, where A sold land to B, but by mistake conveyed, in his deed to B, a parcel of land which A did not own: B's creditor levied on this land; but, finding the mistake, he procured a deed from the owner of the land to B, who refused to accept it: it was held to be of no effect in creating a title in B.⁵ And some of the cases hold, that in such a case, until the deed is accepted, if it be not an escrow, the grantor may resume it, and thus prevent its taking effect at all.⁶ The assent by the cashier of a bank to a deed made to the bank is sufficient.⁷ If these various rulings of the courts can be reconciled, it still seems to leave the title to the estate in an anomalous condition between the depositing of the deed with the stranger and its acceptance by the grantee. The presumption of acceptance, which, it is said, the law raises in such cases, is merely evidence of delivery, at best; and whether it can ever be fairly raised *as a rule of law*, except in case of infant grantees, and such as are

¹ *Cooper v. Jackson*, 4 Wis. 549, 553; *Parmelee v. Simpson*, 5 Wall. 86.

² *Somers v. Pumphrey*, 24 Ind. 240; *Dearmond v. Dearmond*, 10 Ind. 191; *Wilson v. Cassidy*, 2 Ind. 562; *Rivard v. Walker*, 39 Ill. 413.

³ *Parmelee v. Simpson*, 5 Wall. U. S. 81; *Jackson v. Cleveland*, 15 Mich. 101; *Elmore v. Marks*, 39 Vt. 538, 542.

⁴ *Peavey v. Tilton*, 18 N. H. 152; *Tompkins v. Wheeler*, 16 Peters, 119; *Thompson v. Leach*, 2 Vent. 198; *Welsh v. Sackett*, 12 Wis. 243; *Read v. Robinson*, 6 W. & Serg. 329; *Xenos v. Wickham*, 14 C. B. n. s. 474, and notes to Am. ed.

⁵ *Rogers v. Carey*, 47 Mo. 232.

⁶ *Johnson v. Farley*, 45 N. H. 509; *Derry Bank v. Webster*, 44 N. H. 268

⁷ *Farmer's, &c. Bank v. Drury*, 38 Vt. 431.

under disabilities to assent, may perhaps be gravely questioned, after the language of Abbot, C. J., in *Townson v. Tickell*: "The law is not so absurd as to force a man to take an estate against his will." He refers to the case above cited from *Ventris*, and says: "Three of the judges there held that an estate did not pass by surrender to the surrenderee till he expressly accepted it. Mr. Justice *Ventris* differed, and held that it passed immediately, liable to be *divested* by the dissent of the surrenderee. His judgment is, however, wholly founded on this, — that a party to whom an estate is given must be taken to give an implied assent to that which is for his benefit, till the contrary appears." And *Best, J.*, in the same case, says: "It seems to be contrary to common sense to say that an estate should *vest* in a man not assenting to it." And though the case was one of devise, the same reasoning would apply with stronger force, *inter vivos*, in respect to deeds.¹ But a deed may be delivered without an actual manucaption by the grantee or his agent. Thus a wife, wishing to convey her land to her husband through a third person, joined with him in making a deed, which was left upon their table till the next morning, when the grantee came and executed a deed to the husband, who took both deeds and put them on record, and it was held to be a good delivery.² And, if once delivered, the validity and effect of the act will not be impaired by the deed being taken and retained by the grantor.³

21. And if once delivered, it cannot, if valid, be defeated by any subsequent act, unless it be by virtue of some condition contained in the deed itself.⁴

22. Regularly, therefore, there can be but one delivery of the same deed; for, if the first is effectual, the second cannot

¹ *Townson v. Tickell*, 3 B. & Ald. 36. See *Younge v. Guilbeau*, 3 Wall. U. S. 641; *Dikes v. Miller*, 24 Tex. 423; *Fonda v. Sage*, 46 Barb. 109; *Rogers v. Carey*, 47 Mo. 232; 4 *Bythewood*, Conv. 79.

² *Somers v. Pumphrey*, 24 Ind. 240; *Folly v. Vantuyll*, 4 Halst. 153. See also *Shelton's case*, Cro. Eliz. 7; *Pennsylvania Co. v. Dovy*, 64 Penn. St. 260.

³ *Souverybe v. Arden*, 1 Johns. Ch. 255; *Shelton's case*, Cro. Eliz. 7; *Connelly v. Doe*, 8 Blackf. 320; *Somers v. Pumphrey*, 24 Ind. 240.

⁴ *Hawksland v. Gatchel*, Cro. Eliz. 835; *Com. Dig. Fait*, A. 36. See 1 *Wood*, Conv. 194; *Younge v. Moore*, 1 Strohh. 48.

be of any avail. This principle is applicable in cases where infants, *femes covert*, and the like, have undertaken to give validity to a deed which has once been delivered, by delivering it a second time. And the result is, that where it is [*578] merely *voidable, as in the case of an infant, or person of non-sane memory, a second delivery after his disability has been removed would be simply void; whereas, a delivery by a *feme covert* being void, if she makes a second one on becoming *discover*t, it will be good, and give effect to her deed.¹ Where husband and wife joined in a deed of the wife's land, but the deed was not delivered until after her death, though the deed thereby passed the interest of the husband, it did not that of the wife, since the deed never took effect in her lifetime.²

23. A deed takes effect from its delivery, irrespective of its date, though *prima facie* the date is to be taken at the time of delivery.³ But if the date of the acknowledgment is subsequent to the date of the deed, the law does not presume a delivery prior to the acknowledgment.⁴

24. But, to have the effect of a delivery, the deed must first have been executed completely: no delivery before that can give force to the deed.⁵

25. In undertaking to define what will constitute a delivery of a deed, it is said that it may either be "actual, that is, by doing something, and saying nothing; or verbal, that is, by saying something, and doing nothing; or it may be by both." But it must be by something answering to the one or the other, or both these, and with an intent thereby to give effect

¹ 1 Wood, Conv. 196; Com. Dig. Fait, B. 5; Shep. Touch., Prest. ed. 60. and note; 2 Rolle, Abr. Fait, N. 1; Verplank v. Sterry, 12 Johns. 536, 548; Mills v. Gore, 20 Pick. 28, 36; Perkins, § 154.

² Shoenberger v. Zook, 34 Penn. St. 24.

³ Harrison v. Phillips Academy, 12 Mass. 455, 460; Jackson v. Bard, 4 Johns. 230; Geiss v. Odenheimer, 4 Yeates, 273; 1 Wood, Conv. 195; Goddard's case, 2 Rep. 4 b; Shep. Touch. 58, 72; Colquhoun v. Atkinson, 6 Munf. 515; M'Connell v. Brown, Lit. Sel. Cas. 462; Com. Dig. Fait, G.; Cutts v. York Co., 18 Me. 190. But see Elsey v. Metcalf, 1 Denio, 323; Smith v. Porter, 10 Gray, 67; ante, p. *256.

⁴ Blanchard v. Tyler, 12 Mich. 339.

⁵ 1 Wood, Conv. 194; Shep. Touch. 58; M'Kee v. Hicks, 2 Dev. 379; Burns v. Lynde, 6 Allen, 305.

to the deed.¹ Among the illustrations given of what would amount to a delivery by the mode above stated is that of a deed lying upon a table in presence of the parties, and the grantor tells the grantee to take it, and he does so. Here the delivery takes place by words alone on the part of the maker. If, on the other hand, the grantor throws the deed upon the table, intending the other party to take it, and he does so, it will be a delivery, though nothing is said. If, however, the deed is laid upon the table without any such intention, and the grantee *takes it up, it will not [*579] amount to a delivery.² If, therefore, one to whom a deed is made gets possession of it, without something answering to a delivery on the part of the maker, it will not avail him, nor affect the title of the maker.³ Thus where the grantee, after the formal execution of the deed by the grantor, took the same in the grantor's presence, without any objection on his part, it was held to be a good delivery.⁴ So, though the grantor deliver the deed in consequence of false and fraudulent pretences, if it be delivered, and grantee conveys to an innocent third party, it passes a good title.⁵ If delivered, the deed takes effect, though both parties, under a mistake of law, understood it would not be effectual as a delivery until put on record.⁶

26. Ordinarily, nothing further is required to constitute a delivery of a deed, on the part of a corporation, than that their common seal should be put to it by the consent of the corporation, unless, when executing it, they appoint an

¹ Com. Dig. Fait, A. 3, A. 4; Shep. Touch., Prest. ed. 58, n.; 1 Wood, Conv. 198; Co. Lit., Day's ed. 36 a, and note, 223; 2 Rolle, Abr. Fait, K.; Verplank v. Sterry, 12 Johns. 536; Mills v. Gore, 20 Pick. 28, 36; Hughes v. Easten, 4 J. J. Marsh. 572; Methodist Church v. Jaques, 1 Johns, Ch. 450; Dearmond v. Dearmond, 10 Ind. 191; Berry v. Anderson, 22 Ind. 39.

² Com. Dig. Fait, A. 3; Mills v. Gore, 20 Pick. 28, 36; Chamberlain v. Staunton, 1 Leon. 140; 1 Wood, Conv. 198, 195; Methodist Church v. Jaques, 1 Johns. Ch. 456; Shep. Touch. 58; Thoroughgood's case, 9 Rep. 136; Co. Lit. 36 a, 49 b.

³ 1 Wood, Conv. 198; Cutts v. York Co., 18 Me. 190; Black v. Lamb, 1 Beasley (N. J.), 108, 116; Roberts v. Jackson, 1 Wend. 478; Hadlock v. Hadlock, 22 Ill. 388; Fisher v. Beckwith, 30 Wis. 55; Ford v. James, 2 Abb. N. Y. R. 162.

⁴ Williams v. Sullivan, 10 Rich. Eq. 217; Stewart v. Weed, 11 Ind. 94.

⁵ Berry v. Anderson, 22 Ind. 41.

⁶ Henchcliff v. Hinman, 18 Wis. 138.

attorney to deliver it. In that case, it does not become their deed until its formal delivery.¹ A delivery of a deed to the authorized agent of a corporation is a delivery to the corporation.²

27. There is commonly much less difficulty in determining whether, in any given case, there has been a delivery of a deed, where the transaction is directly between the parties to the instrument, than where it is delivered through the agency of third persons; for the delivery may be made by or through other persons than the immediate parties to the same. And a delivery may be made good by a subsequent assent, though originally invalid for want of it, upon the principle, *Omnis rati habitio mandato æquiparatur*.³

28. Thus a deed may be delivered to the grantee himself, or it may be delivered to a stranger unknown to the person for whose benefit it is made, if so intended by the maker; and this may be an effectual delivery the moment it is assented to by the grantee, even though the grantor may in the mean time have deceased.⁴ Thus, in *Hatch v. Hatch*, and [*580] *Foster v. Mansfield*,⁵ * a father made a deed to his son, and placed it in a stranger's hands to be delivered to the grantee on the grantor's death. It remained there until the death of the latter, and was then delivered to the grantee, and was held to be a good deed, although the original delivery was not regarded as that of an escrow by the grantor. But, in another case, A made a deed to B, and

¹ 1 Wood, Conv. 194; Co. Lit. 36 n., 22 n.; *Willis v. Jermaine*, 2 Leon. 97; s. c. Cro. Eliz. 167; Com. Dig. Fait, A. 3; 2 Rolle, Abr. Fait, I.

² *Western R. R. v. Babcock*, 6 Met. 356.

³ 1 Wood, Conv. 193; *Turner v. Whidden*, 22 Me. 121; *Shirley v. Ayres*, 14 Ohio, 307; *Cooper v. Jackson*, 4 Wis. 537; *Holbrook v. Chamberlin*, 116 Mass. 161, case of partnership.

⁴ 1 Wood, Conv. 193; Com. Dig. Fait, A. 3; *Hatch v. Hatch*, 9 Mass. 307; *Hulick v. Scovill*, 4 Gilm. 176; *Buffum v. Green*, 5 N. H. 71; *Belden v. Carter*, 4 Day, 66; *Ruggles v. Lawson*, 13 Johns. 285; *Wheelwright v. Wheelwright*, 2 Mass. 447, 452; *Doe v. Knight*, 5 B. & C. 671; *O'Kelly v. O'Kelly*, 8 Met. 436; *Foster v. Mansfield*, 3 Met. 412; *Wesson v. Stevens*, 2 Ired. Eq. 557; *Morrison v. Kelly*, 22 Ill. 626; *Marsh v. Austin*, 1 Allen, 238; *Cooper v. Jackson*, 4 Wis. 553; *Hatch v. Bates*, 54 Me. 139; *Kingsbury v. Burnside*, 58 Ill. 310; *Cecil v. Beaver*, 28 Iowa, 241.

⁵ *Hatch v. Hatch*, 9 Mass. 307; *Foster v. Mansfield*, 3 Met. 412; *O'Kelly v. O'Kelly*, 8 Met. 439; *Stephens v. Rinehart*, 72 Penn. 440.

delivered it to C, to hold subject to A's order during his life, and, in case of his death, to deliver it to B. After A's death, C delivered it to B; but it was held to be no delivery, and that nothing passed by the deed.¹ In Pennsylvania, the doctrine of *Hatch v. Hatch* is fully sustained.² When, however, a soldier, upon going into the service, made a deed to his wife, and left it, with other papers, with her, without her knowing what they were, and he died without returning, after which she discovered the deed, it was held to be a sufficient delivery.³ But so long as the deed is within the control of the grantor, and subject to his authority, it cannot be held to have been delivered. Thus, where the grantor placed a deed in another's hands, and directed him to keep it till he, the grantor, died, and to hold it subject to his control as long as he lived, and then to deliver it to the grantee, it was held to be no delivery. A deed cannot be even an *escrow*, unless the grantor part with the control of it until the condition on which it depends happens or fails. Nor will the court presume an acceptance of a deed, so long as the grantee is ignorant of its having been made.⁴ The case of *Belden v. Carter* involved the same principle; and the case of *Doe v. Knight* furnishes, perhaps, a still stronger illustration of this doctrine.⁵ There, one Wynne, being indebted to Garnans, made and executed a mortgage to him in his absence, and without his knowledge, in the presence of his niece, who witnessed it, and to whom he declared that he delivered it. He afterwards had the deed in his possession, wrapped in an envelope, and handed the envelope to his sister, telling her to keep it, and that it belonged to Garnans. After that he took it again, and, at a subsequent time, handed it again to her, saying, "Put this by." The matter stood thus until Wynne died, when the sister handed the parcel to a friend of Garnans, through whom he received it. Wynne, in his lifetime, had assured Garnans that he would secure him for his indebtedness. The

¹ *Prestman v. Baker*, 30 Wis. 644.

² *Stephens v. Huss*, 54 Penn. St. 26

³ *Dale v. Lincoln*, 62 Ill. 22.

⁴ *Prestman v. Baker*, 30 Wis. 644, wherein the court disapprove of *Doe v. Knight*, *infra*, because the deed remained subject to the grantor's control.

⁵ *Belden v. Carter*, 4 Day, 66; *Doe v. Knight*, 5 B. & C. 671. See *Doe v. Knight*, explained and applied in *Xenos v. Wickham*, 14 C. B. n. s. 470.

judge who tried the case instructed the jury, that, if Wynne retained the control of the deed, there was no delivery ; but that if he parted with it, and for the benefit of Garnans, in order that it should be delivered to him in Wynne's lifetime, or after his death, it would be a good delivery : which ruling the Court of King's Bench held to be correct, and the verdict in favor of the validity of the deed was sustained. Although, in referring to the case cited, the court of Georgia, in *Oliver v. Stone*, remark, " I must say, I think *Garnans v. Knight* somewhat difficult to uphold," it forms one of a pretty large class of cases wherein the principle is maintained, that, so far as the grantor is concerned, it will be a sufficient act of delivery, if, after executing a deed, he place it in the hands of another, out of his own possession and control, if done with an intent that it should take effect as his deed, in favor of the grantee ; and the same will become effectual to pass the estate granted, as soon as the same is known and assented to by the grantee.¹ It would be otherwise if the grantor retain control over the deed as to its delivery, as when he delivers it to a third party to keep and deliver it to the grantee named, *unless* he should call for it again.² But where a father made a deed to his minor children, and, when he acknowledged it, he told the magistrate to keep it, and have it recorded, which he did, it was held to be a good delivery, although the father, after it had been recorded, notified the recording officer not to deliver it to any one but himself, except, in case of his death, it was to be delivered to the grantees.³ If, however, it is merely delivered to a third person to keep, without the knowledge of the grantee, though he be the son of the grantor, it would have no effect if the grantor could withdraw it at his pleasure, even if it remained in that state till the grantor's death.⁴ The

¹ *Cin. Wil. &c. R. R. v. Iliff*, 13 Ohio St. 249; *Oliver v. Stone*, 24 Ga. 63, 70; *Mallett v. Page*, 8 Ind. 364; *Guard v. Bradley*, 7 Ind. 600; *Stewart v. Weed*, 11 Ind. 92; *Butler & Baker's case*, 3 Rep. 26 b; *Broom*, Com. 275; *Phillips v. Houston*, 5 Jones (Law), 302; *Cloud v. Calhoun*, 10 Rich. (Eq.) 358, 362; *Boody v. Davis*, 20 N. H. 140; *Mitchell v. Ryan*, 3 Ohio St. 382; *Church v. Gilman*, 15 Wend. 656.

² *Phillips v. Houston*, *sup.*, and cases cited; *Deardorff v. Foresman*, 14 Am L. Reg. 545; *Cook v. Brown*, 34 N. H. 476.

³ *Rivard v. Walker*, 39 Ill. 413.

⁴ *Baker v. Haskell*, 47 N. H. 479.

law on this subject is thus stated by Shaw, C. J.: "It is true, that, in theory of law, the grantee in a deed-poll is held to be a party by accepting the deed. But the deed does not derive its efficacy as a grant and conveyance from the act of the grantee in accepting, but from that of the grantor in executing it. In case of a plain, absolute conveyance without condition, either no special acceptance is necessary to give it effect, or, what is nearly the same thing, the acceptance of the grantee will be presumed. So the delivery of the deed to a third person, unconditionally, for the use of the grantee, gives effect to the deed. From these considerations, it seems to follow that the efficacy of a deed to transfer real estate by deed-poll does not depend upon the legal capacity of the grantee to transfer an estate by deed." It was accordingly held, that a conveyance may be made by deed-poll to an infant, lunatic, or *feme covert*, although such grantee would be under legal disability to make a conveyance.¹ Where the grantees are minors, and the grant is a beneficial one, the law will presume an acceptance by them.² In Iowa, if the grant is beneficial to the grantee, and the deed be executed and recorded, a delivery and acceptance of it will be presumed, unless the contrary is shown.³ The foregoing remarks, however, it would seem, are to be taken as a statement of what, in certain cases, would be taken as *evidence* of assent on the part of the grantee, rather than as doing away with what seems to be a first principle, that no man can be compelled to become a purchaser of land without his knowledge and assent. Thus it is said, "The act of making, acknowledging, and having the deed recorded, would not be sufficient to transfer the title, for the reason that a contract can only be consummated by the act of two persons, or, in technical language, by the assent of two minds, one agreeing to part with, the other to accept, the title." "It is no answer to this position to say, that, when a deed has been properly acknowledged and

¹ *Concord Bank v. Bellis*, 10 Cush. 278; *Mitchell v. Ryan*, 3 Ohio St. 387; *Peavey v. Tilton*, 18 N. H. 152.

² *Spencer v. Carr*, 45 N. Y. 410; *Rivard v. Walker*, 39 Ill. 413; *Cecil v. Beaver*, 28 Iowa, 241.

³ *Robinson v. Gould*, 26 Iowa, 93; *Cecil v. Beaver*, 28 Iowa, 241.

recorded, a delivery will be presumed; for this presumption, like all presumptions which exist only for the sake of convenience, must yield to facts when established."¹

29. But although several of the cases seem to sustain the doctrine, that a delivery of a deed to a stranger for the grantee, where it is obviously for his benefit, passes the title at once as an effectual delivery, the better opinion seems to be, that no deed can take effect as having been delivered until such act of delivery has been assented to by the grantee, and he shall have done something equivalent to an [*581] actual acceptance of it; and, * moreover, the act of delivery and acceptance must, from the nature of the case, be mutual and concurrent acts. "Delivery always implies an acceptance by the person to whom the delivery is made," and a presumption of delivery arising from the deed being recorded may be rebutted by proof. "Acceptance by grantee is an essential part of a delivery."² Proof of an acceptance, at a time subsequent to that of the act of delivery, would not be sufficient to give validity to the deed, unless the act of delivery be a continuing one in its nature, such as leaving a deed on deposit to be accepted by the grantee at his election.³ Thus, where a father made a deed to his son, and caused the same to be recorded in the registry of deeds, where it lay at the time of the death of his son, who never knew of or assented to such deed, it was held, that it never took effect to pass any title to his son, nor could his heirs claim under it.⁴ It is an essential pre-

¹ Bullitt v. Taylor, 34 Miss. 741. See Boardman v. Dean, 34 Penn. St. 252; Berkshire M. F. Ins. Co. v. Sturgis, 13 Gray, 177. See Mitchell v. Ryan, 3 Ohio St. 386, 387; Jackson v. Bodle, 20 Johns. 184; Dikes v. Miller, 24 Texas, 417; Derry Bank v. Webster, 44 N. H. 268; Somers v. Pumphrey, 24 Ind. 243; Mallett v. Page, 8 Ind. 364.

² Wilsey v. Dennis, 44 Barb. 359; Fonda v. Sage, 46 Barb. 123; Foster v. Beardsley Co., 47 Barb. 513; Younge v. Guilbeau, 3 Wall. (U. S.) 636, 641; Xenos v. Wickham, 14 C. B. n. s. 474, note; Jackson v. Phipps, 12 Johns. 422.

³ Hulick v. Scovil, 4 Gilm. 177, a very fully considered and ably reasoned opinion; Buffum v. Green, 5 N. H. 71; Canning v. Pinkham, 1 N. H. 353; Church v. Gilman, 15 Wend. 656, 660; Jackson v. Dunlap, 1 Johns. Cas. 114; Lloyd v. Giddings, 7 Ohio, pt. 2, 50; Jackson v. Bodle, 20 Johns. 187; 1 Wood. Conv. 240.

⁴ Maynard v. Maynard, 10 Mass. 456. See also Jackson v. Phipps, 12 Johns. 418; Pennel v. Weyant, 2 Harring. 501; Elsey v. Metcalf, 1 Denio, 326; Jones

requisite, that the instrument in question should be understood by the parties to be completed and ready for delivery, in order to have a mere placing it in the hands or possession of the grantee or his agent construed into a delivery. Thus, in one case, it was handed by one party to the other to examine and see if it was satisfactory, it being understood that it might be necessary to alter or correct it. In another, it was handed to the attorney of the other party, accompanied by a declaration by the party executing it, that he was not to be bound until something else was done. And, in both these cases, it was held not to be a delivery.¹ So, where one executed a deed, and left it with the grantee's agent to keep till the grantee concluded whether to accept of it or not, it was held to be no delivery. And even if the deed is deposited with the grantee, but for a purpose other than delivery, it would not take effect as a deed; nor can a title be derived from a deed which has not been delivered.² While, therefore, it is not competent to control a deed by parol evidence, where it has once taken effect by delivery, it is always competent, by such evidence, to show that the deed, though in the grantee's hands, has never been delivered.³

30. Nor will the making and executing a deed in all respects, even to registering the same, be of any validity, unless delivered in the lifetime of the grantor; though if the recording of the deed is intended as a delivery, and is known to the grantee, and he assents to the same, it will take effect from the time he so assents.⁴ Thus making a deed and putting it

v. Bush, 4 Harring. 1. But see *Mitchell v. Ryan*, 3 Ohio St. 377; *Hatch v. Bates*, 54 Me. 140; *Kingsbury v. Burnside*, 58 Ill. 310; *Baker v. Haskell*, 47 N. H. 479.

¹ *Graves v. Dudley*, 20 N. Y. 76; *Millership v. Brookes*, 5 H. & Nor. 797; *Black v. Shreve*, 13 N. J. 457. See *Parker v. Parker*, 1 Gray, 409; *Howe v. Dewing*, 2 Gray, 476; *Worrall v. Munn*, 1 Seid. 229. Note and cases collected, Am. ed. 5 H. & Nor. 801; *Phil. W. & B. Railroad Co. v. Howard*, 13 How. 334; *Bell v. Ingestre*, 12 A. & E. n. s. 317; *Dyson v. Bradshaw*, 23 Cal. 528; *Berry v. Anderson*, 22 Ind. 39; *Fonda v. Sage*, 46 Barb. 124.

² *Ford v. James*, 2 Abb. N. Y. Rep. 162.

³ *Black v. Lamb*, 1 Beasley (N. J.), 116; *Roberts v. Jackson*, 1 Wend. 478; *Johnson v. Baker*, 4 B. & Ald. 440; *Black v. Shreve*, 13 N. J. 457, 459.

⁴ *Jackson v. Leek*, 12 Wend. 107; *Barns v. Hatch*, 3 N. H. 304; *Denton v. Perry*, 5 Verm. 382; *Harrison v. Phillips Academy*, 12 Mass. 455, 461; *Jackson v. Phipps*, 12 Johns. 418; *Jackson v. Richards*, 6 Cow. 617; *Elsey v. Metcalf*,

on record without the knowledge of the grantee would be no delivery; and if the grantor then take the deed, and do not actually deliver it, no knowledge or assent of the grantee in respect to the deed will give it effect, if the grantor, prior to such assent, had concluded not to deliver it, and continued of that mind afterwards.¹

31. If a deed is found in the grantee's hands, a delivery and acceptance is always presumed.² And the execution of a deed in the presence of an attesting witness is evidence from which a delivery may be inferred.³ If a grantee, in a deed which has been recorded, accept it after the grantor's death, it would estop him to deny its effect.⁴

32. And although, where the grantor has parted with all control of the deed, and it is upon its face beneficial to the grantee, an acceptance thereof may be presumed, not [*582] withstanding the * delivery was made to one without any previous authority to receive it, still it would be necessary, in order for this presumption to be entertained, that the person claiming under such a deed should show affirmatively, if the fact is doubtful, that the grantee was *in esse* at the time of such delivery made.⁵

33. Where the grantor, after executing the deed ready for delivery, retained it, by an agreement with the grantee, as

1 Denio, 326; Hedge v. Drew, 12 Pick. 141; Powers v. Russell, 13 Pick. 69, 77; Parker v. Hill, 8 Met. 447, that a delivery, after being recorded, is good; Porter v. Buckingham, 2 Harring. 197; Baldwin v. Maultsby, 5 Ired. 505; Stilwell v. Hubbard, 20 Wend. 44; Rathbun v. Rathbun, 6 Barb. 98; Oliver v. Stone, 24 Ga. 63; Berkshire M. F. Ins. Co. v. Sturgis, 13 Gray, 177; Boardman v. Dean, 34 Penn. St. 252; Boody v. Davis, 20 N. H. 140; Shaw v. Hayward, 7 Cush. 174; Mills v. Gore, 20 Pick. 28; *ante*, pl. 20 a; Younge v. Guilbeau, 3 Wall. 641.

¹ Hawks v. Pike, 105 Mass. 560; Hatch v. Bates, 54 Me. 139. But see Robinson v. Gould, 26 Iowa, 93; Cecil v. Beaver, 28 Iowa, 241.

² Clarke v. Ray, 1 Harr. & J. 319; Ward v. Lewis, 4 Pick. 518; Ward v. Ross, 1 Stew. (Ala.) 136; Canning v. Pinkham, 1 N. H. 353; Cutts v. York Co., 18 Me. 190; Green v. Yarnall, 6 Mo. 326; Houston v. Stanton, 11 Ala. 412; Chandler v. Temple, 4 Cush. 285; Southern Life Ins. Co. v. Cole, 4 Fla. 359. But it is competent to show that it was surreptitiously obtained. Den v. Farlee, 1 N. J. 279; Morris v. Henderson, 37 Miss. 501; Adams v. Frye, 3 Met. 109; Williams v. Sullivan, 10 Rich. Eq. 217; Little v. Gibson, 39 N. H. 505; Black v. Shreve, 13 N. J. 459; Wolverton v. Collins, 34 Iowa, 238.

³ Howe v. Howe, 99 Mass. 98; Moore v. Hasleton, 9 Allen, 106.

⁴ Ford v. Flint, 40 Verm. 382.

⁵ Hulick v. Scovil, 4 Gilm. 190; Bensley v. Atwill, 12 Cal. 231, 236.

security for the payment of the purchase-money, it was held to be neither a delivery nor an acceptance.¹ But where the parties were together, and a deed was duly executed and acknowledged, a declaration by the grantor that he delivered it as his deed, without asserting any right to retain it, was held to be a delivery, although the deed was left where it was executed, and was afterwards found in the grantor's possession.² So where a father made a deed to a son, and handed it to his wife, and soon after met his son and told him what he had done, and that the deed was at his house ready for him. The son afterwards occupied the premises, and erected a house thereon. After the death of the father, it was held that the fact of delivery of the deed could not be controverted.³ But where one, in the execution of an agreement to convey lands, tenders a deed fully executed and acknowledged in performance of that agreement, which the grantee refuses to accept, it in no manner affects the vendor's title to his estate.⁴

34. Where the deed is delivered to the grantee named, the law presumes it was done with an intent, on the part of the grantor, to make it his effectual deed; but if it is delivered to a stranger, and nothing is said at the time, no such inference is drawn from the act of delivery.⁵ But it has been held, that depositing a deed in the post-office, under a direction to the grantee, is tantamount to sending it by a special messenger, and is a delivery.⁶ The law bearing upon two or three of the points above stated is commented upon by the court of Ohio, in a case where the grantor caused his deed to be recorded, and the question was made as to its delivery. They held that the record of a deed is *prima facie* evidence of its delivery; that the delivery of a deed to a stranger for the use of the grantee may be a sufficient delivery, depending upon the intention with which it was done. If delivered to

¹ Jackson v. Dunlap, 1 Johns. Cas. 114.

² Scrugham v. Wood, 15 Wend. 545; Souverbye v. Arden, 1 Johns. Ch. 253, 255; Stewart v. Weed, 11 Ind. 92; Pennsylvania Co. v. Dovey, 64 Penn. St. 280.

³ Walker v. Walker, 42 Ill. 311, 314.

⁴ Cole v. Gill, 14 Iowa, 529.

⁵ Shep. Touch. Prest. ed. 58; Church v. Gilman, 15 Wend. 656; 1 Wood, Conv. 195. For what should be said, see Souverbye v. Arden, 1 Johns. Ch. 255.

⁶ M'Kinney v. Rhoades, 5 Watts, 343.

the grantee himself, no words are necessary, since the law presumes in such case it is for his use. If delivered to a stranger, there is no such presumption; and there must, therefore, be some evidence, beyond such delivery, of his intent thereby to part with his title. But no precise form of words is necessary to declare such intent. Any thing that shows that the delivery is for the use of the grantee is enough. And having it recorded is of this character, so far as to raise a reasonable presumption, unless controlled by other evidence. As a general rule, acceptance by the grantee is necessary to constitute a good delivery; for a man may refuse even a gift. But the assent may be before as well as after the deed made. And where the grant is a pure, unqualified gift, the presumption of acceptance can only be rebutted by proof of dissent. "And it matters not that the grantee never knew of the conveyance; for, as his assent is presumed from its beneficial character, the presumption can be overthrown only by proof that he did not know of it, and rejected it." It is upon this ground that a deed to an infant child is sustained. And in that case, the deed was held to pass the title from a father to a daughter, though she died without knowledge of its having been made; in which respect it is opposed to the case of *Maynard v. Maynard*, cited above.¹ In Alabama, where a grant was made by deed to two children of the age of ten years by a father, who handed the deed to their mother, and "told her to keep it," but nothing more was said or done, the court held that it depended upon his intention whether it should be a delivery of the deed or not, and left it to the jury to find.² But, until known or assented to by the grantee, the granted premises were held liable to be attached by a creditor of the grantor, or to be mortgaged by him.³

¹ *Mitchell v. Ryan*, 3 Ohio St. 377; *Folk v. Varn*, 9 Rich. Eq. 303, *accd't* See *Maynard v. Maynard*, 10 Mass. 456; *ante*, p. *581, pl. 29, and cases cited; *Wall v. Wall*, 30 Miss. 91, acceptance presumed from the beneficial character of the grant, though unknown to the grantee. See *Tibbals v. Jacobs*, 31 Conn. 428; *Cecil v. Beaver*, 28 Iowa, 240.

² *Gregory v. Walker*, 38 Ala. 26, 33; *Baker v. Haskell*, 47 N. H. 479.

³ *Day v. Griffith*, 15 Iowa, 103; *Woodbury v. Fisher*, 20 Ind. 389; *Parmelee v. Simpson*, 5 Wall. U. S. 86; *Johnson v. Farley*, 45 N. H. 509; *Derry Bank v. Webster*, 44 N. H. 268.

35. The relation of a party to whom the deed is delivered to the estate and the grantee named may be such, that the law will imply an acceptance sufficient to give effect to the deed. Thus in one case, where delivery was made to a father for his daughter, his acceptance was held sufficient from his character as her natural guardian.¹ So where a deed of trust was delivered to the *cestui que trust*, who was the beneficiary under the provisions of the deed.²

* 36. If there are several grantees in a deed, it may [*583] be delivered to one on one day, and to another on another day, and thereby take effect as to all.³ But a delivery to one does not operate as a delivery to the other, unless so expressed by the grantor.⁴ And where an indenture of partition, prepared to be signed by several co-tenants, was executed by one, and came into the possession of the others, who refused to execute, it was held not to be a delivery on his part.⁵

37. It has been stated, that, to give effect to a deed, there must be an assent to it by the grantee; and where it is in his favor, the law inclines to presume such assent; yet if a deed be made to a married woman, and her husband dissents thereto, it is void as to her at common law.⁶ If the grant be to husband and wife, and he assent, she cannot, after his death, avoid the deed by verbal waiver or disclaimer of the title.⁷ But it is unqualifiedly stated by Coke, that if an estate be conveyed to a wife, and the husband expressly assents to the same, she may, after his death, and so may her heirs, waive the same.⁸

38. And generally, if a deed is delivered to one who is authorized by another to receive it for him, or to one without

¹ *Bryan v. Wash*, 2 Gilm. 557.

² *Souverbye v. Arden*, 1 Johns. Ch. 240; *Jaques v. Methodist Church*, 17 Johns. 577; s. c. 1 Johns. Ch. 456; *Cloud v. Calloun*, 10 Rich. Eq. 362; *Morrison v. Kelly*, 22 Ill. 612; *Rogers v. Carey*, 47 Mo. 236.

³ 1 Wood, Conv. 195.

⁴ *Hannah v. Swarner*, 8 Watts, 9.

⁵ *Tewksbury v. O'Connell*, 20 Cal. 69.

⁶ 1 Wood, Conv. 240; *Melvin v. Proprs., &c.*, 16 Pick. 167; *Whelpdale's case*, 5 Rep. 119; *Butler & Baker's case*, 3 Rep. 29; *Foley v. Howard*, 8 Clarke (Iowa), 36; Co. Lit. 3 a.

⁷ *Butler & Baker's case*, 3 Rep. 26; 1 Wood, Conv. 240.

⁸ Co. Lit. 3 a.

such previous authority, but authorized by the grantee to retain it for him, it is held to constitute an effectual delivery.¹ Where the deed conveys an estate to one which is defeasible upon contingency, and the same is thereupon to go over to another as a contingent limitation, or there is a contingent remainder limited after the expiration of a particular estate, a delivery of the deed to the first taker is a delivery as to all who may be to take under it.² And a remainder-man may take under a deed-poll delivered to the tenant of the particular estate, though a stranger to the deed.³

39. There is a class of cases which it is enough simply to refer to in this connection, where courts, in their eagerness to carry out the intent of the grantor, and, presuming an intent on the part of the grantee from the manifest advantage to result to him from the deed, so far assume an acceptance to be made as to hold that a good and sufficient delivery has taken place, and become effectual, before any actual acceptance by the grantee. These are so nearly exceptions to the general rule as to deserve a separate consideration, and embrace that class of conveyances which debtors in embarrassed circumstances make for the benefit of creditors when delivering a deed of assignment, absolutely and unconditionally, to a third person, to be delivered to the creditor. Of this class is *Merrills v. Swift*, where the deed took precedence of an attachment, though not actually received and accepted by the creditor till after an attachment made.⁴

40. While such is the effect of a delivery, where it is made with an intent to pass a present title, there may be a [*584] * conditional delivery where the deed, though delivered, will not take effect until the happening of some condition annexed thereto. A deed thus delivered is called an *escrow*.⁵

41. But a deed can never be an escrow if delivered to the

¹ *Turner v. Whidden*, 22 Me. 121; *Stewart v. Weed*, 11 Ind. 94; *Guard v. Bradley*, 7 Ind. 600; *Western R. R. v. Babcock*, 6 Met. 346, case of a delivery to agent of the corporation.

² *Folk v. Varn*, 9 Rich. Eq. 303.

³ *Phelps v. Phelps*, 17 Md. 134.

⁴ *Merrills v. Swift*, 18 Conn. 257; *Wilt v. Franklin*, 1 Bin. 502. *Tompkins v. Wheeler*, 16 Peters, 119.

⁵ *Termes de la Ley*, "Escrow."

grantee himself, unless for the express purpose of being handed to another person, even though accompanied with an express condition, and not to take effect unless such condition is complied with. The title will nevertheless pass by such delivery.¹ It has accordingly been held, that, if one of two obligors in an instrument deliver it to the obligee, it is an effectual delivery as to both. So if an obligor execute an instrument and deliver it to his co-obligor, or retain it himself, as an escrow, to be delivered to the obligee, it will not have that character. The importance of this will be perceived when it is recollected, that, after a deed has been delivered as an escrow, it is no longer revocable by the maker, but the same will take effect whenever the condition shall have happened or been complied with upon which it is to be finally delivered.² If the delivery is made to the party, no matter what may be the form of the words, the delivery is absolute, and the deed takes effect presently as the deed of the grantor, discharged of the conditions upon which the delivery was made.³ But where a composition deed was executed on part of a surety, and delivered to a creditor, to be void if the creditors did not sign it, the creditor taking it to get their signatures, it was held to be an escrow of no binding obligation unless all the creditors signed it.⁴ And this will be true, though, after its delivery in the manner above stated, the deed, by the agreement of

¹ Shep. Touch. 59; Whyddon's case, Cro. Eliz. 520; Fairbanks v. Metcalf, 8 Mass. 230, 238; Brown v. Reynolds, 5 Sneed, 639; Cin. Wil. & Z. Railroad v. Iliff, 13 Ohio St. 249-254. But see, as to conditional delivery of bonds, 1 Wood, Conv. 193; Hawksland v. Gatchel, Cro. Eliz. 835, which is denied in Thoroughgood's case, 9 Rep. 137; Lawton v. Sager, 11 Barb. 349; Com. Dig. Fait, A. 4; Williams v. Green, F. Moore, 642; Holford v. Parker, Hob. 246, and Williams' note; Foley v. Cowgill, 5 Blackf. 18; Gilbert v. N. A. F. Ins. Co., 23 Wend. 43; Fireman's Ins. Co. v. McMillan, 29 Ala., 160; Ward v. Lewis, 4 Pick. 520; Jayne v. Gregg, 42 Ill. 416; Blake v. Fash, 44 Ill. 305.

² Millett v. Parker, 2 Met. (Ky.) 608, 616; Worrall v. Munn, 1 Seld. 229; Wight v. Shelby R. R., 16 B. Mon. 4. See M. & I. Plank Road Co. v. Stevens, 10 Ind. 1.

³ Worrall v. Munn, 1 Seld. 229. See Herdman v. Bratten, 2 Harring. 396; State v. Chrisman, 2 Ind. 126; M. & Ind. Plank Road Co. v. Stevens, 10 Ind. 1; Black v. Shreve, 13 N. J. 458; Cin. & Wil. & Z. Railroad v. Iliff, 13 Ohio St. 249; Moss v. Riddle, 5 Cranch, 351; Lloyd v. Giddings, 7 Ham. (Ohio) 52. But *contra*, Bibb v. Reid, 3 Ala. 88.

⁴ Johnson v. Baker, 4 B. & Ald. 440. See Black v. Shreve, 13 N. J. 462.

the parties, be placed in a stranger's hands, to remain till they call for it. It must, after all, depend, in each case, upon whether the parties at the time meant it to be a delivery to take effect presently. As where a deed was handed to the grantee, to place it in a third person's hands to keep as an escrow, and it was so received and transmitted, no title vested in the grantee till a second delivery.¹ But, in order to have a deed have the character and qualities of an escrow, it must be completely executed in all respects, except the formal delivery.²

42. But a deed is a presently operative deed, and not an escrow, though placed in a stranger's hands, with a direction to deliver it to the grantee at some future day, or upon a certain event, unless there be some condition connected with such delivery, the happening of which, by the terms of the authority in the receiver, must precede delivery to the grantee, and, until then, the deed is to have no effect. Such, in fact, was the delivery in the cases, above cited, of *Hatch v. Hatch*, *Belden v. Carter*, and *Doe v. Knight*; and the law upon the subject is thus stated by Perkins: "If I deliver an obligation or other writing unto a man as my deed, to deliver [*585] unto him to *whom it is made, when he shall come to York, it is my deed presently; and if he shall deliver it to him before he come to York, yet I shall not avoid it; and if I die before he come to York, and afterwards he cometh to York, and he delivereth the deed unto him, it is clearly good and my deed, and that it cannot be if it were not my deed before my death."³ Where the grantor handed the deed to a third person to hold for the grantee, but the holder never delivered it unto the grantee till after the grantor's death, it was held that the estate vested in the

¹ *Shep. Touch. Prest. ed. 59*; *Den v. Partee*, 2 Dev. & B. 530; *Simonton's Estate*, 4 Watts, 180; *Murray v. Stair*, 2 B. & C. 82; *Jackson v. Sheldon*, 22 Me. 569; *Gilbert v. N. A. Ins. Co.*, 23 Wend. 43. But see this questioned in *Braman v. Bingham*, 26 N. Y. 483; *Fairbanks v. Metcalf*, 8 Mass. 239.

² *Deardorff v. Foresman*, 14 Am. L. Reg. 551.

³ Perkins, § 143; *Shep. Touch. Prest. ed. 58, 59*. See *Wheelwright v. Wheelwright*, 2 Mass. 447. But see this doctrine doubted, *State Bank v. Evans*, 3 Green, 155; and see 4 Kent, Com. 455, note. But is fully sustained by *Foster v. Mansfield*, 3 Met. 412; *O'Kelly v. O'Kelly*, 8 Met. 436; *Murray v. Stair*, 2 B. & C. 82; *Shaw v. Hayward*, 7 Cush. 175.

grantee upon the handing of the deed to the bailee, although he was not employed by the grantee to receive it.¹ But it does not take effect until the second delivery, unless the grantor in the mean time becomes incapable of delivering the deed, when it relates back to the first delivery.² Whether putting a deed into a third person's hands is a present delivery, or an *escrow*, depends upon the *intent* of the parties. If the delivery depends upon the performance of a *condition*, it is an *escrow*; otherwise it is a *present grant*, though it be to wait the lapse of time, or happening of an event. If it is to be delivered at the grantor's death, it is a present deed; and a quitclaim by the grantee, intermediate, would pass his estate. But if it be expressly delivered as an *escrow*, to be delivered at a future time, it is not a present conveyance.³ But it was held by Denio, J., that though, in the case supposed, the delivery at the grantee's death would retroact so as to make the estate the grantee's from the first delivery, it would not take effect so as to pass the estate until the second delivery.⁴ But to have it a delivery in the case supposed, so as to pass an estate, the grantor must absolutely part with the control or dominion over the deed. If it is subject to be recalled by the grantor before delivery, it is not held to be a delivery.⁵ Thus, where A made a deed to his sister, and left it in a third person's hands without her knowledge, and at his death devised two acres of his land to B, and, after his death, to his sister, "together with other lands I have already conveyed her," it was held to be no delivery of the deed, and that the sister took by will, having reference to the deed for what he had devised to her.⁶

43. Writers, accordingly, are careful to caution persons

¹ Mather v. Corless, 103 Mass. 568.

² Foster v. Mansfield, 3 Met. 412, 415.

³ Foster v. Mansfield, 3 Met. 414, 415; Price v. P. & Ft. W. & C. Railroad, 34 Ill. 13. See 2 Roll. Abr. 24 pl. 17. Tooley v. Dibble, 2 Hill, 641; Braman v. Bingham, 26 N. Y. 483; Hathaway v. Payne, 34 N. Y. 106, 107; Cook v. Brown, 34 N. H. 465.

⁴ Hathaway v. Payne, *sup.*, 113.

⁵ Shirley v. Ayres, 14 Ohio, 310; Cook v. Brown, 34 N. H. 465; Fitch v. Bunch, 30 Cal. 213; Deardorff v. Foresman (Ind.), 14 Am. L. Reg. 545; Berry v. Anderson, 22 Ind. 36; Millett v. Parker, 2 Met. (Ky.) 618.

⁶ Thompson v. Lloyd, 49 Penn. St. 128.

making deeds, and wishing to deliver them as *escrows*, to use a proper form of words expressive of their intent; such, for instance, as, "I deliver this as an escrow to you to keep until such a day, and upon condition, &c.; and then you shall deliver this escrow to him as my deed." It probably would not be necessary to use any technical form of words in such a case, and would be sufficient if the party making the deed, when he placed it in a third party's hands, declared, in intelligible terms, that it was not to be deemed or delivered as his deed until some future time, and on the happening of some future event; thereby expressly negating the intention to treat it as his present deed, or as being to take effect presently.¹

44. When a deed has been delivered as an escrow, it has no effect, as a deed, until the condition has been performed,² and no estate passes until the second delivery,³ though, [*586] when such *second delivery has been made, it relates back to the first, for many purposes, and is considered as a consummation of an inchoate act then begun.⁴ But if, in the mean time, the estate should be levied upon by a creditor of the grantor, he would hold by virtue of such levy, in preference to the grantee in the deed.⁵ Nor does such second delivery carry a right to the intermediate rents accruing between the first and second delivery.⁶ But whether the deed,

¹ Shep. Touch. Prest. ed. 58, 59; 1 Wood, Conv. 196; Jackson v. Catlin, 2 Johns. 248, 259; Fairbanks v. Metcalf, 8 Mass. 230, 238; Jackson v. Sheldon, 22 Me. 569; White v. Bailey, 14 Conn. 271. A deed sent enclosed in a letter to a third person, to be delivered to grantee upon his paying a certain sum, was an escrow; Clark v. Gifford, 10 Wend. 310; Gilbert v. N. A. Ins. Co., 23 Wend. 43; State Bank v. Evans, 3 Green, 155; Millett v. Parker, 2 Met. (Ky.) 616; Shoenberger v. Hackman, 37 Penn. St. 87; State v. Peck, 53 Me. 293; Jolinson v. Baker, 4 B. & Ald. 440.

² Com. Dig. Fait, A. 4; Hinman v. Booth, 21 Wend. 267; Fairbanks v. Metcalf, 8 Mass. 230, 238; Perk. § 138; Touch. 59; Black v. Shreve, 13 N. J. 458.

³ Shep. Touch. Prest. ed. 59; Green v. Putnam, 1 Barb. 500, 504, Frost v. Beekman, 1 Johns. Ch. 297; Everts v. Agnes, 4 Wis. 351; James v. Vanderheyden, 1 Paige, 385.

⁴ 1 Wood, Conv. 197; Ruggles v. Lawson, 13 Johns. 285; Shep. Touch. 59, 73; Butler & Baker's case, 3 Rep. 35; Shirley v. Ayres, 14 Ohio, 307.

⁵ Jackson v. Rowland, 6 Wend. 666; Frost v. Beekman, 1 Johns. Ch. 297; Jackson v. Catlin, 2 Johns. 248.

⁶ Perkins, § 10; 3 Prest. Abst. 65.

when thus delivered, shall retroact so as to have the same effect upon intermediate rights as if fully delivered at first, has, in some cases, been held to depend upon the intention of the parties, and in others to turn upon the point, that such a construction was necessary to protect the grantee against intervening rights.¹ If the deed is delivered before the previous condition is performed, it will not be the deed of the grantor, or have any effect as such.² But it may be used as evidence of the contract to sell and purchase the land, and, in that way, have effect given to it, under the statute of frauds, as a writing signed by the parties.³ The effect to be given to the obtaining possession of a deed delivered as an escrow, before the condition is performed, was fully considered in a case where the grantee obtained such possession by fraud before the condition had been performed, and then conveyed the estate to an innocent purchaser. The court say: "Until the performance of the condition, it (the deed) must remain a mere scroll in writing, of no more efficacy than any other written scroll; but when, upon the performance of the condition, it is delivered to the grantee or his agent, it then becomes a deed to all intents and purposes, and the title passes from the date of the delivery. The delivery, to be valid, must be with the assent of the grantor. If the grantee obtain possession of the escrow, without performance of the condition, he obtains no title thereby, because there has been no delivery with the assent of the grantor, which assent is dependent upon compliance with the condition." "The recording of an escrow does not make it a deed." They held that the depository of an escrow was as much the agent of the grantee as the grantor. "He is as much bound

¹ Price v. Pittsburg, &c. R. R., 34 Ill. 34, 36; Shirley v. Ayres, 14 Ohio, 310.

² Perkins, § 138; but see Id. § 144; Stiles v. Brown, 16 Vt. 563, 569; Jackson v. Sheldon, 22 Me. 569. See Hooper v. Ramsbottom, 6 Taunt. 12; State Bank v. Evans, 3 Green, 155; Rhodes v. Gardiner, 30 Me. 110, unless the grantee holding it convey the land to a *bona fide* purchaser ignorant of the fact as to the delivery. Blight v. Schenck, 10 Penn. St. 285; Peter v. Wright, 6 Ind. 183; Souverbye v. Arden, 1 Johns. Ch. 240; Berry v. Anderson, 22 Ind. 40. Even an innocent purchaser cannot hold in such case. Smith v. So. Roy-alton Bank, 32 Vt. 341; People v. Bostwick, 32 N. Y. 450; Illinois C. R. v. McCullough, 59 Ill. 170.

³ Cagger v. Lansing, 57 Barb. 421.

to deliver the deed, on performance of the condition, as he is to withhold it until performance." And, being thus in the hands of the agent of the grantee, the deed takes effect, the moment the condition is performed, without any formal delivery into the hands of the grantee.¹ The grantee in the case, after obtaining possession of the deed, had it recorded, and then conveyed the estate to an innocent purchaser. But the court, upon full consideration, held that the purchaser acquired nothing by his deed, because his grantor never acquired any title by gaining possession of the escrow. They liken it to a deed which the grantee had stolen, where no title is gained thereby; and distinguish it from one obtained by fraud from the grantor himself, where a title does pass by the actual delivery by the grantor.² A grantor may deliver his deed to the agent of the grantee, to be delivered to the grantee if certain conditions are performed; otherwise to return it to the grantor: and if the agent accept it on those terms, the delivery will not give effect to the deed unless the condition is performed.³

45. The instances given in the books, illustrating some of these propositions, seem to imply the necessity of a second formal delivery to the party who is to take by the deed, unless such a construction would defeat the intent of the parties. Thus it is said in the Butler and Baker's case, that, "to some intent the second delivery hath relation to the first delivery, and in some not; and yet, in truth, the second delivery hath all its force by the first delivery, and the second is but an execution and consummation of the first. And therefore, in such case of necessity, *ut res magis valeat quam pereat*, it shall have relation, by fiction, to be made his deed *ab initio* by force of the first delivery. And therefore, if, at the time of the first delivery, the lessor be a *feme sole*, and, before the second delivery, she take a husband; or if, before the second delivery, she dieth; in this case, if the second delivery shall not have

¹ Shirley v. Ayres, 14 Ohio, 308.

² Everts v. Agnes, 4 Wis. 343; s. c. 6 Wis. 453; Black v. Shreve, 13 N. J. 458; Dyson v. Bradshaw, 23 Cal. 536; Abbott v. Alsdorf, 18 Mich. 158.

³ Cincin., Wil., & Z. Railroad v. Iliff, 13 Ohio St. 249-254; Southern L. Ins., &c. Co. v. Cole, 4 Fla. 359.

relation to this intent to make it the deed of the lessor *ab initio*, but only from the second delivery, the deed in both cases should be void, and therefore, in such case, for necessity, and *ut res magis valeat quam pereat*, to this intent, by fiction of law, it shall be * a deed *ab initio*; and yet, [*587] in truth, it was not his deed till the second delivery.”

And the same rule applies if the party who makes the deed dies before the event happens when it is to be delivered.¹ And, in such case, if money is paid as a performance of the condition after the grantor's death, the same will go to the heirs, and not to the personal representatives of the grantor.² But if a *feme covert* deliver a deed as an escrow, and become discover before the second delivery, such second delivery would give no validity to the deed, the first being void.³

45 a. There is a class of cases growing out of the conveyance of lands which is required to be noticed here, as they seem to conflict with some of the doctrines hereinbefore stated. Thus it has been laid down as a general proposition, that, upon the execution and delivery of a deed, the title of the grantor passes to and vests in the grantee; and that no one ceases to be the owner of an estate, the soil and freehold of which have once vested in him, by mere abandonment of the same, without some deed of conveyance. But cases like the following have occurred, where the title of an owner has been held to pass to a third person without any such deed. Thus, where A made his deed to B, who, having made sale of the estate to C, surrenders up his deed to A before it is recorded, and A, at his request, makes a new deed to C, it has been held to convey a good title to C. Nor, when analyzed, is there any thing in this necessarily at variance with the

¹ 3 Prest. Abst. 65; Butler & Baker's case, 3 Rep. 36; Perryman's case, 5 Rep. 84 b; Perkins, §§ 11, 138-140; Shep. Touch. Prest. ed. 59; Jackson v. Catlin, 2 Johns. 248, 259; Hatch v. Hatch, 9 Mass. 307, 310; 1 Wood, Conv. 197; Jackson v. Rowland, 6 Wend. 666; Holford v. Parker, Hob. 246 a, and Williams' note; Shirley v. Ayres, 14 Ohio, 309; Ruggles v. Lawson, 13 Johns. 285. See Carr v. Hoxie, 5 Mason, 60; Evans v. Gibbs, 6 Humph. 405; Frost v. Beekman, 1 Johns. Ch. 257; Hall v. Harris, 5 Ired. Eq. 303; Price v. Pittsburg, &c. Railroad, 34 Ill. 36.

² Teneick v. Flagg, 5 Dutch. 25.

³ Butler & Baker's case, 3 Rep. 34; Com. Dig. Fait, B. 5; Jennings v. Bragg, Cro. Eliz. 447.

familiar principles of law. The grantor would, of course, be estopped to deny his own deed to the second grantee; while the first grantee, having voluntarily destroyed the evidence of his title, would not be admitted to impeach that of a purchaser, whom he had induced to accept and pay for a deed from the grantor in whom the record title remained.¹ But where a deed had been delivered, but not recorded, and the grantor, about a month afterwards, took the deed, and, with the knowledge and assent of the grantee, inserted, "saving and excepting the saw-timber on the premises," and the deed was then recorded, it was held to be inoperative to reconvey the property in the timber, which had already passed to the grantee by the deed.² But where a mortgagee sold and assigned the mortgage-note and mortgage, and afterwards purchased them again, and his assignee cancelled the first assignment and delivered back the deed to him, it was held that the mortgagee was thereby reinvested in his rights as mortgagee.³ But such redelivery and cancellation would not have the effect to defeat the grantee's title unless it reconstituted it in the grantor.⁴ But nothing short of actual cancellation of the deed would affect the title of the grantee.⁵ If the first deed be to the wife, and is, by her agreement, given up and cancelled, and a new deed be made by the grantor to the husband, it does not operate to divest the estate of the wife, and create one in the husband.⁶ So, if such original deed had been to two tenants in common, and the same had been given up by one to be cancelled, but not assented to by the other, and a new deed made, it would be effectual to convey one undivided half part of the estate.⁷ In Indiana, the court held, that if one holding an unrecorded deed voluntarily gave it up to the grantor to be cancelled, and it was destroyed, he

¹ Commonwealth v. Dudley, 10 Mass. 403; Holbrook v. Tirrell, 9 Pick. 105; Trull v. Skinner, 17 Pick. 213; Lawrence v. Stratton, 6 Cnsh. 163, 169; Patterson v. Yeaton, 47 Me. 314. See Parker v. Kane, 22 How. 1, 18; Steel v. Steel, 4 Allen, 423; Blake v. Fash, 44 Ill. 305.

² Booker v. Stivender, 13 Rich. Eq. 85.

³ Howe v. Wilder, 11 Gray, 267.

⁴ Bank v. Eastman, 44 N. H. 438.

⁵ Barrett v. Barron, 13 N. H. 150.

⁶ Wilson v. Hill, 2 Beasley (13 N. J.), 143.

⁷ Lawrence v. Stratton, *sup.* See Speer v. Speer, 7 Ind. 178.

could not afterwards recover the land, not because such cancellation reconveyed the title to the original grantor, but it destroyed the means, on the part of the grantee, to establish his title. He could not show the contents by parol as of a lost deed.¹ The cases in general, however, agree that mere cancelling or delivering back the grantor's deed does not divest the grantee's title.² But the courts of New Hampshire, on the contrary, hold, that a voluntary surrendering of an unrecorded deed by the grantee to the grantor, with a view of thereby revesting the estate in the grantor, has that effect, upon the principle of estoppel.³ And such a surrender of the deed before record, and giving up possession of the premises to the grantor, may have the effect of reinvesting the original owner in his title, by reason of the parties having destroyed the only evidence competent to establish the title of the purchaser. Having voluntarily cancelled his deed, he cannot be admitted to show its contents by secondary evidence.⁴ But where a deed was made to one upon condition, stated in the deed, that he should have the term of two years in which to determine whether he would complete the bargain, and take the land, and pay the purchase-money, with a right on his part to rescind the bargain, "in which event the land was to revert to the grantor," it was held, that the grantee might rescind the bargain by parol, and, upon doing so, the title to the land would revert accordingly.⁵

46. At common law, in order to pass a title effectually by a deed of feofment, it was requisite that livery of seisin of

¹ *Thompson v. Thompson*, 9 Ind. 328; *Speer v. Speer*, 7 Ind. 178.

² *Holbrook v. Tirrell*, 9 Pick. 108; *Gilbert v. Bulkley*, 5 Conn. 262; *Botsford v. Morehouse*, 4 Conn. 550; *Fawcetts v. Kinney*, 33 Ala. 264; *Conway v. Deerfield*, 11 Mass. 332; *Ward v. Lumley*, 5 H. & N. 87, 94, and note to Am. ed.; *Kearsing v. Kilian*, 18 Cal. 491. See 1 Greenl. Ev. § 265; *Steel v. Steel*, 4 Allen, 422; *Holmes v. Trout*, 7 Peters, 171; *Wilson v. Hill*, 2 Beasley (13 N. J.), 143; *Patterson v. Yeaton*, 47 Me. 308; *Fonda v. Sage*, 46 Barb. 122; *Howard v. Huffman*, 3 Head, 562, though done before recording; *Hall v. McDuff*, 24 Me. 312; *Parker v. Kane*, 4 Wis. 12.

³ *Dodge v. Dodge*, 33 N. H. 487, 495; *Thomson v. Ward*, 1 N. H. 9; *Mussey v. Holt*, 4 Foster, 248; *Farrar v. Farrar*, 4 N. H. 191; *Bank v. Eastman*, 44 N. H. 438; *Howard v. Huffman*, 3 Head, 564; *Sawyer v. Peters*, 50 N. H. 143.

⁴ *Blaney v. Hanks*, 14 Iowa, 400; *Parker v. Kane*, 4 Wis. 12.

⁵ *Hughes v. Wilkinson*, 37 Miss. 482.

the land should be made to the feoffee.¹ But, as has been heretofore explained, the statute of uses obviated the necessity of any formal livery of seisin; and as, therefore, all modern deeds derive their force and validity from this statute, this ceremony has grown into practical disuse, as a part of the process of a conveyance, except in those cases where the grantor, being disseised, enters to regain his seisin, in order to give effect to his deed, which he delivers to the grantee upon the premises, so as to pass the legal seisin.² And where a disseisee entered upon the land, and delivered a deed while there, it was held to be valid, although the purchaser knew the title to be in dispute.³ It will, moreover, be found, that in many of the States the execution and recording of a deed is made to perform the office of livery of seisin at common law.⁴

46 *a.* There are cases where the transaction is not complete and effectual in itself to convey a title to lands, but, by being connected with other acts or transactions as parts of the one under consideration, it becomes effective by the relation which the law creates between them, whereby they are made to partake of the character of a single and integral act. It may be difficult to classify these cases; but a reference to a few of them will give a general idea of what is here meant. One of these would be the case of a sale of premises made by a sheriff, upon execution, but no deed delivered till a subsequent period, during which the judgment debtor had died. When the deed is given, it has relation back to the sale, and is considered as then taking effect, and its validity is not affected by the intermediate death of the debtor. The rule stated in such cases is, "Where there are divers acts concurrent to make a conveyance, estate, or other thing, the original act shall be preferred, and to this the other acts shall have relation."⁵

¹ 1 Wood, Conv. 241; Co. Lit. 266 b; 2 Bl. Com. 318; *Jackson v. Wood*, 12 Johns. 74; Shep. Touch. 54.

² *Ante*, p. *487; Co. Lit. 266 b; Shep. Touch. 54.

³ *Warner v. Bull*, 13 Met. 1.

⁴ *Higbee v. Rice*, 5 Mass. 352; *Caldwell v. Fulton*, 31 Penn. St. 483; *Purd. Dig.* 321, § 74; *Wyman v. Brown*, 50 Me. 160; *Bryan v. Bradley*, 16 Conn. 481; *Williamson v. Carlton*, 51 Me. 462.

⁵ *Jackson v. M'Call*, 3 Cowen, 75, 80; *Viner's Ab. Relation*, E.

Several cases are mentioned in the one cited; and the language of Kent, C. J., in another case,¹ was: "A conveyance will, in many cases, be deemed to relate back to the time when the agreement was concluded, and render valid any intermediate disposition of the land."² In *Landes v. Brant*, the title in question was an imperfect one, in the original claimant, under the Spanish government; and a creditor of the one holding this title seized and sold his title on execution; and, subsequently to this, the United States confirmed the title to the original claimant. It was held, that, by relation, he was the real owner when the sale was made, and consequently the purchaser under the sheriff's sale held the land against the devisees of the original claimant. The court quote from Cruise with approbation, as applicable to such cases: "There is no rule better founded in law, reason, and convenience, than this, that all the several parts and ceremonies necessary to complete a conveyance shall be taken together as one act, and operate from the substantial part by relation."³ Another class of cases is one already mentioned, where deeds have been delivered as escrows, and, before the event happens upon which they are to be delivered, the grantor dies, or, if a *feme sole*, marries. In such cases, when the contingency happens, the deed is delivered, and takes effect by relation from the date of the first delivery as an escrow.⁴ But the case of *Frost v. Beekman* further sustains the proposition, that courts will not apply the doctrine of relation, when by so doing they will work injustice to the rights of innocent parties acquired between the events which it is proposed thus to unite by relation, nor by making that tortious which was lawful originally. Thus, though a deed, made

¹ *Johnson v. Stagg*, 2 Johns. 520. See also *Jackson v. Bull*, 1 Johns. Cas. 81; *Jackson v. Dickenson*, 15 Johns. 309.

² *Crowley v. Wallace*, 12 Mo. 143, in its facts and decision was identical with that of *Jackson v. M'Call*, *sup.*

³ *Landes v. Brant*, 10 How. 348, 373. See the same doctrine, *Barr v. Gratz*, 4 Wheat. 213; *Cavender v. Smith*, 5 Clarke (Iowa), 157; s. c. 3 Greene (Iowa), 349; *Rogers v. Brent*, 5 Gilm. 573.

⁴ *Frost v. Beekman*, 1 Johns. Ch. 297; *Butler & Baker's case*, 3 Rep. 35. See *Foster t. Mansfield*, 3 Met. 412; *O'Kelly v. O'Kelly*, 8 Met. 436; *Viner's Ab. Relation*, E.

in pursuance of a previous contract to sell, may, as between the parties to the same, relate back to the date of the contract, it will not be allowed to do so to the injury of intermediate innocent purchasers, or strangers who have acquired an interest. The doctrine, as stated by Thompson, J., is: "It is a general rule with respect to the doctrine of relation, that it shall not do wrong to strangers: as between the same parties, it may be adopted for the advancement of justice."¹ But a sale and deed made by the owner of a particular estate upon which depends a contingent remainder will not operate, by relation to defeat the remainder, if the deed is not actually delivered until after the same has vested.² There is, however, a large class of cases where the doctrine of relation applies to its full extent; as, for instance, where an execution title relates back to the time of the attachment creating the lien, which is perfected by the sale or levy under such execution, and cuts off intermediate conveyances.³

46 *b*. A deed of confirmation may make a voidable or defeasible estate good, but does not strengthen a void one. If a disseisee make a deed of confirmation to his disseisor, it is commensurate with the estate of the disseisor, which is a fee; and it would confirm a fee in him, though it contain no words of inheritance.⁴

47. There are two kinds of deeds known to the law, — deeds-poll and indentures, — though the distinction between them is far less important than it was once deemed to be, when, to prevent a commission of fraud, it was considered necessary to write the two parts of a mutual agreement, or the duplicate of an instrument which was to be executed by two persons, on the same piece of parchment or paper, and

¹ *Vancourt v. Moore*, 26 Mo. 92; *Jackson v. Bard*, 4 Johns. 230, 234; *Fite v. Doe*, 1 Blackf. 127, 130; *Samson v. Thornton*, 3 Met. 275; *Viner's Ab. Relation*, K. 4; *Butler & Baker's case*, 3 Rep. 29.

² *Thompson v. Leach*, 2 Vent. 200.

³ *Smith v. Allen*, 1 Blackf. 22; *Heywood v. Hildreth*, 9 Mass. 393; *Taylor v. Robinson*, 2 Allen, 564; *Viner's Ab. Relation*, E.; *Pierce v. Hall*, 41 Barb. 142.

⁴ *Co. Lit.* 295 b, 296 b; *Viner's Ab. Confirmation*, Y., pl. 5; *People v. Law* 22 How. Prac. Cas. 125, 126; *Gilbert*, Ten. 69; *Knight v. Dyer*, 57 Me. 177; *Gallatian v. Cunningham*, 8 Cow. 375.

then to cut them apart with an irregular line, so that the edge of one part would * fit into that of the other, [*588] *instar dentium*, and thus establish the authenticity of the several parts. This cutting of the paper or parchment is rarely, if ever, practised now; and the word *indenture* is used to describe a deed to which two or more persons are parties, and in which these enter into reciprocal and corresponding grants or obligations towards each other: whereas a deed poll is properly one in which only the party making it executes it, or binds himself by it as a deed, though the grantors or grantees therein may be several in number; the ordinary purpose of a deed-poll being to transfer the rights of the grantor to the grantee.¹ Indentures are bipartite, tripartite, and the like, according to the number of parts of which they consist, each of which would have as complete effect as the whole together. This form of deeds began to be used in the time of John and Henry II., and has been in use ever since that period.² It was formerly more usual for each party to sign but one of these parts; though this was done, as it was called, *interchangeably*, in which case the part which was executed by the grantor was usually called the "original," and the other the "counterpart." Of late, however, it has become common for each party to execute all the parts, which thereby all become original.³ Deeds-poll may generally be said to include every kind of deed which is not an indenture.⁴ They are usually in form in the first person; but they are equally good, though made in the third person; and an indenture may be made in the first or the third person, though most commonly the latter form is adopted.⁵ Some of these deeds contain matters of grant or gift, under which are included feofments, gifts, bargains and sales, grants and leases. Some of them contain matters of discharge, such as surrenders,

¹ Shep. Touch. 50; Walk. Am. Law, 576; Wms. Real Prop. 125; Dyer v. Sanford, 9 Met. 395, 406.

² Com. Dig. Fait, C. 1; Lit. § 370; Shep. Touch, 50.

³ Co. Lit. 229 a, note 140; Shep. Touch. 53; Dudley v. Sumner, 5 Mass 488.

⁴ Co. Lit. 229 a; Com. Dig. Fait, D. 1; Giles v. Pratt, 2 Hill (S. C.), 439.

⁵ Shep. Touch. 51, 53.

releases, acquittances, defeasances, and the like.¹ But [*589] though a * deed, in terms, be called an indenture, and be so in form, except in requiring something from both parties named, yet if it is prepared and intended for the grantor only to execute it, and he does so, it is a valid deed as to him.²

48. An indenture has been said to be the stronger deed of the two, especially in its effect in working an estoppel.³ The doctrine has been maintained by some, that a party to an indenture, made and executed by another to him, will become a covenantor, and liable as such, though he may not sign or seal the deed, if he is named in it and accepts it, and it contains covenants, which, by the terms of the deed, he is to perform. This point is very elaborately argued and expressly decided in *Finley v. Simpson* in favor of holding such party bound as a covenantor, and the position of Mr. Platt to the contrary is controverted.

49. In Massachusetts, the remedy against a grantee in a deed-poll, for failing to perform a duty prescribed in such deed for him to perform, would be *assumpsit*, and not covenant; and the same seems to be true where the instrument is in form an indenture, if it is not executed by the party to be charged.⁴ And the same is held in Pennsylvania.⁵ But in New York the court held, that, if in a deed-poll there is a duty to be performed by the grantee, covenant will lie against him, though he do not sign the deed, on the ground, that, by accepting the deed, he is estopped to deny that he covenants to do what the deed requires of him, and that, by accepting the deed, he adopts the seal as his own.⁶ The rule in Connecticut is the same as in Massachusetts.⁷ And some of the

¹ *Shep. Touch.* 51.

² *Shep. Touch. Prest. ed.* 53, and note; *Foster v. Mapes*, *Cro. Eliz.* 212; *Hallett v. Collins*, 10 *How.* 174; *Walk. Am. Law*, 376; *Hipp v. Hockett*, 4 *Tex.* 20, 25.

³ *Finley v. Simpson*, 2 *N. J.* 311, 332; *Platt, Cov.* 18. See *Shep. Touch.* 52.

⁴ *Newell v. Hill*, 2 *Met.* 180; *Goodwin v. Gilbert*, 9 *Mass.* 510; *Nugent v. Riley*, 1 *Met.* 117; *Johnson v. Mussy*, 45 *Vt.* 419.

⁵ *Maule v. Weaver*, 7 *Penn. St.* 329.

⁶ *Atlantic Dock Co. v. Leavett*, 54 *N. Y.* 35.

⁷ *Hinsdale v. Humphrey*, 15 *Conn.* 431. See *Burnett v. Lynch*, 5 *B. & C.* 539.

cases hold, that a third party in whose favor a promise is made may maintain assumpsit upon it, if broken, although no party to the instrument containing the covenant or agreement.¹ But a different doctrine is maintained in Massachusetts.²

50. The words of an indenture are the words of either party; and though spoken as the words of one only, they are not his words alone, but may be applied to the other party also, or exclusively, if they more properly belong to him; for every word that is doubtful is to be attributed to him to whom the intent of the parties shows it is most applicable.³

51. While the basis of most that has been said of the nature and character of deeds as a means of creating title to lands, and of the essential elements and constituents of such deeds, * may be found in the rules and principles of the common law, there are certain formalities prescribed by statute for the prevention of frauds in conveyancing, such as the registration of deeds, which remain to be considered. This is something distinct from the enrolment of deeds of bargain and sale, which was required by the statute 27 Hen. VIII. c. 16, and was essential to the validity of such deeds; whereas, with very few exceptions, relating principally to conveyances by married women, the validity of deeds between the original parties to them is not affected by their registration. There were requirements in the English process of enrolment which could not be complied with in this country without legislation; and it is declared by the court of Indiana, where deeds of bargain and sale are in use, that enrolment, according to the English law, has never been regarded in that State as necessary to the validity of such a deed.⁴ In some of the counties of England, a system of registration has been in use since the time of Anne. But the landholders in that kingdom have hitherto successfully resisted a general introduction of any system of recording con-

¹ Van Schaick v. Third Av. R. R., 38 N. Y. 354; Lawrence v. Fox, 20 N. Y. 268; Thorp v. Keokuk Coal Co., 48 N. Y. 256, 257.

² Mellen v. Whipple, 1 Gray, 317; ante, vol. 1, p. *571.

³ Shep. Touch. 52.

⁴ Givan v. Doe, 7 Blackf. 210. So in New York, Jackson v. Wood, 12 Johns,

veyances, although the importance of such a system has been urged by able committees, and the ablest writers in the country, upon the attention of Parliament. But the system is in full vigor in each of the United States, varying somewhat in its details, but substantially the same in all. Each State has accordingly, in its legislation, provided for officers charged with the duty of making such records, and offices within which these records are to be preserved for reference. And, to guard against imposition in recording instruments which may have been improperly obtained, each State, except Kansas¹ and Illinois (in which, though the registration will be constructive notice to creditors and after-purchasers, such deed cannot be used in evidence unless proved in a manner required by the rules of evidence applicable to such writings,² whereas, if acknowledged and recorded, it may be read in evidence without proof of its execution),³ requires that the free and voluntary execution of the deed should be acknowledged or proved before certain officers or courts, and a certificate thereof be appended to each deed which shall be offered for record, which certificate alone authorizes the register to enter the deed upon the record.⁴ And so far as forming a part of a wife's conveyance of her interest is concerned, it is designed to take the place of the old English fine and recovery.⁵ The duty, however, of taking and certifying the acknowledgment of deeds, is a ministerial, and not a judicial one; and it is no objection, therefore, that the officer who takes it stands in so near a relation to the party making the acknowledgment as to render him incompetent to act in a judicial capacity, or that of a juror. But an acknowledgment taken by one interested in the conveyance is not valid.⁶ Where the deed shows upon its face that the acknowledgment was taken by a party in interest, it is not a constructive notice, if recorded. But if every thing appears fair upon its face, it will be a good notice, though there be some hidden defect.⁷ But where the wife of

¹ *Simpson v. Munde*, 3 Kans. 181.

² *Carpenter v. Dexter*, 8 Wall. 532.

³ *Reed v. Kemp*, 16 Ill. 445.

⁴ *Carpenter v. Dexter*, 8 Wall. 532.

⁵ *Morris v. Sargent*, 18 Iowa, 99.

⁶ *Wilson v. Traer*, 20 Iowa, 233; *Beaman v. Whitney*, 20 Me. 413; *Withers v. Baird*, 7 Watts, 227; *Groesbeck v. Seeley*, 13 Mich. 345.

⁷ *Stevens v. Hampton*, 46 Mo. 408.

the magistrate who took the acknowledgment of a mortgage was the mortgagee, it was held good in Wisconsin.¹ It must be done by the officer within the limits of his appointment; and if done beyond these, it is void.² But in Massachusetts, a magistrate for one county may act in taking an acknowledgment in another.³ And it must be done according to the law of the State where the land lies.⁴ In executing this duty, moreover, the certificate of the acknowledgment should show affirmatively, that the requirements of the statute in respect to the same had been *substantially* complied with.⁵ Thus, in Illinois, omitting to state that the person acknowledging the deed was known to the magistrate who made it was held a fatal defect.⁶ The certificate that A acknowledged the deed, when A was the *grantee*, and B the grantor, was a fatal error. But where it was that "A, the signer," acknowledged, or "T. G., the signer," where the grantor's name was T. G. S., it was held that the court, by such a reference, might construe and correct the certificate.⁷ The certificate of the officer taking the acknowledgment is not conclusive as to the facts stated in it, but it may be impeached by evidence.⁸ But in Maryland such evidence was excluded; and in Texas the certificate is conclusive, unless impeached for fraud or imposition.⁹ In respect to the effect given to a register's certificate, the court of New Brunswick hold it conclusive, unless the fact be shown affirmatively that the person signing as such is not the register.¹⁰

The purposes of this record are chiefly to give notice to all persons having occasion to ascertain whether there

¹ Kimball v. Johnson, 14 Wis. 683.

² Lynch v. Livingston, 8 Barb. 463; s. c. 2 Seld. 422. See Harris v. Burton, 4 Harring. 66. See Howard Mut. L. Assn. v. M'Intyre, 3 Allen, 572; Jackson v. Humphrey, 1 Johns. 498; Jackson v. Colden, 4 Cow. 280; Thurman v. Cameron, 24 Wend. 91, 92; *contra*, Odiorne v. Mason, 9 N. H. 30.

³ Learned v. Riley, 14 Allen, 109; Stat. 1863, c. 157.

⁴ Jones v. Berkshire, 15 Iowa, 248.

⁵ Jacoway v. Gault, 20 Ark. 190; Bryan v. Ramirez, 8 Cal. 461.

⁶ Tully v. Davis, 30 Ill. 108.

⁷ Wood v. Cochrane, 39 Vt. 544; Chandler v. Spear, 22 Vt. 388.

⁸ Dodge v. Hollinshead, 6 Minn. 46; Jackson v. Schoonmaker, 4 Johns. 161, Edgerton v. Jones, 10 Minn. 429; *post*, *595.

⁹ Bissett v. Bissett, 1 H. & M'H. 211; Hartley v. Frosh, 6 Tex. 208.

¹⁰ Robinson v. Chassey, 1 Hannay, N. B. 50.

[*591] has been * any prior conveyance or incumbrance of any real estate ; and when it is made, it becomes constructively a notice, and as effectual in law as if given personally to the party to be affected by it. It may, therefore, be stated in general and nearly unqualified terms, that between the parties to the deed, or the heirs or devisees of the grantor and the grantee and those claiming under him, the validity of the deed is not affected by the want of record ; and that the same is true as to all purchasers who may take a subsequent deed, knowing of the existence of a prior one. The authorities upon this point are numerous ; and the language of the court of Pennsylvania, in one case, is as follows : “ The deed was upon record, and, being there, was constructive notice to all the world.” All the authorities agree that there is no difference in legal effect between actual and constructive notice.¹ But the purchaser should have actual notice of the previous deed, or of some fact which would satisfy a prudent man that there had been a transfer of the land.² But to prevail against such prior purchaser, even where the second has no notice of the first conveyance, he must have purchased upon payment of a good and valuable consideration.³ But the registration of a deed is notice to those only who claim title through or under the grantor in the recorded deed.⁴ Nor is it notice to a grantee, in a deed already on record, of acts done by his grantor after the first deed was recorded.⁵ But notice to an agent or trustee is notice to the principal.⁶ If a vendee make a mortgage to his vendor, who puts it on record, it is no notice of the vendee’s deed from the vendor, which is not recorded, as against a second purchaser from such vendor. Nor is a purchaser bound to take notice of the

¹ *Hill v. Epley*, 31 Penn. St. 335. See *Godbold v. Lambert*, 8 Rich. Eq. 155 ; *Belk v. Massey*, 11 Rich. (Law) 614 ; *Morrison v. Kelly*, 22 Ill. 610 ; 4 Dane, Abr. 85 ; *Jamaica Pond v. Chandler*, 9 Allen, 169 ; *Ellison v. Wilson*, 36 Vt. 67 ; *Wilkins v. May*, 3 Head, 176 ; *Speer v. Evans*, 47 Penn. St. 144 ; *Dixon v. Lacoste*, 1 Sm. & M. 107 ; *Patterson v. De la Ronde*, 8 Wall. 300 ; *Robinett v. Compton*, 2 La. An. 854.

² *Mills v. Smith*, 8 Wall. 33 ; *Maupin v. Emmons*, 47 Mo. 306.

³ *Barney v. McCarty*, 15 Iowa, 514 ; *Maupin v. Emmons*, 47 Mo. 306 ; *Shotwell v. Harrison*, 22 Mich. 410.

⁴ *Ely v. Wilcox*, 20 Wis. 530 ; *Losey v. Simpson*, 3 Stockt. Ch. 246, 249.

⁵ *George v. Wood*, 9 Allen, 80.

⁶ *Myers v. Ross*, 3 Head, 59.

record of a deed made by a vendee of the same vendor, if such vendee's deed is not itself on record, so as to complete the chain of his title.¹ If a purchaser know that his vendor has made a prior deed of the estate to another, it will not aid him in getting his own deed on record first that he did not know the kind of conveyance which his grantor had made.² And in determining what shall be regarded as constructive notice, the courts in many of the States hold, that open and visible possession by the grantee in a deed is to be deemed such notice of its having been made ;³ while in other States a different rule prevails, holding, at least, that such possession is not to be deemed conclusive evidence of notice.⁴ The cases cited below are those where the courts have held that possession by other than the original owner was evidence of notice of an unrecorded deed of some kind. But, to have it received as equivalent to actual notice, it must appear, affirmatively, to have been open, visible, exclusive, and unambiguous, such as is not liable to be misunderstood or misconstrued. And no inference is to be deduced from possession, when it is consistent with the possessory title on record.⁵ Open and notorious possession may be sufficient to put a purchaser on inquiry as to the existence of a deed, and he may meet this by showing that he made diligent but ineffectual inquiry.⁶ One ground on which possession obviated the necessity of notice by record, as put in an early case in Massachusetts, was, that a man out of possession of land could not convey it ; but that,

¹ *Losey v. Simpson*, 3 Stockt. Ch. 246. ² *Galland v. Jackman*, 26 Cal. 87.

³ *Watkins v. Edwards*, 23 Texas, 443 ; *Partridge v. McKinney*, 10 Cal. 181 ; *Stafford v. Lick*, 7 Cal. 479 ; *Hunter v. Watson*, 12 Cal. 363 ; *Morrison v. Kelly*, 22 Ill. 610 ; *Helms v. May*, 29 Ga. 121 ; *Wyatt v. Elam*, 23 Ga. 201 ; *Berg v. Shipley*, 1 Grant, Cas. 429 ; *Coleman v. Barklew*, 3 Dutch. 357 ; *Lea v. Polk Co. Copper Co.*, 21 How. 498 ; *Maupin v. Emmons*, 47 Mo. 307 ; *Watrous v. Blair*, 32 Iowa, 63 ; *Harper v. Perry*, 28 Iowa, 62 ; *Russell v. Sweesey*, 22 Mich. 239.

⁴ *Moore v. Jourdan*, 14 La. An. 414 ; *Nutting v. Herbert*, 37 N. H. 346 ; *Pomroy v. Stevens*, 11 Met. 244 ; *Mara v. Pierce*, 9 Gray, 306 ; *Dooley v. Wolcott*, 4 Allen, 406. In Pennsylvania, the court say, possession, in order to be notice, must be clear and unequivocal possession. *Billington v. Welsh*, 5 Binn. 129.

⁵ *Colby v. Kenniston*, 4 N. H. 262 ; *Emmons v. Murray*, 16 N. H. 398 ; *Fair v. Stevenot*, 29 Cal. 490 ; *Ely v. Wilcox*, 20 Wis. 531 ; *Patten v. Moore*, 32 N. H. 384 ; *Truesdale v. Ford*, 37 Ill. 210.

⁶ *Fair v. Stevenot*, 29 Cal. 490 ; *Lestrade v. Barth*, 19 Cal. 676.

of course, can apply only where the original owner is as much out of possession as if he were actually disseised.¹ In Ohio, a purchaser is charged with notice of the equitable title of the one in possession of the estate he purchases, whatever that may be.² But where a vendor sold a part of his estate, and retained a part, and both he and his vendee occupied the premises, it was held not to be a notice of the purchase. To have that effect, it must be exclusive, open, and notorious, such as enclosure, cultivation, erection of buildings, and the like.³ In all this, it is to be remembered that the recording of the deed has nothing to do with the actual passing of the title: it is but notice of that act having been already done.⁴ In many States, this is the effect of the statute provisions upon the subject; but in others it is a construction of equity as well as law, that it is a fraudulent act for one who has already sold and conveyed his land to undertake to cheat the purchaser by selling it again; and that whoever, knowing this, joins to aid him in the fraud by accepting the deed, will not be permitted to avail himself of it in a court of justice. It is proposed to illustrate some of these general propositions, but, for obvious reasons, without attempting to go into a detail of the legislation of the several States upon the subject.

52. In the first place, it has been held in the following States, and probably the same rule is in force in all, that the date of the record of a deed has reference to the time of its being lodged or deposited with the proper recording officer at the office of registration; namely, Ohio, South Carolina, New Jersey, Alabama, Rhode Island, Missouri, Kentucky, Mississippi, Massachusetts, Virginia, Vermont, Connecticut, and Indiana.⁵

¹ Anonymous, Quincy, 370.

² *McKinzie v. Perrill*, 15 Ohio St. 168.

³ *Billington v. Welsh*, 5 Binn. 132; *Smith v. Yule*, 31 Cal. 184; *Truesdale v. Ford*, 37 Ill. 210. See, upon possession being notice, *Crassen v. Swoveland*, 22 Ind. 434; *Daniels v. Davison*, 16 Ves. 249; *Woodward v. Clark*, 15 Mich. 112; *Stewart v. McSweeney*, 14 Wis. 468; *Boggs v. Anderson*, 50 Me. 161. And for what would amount to implied notice, see *Curtis v. Mundy*, 3 Met. 405.

⁴ *King v. Gilson*, 32 Ill. 354; *Stevens v. Morse*, 47 N. H. 433; *Earle v. Fiske*, 103 Mass. 492.

⁵ *Walk. Am. Law*, 358; *Warnock v. Wightman*, 1 Brev. 331; *Den v. Richman*, 1 Green, 52; *Mallory v. Stodder*, 6 Ala. 801; *Dubose v. Young*, 10 Ala. 365; *Nichols*

53. In the next place, a deed duly recorded is constructive notice of its existence and its contents to all persons claiming what is thereby conveyed under the same grantor by subsequent purchase or mortgage, but not to other persons.¹ Thus where one of several co-tenants conveyed the entire estate by deed, which was recorded, it was held not to be a constructive notice to his co-tenants of such deed, inasmuch as they did not claim under him.²

* 54. But the record of a deed is not constructive [*592] notice of its existence or contents, unless all the prerequisites prescribed by law to be observed in respect to its registration, such as its acknowledgment and the like, have been complied with. Nor would it be constructive notice if the deed were on record in any way not authorized by law; and the same would be true of any instrument not required by law to be recorded.³ It is also true that the registry of a defective deed is no notice of title to any one. If defective in the formal requisites of its execution or proof, it

v. Reynolds, 1 R. I. 30; *Harrold v. Simonds*, 9 Mo. 326; *Davis v. Ownsby*, 14 Mo. 175; *Gill v. Fauntleroy*, 8 B. Mon. 177; *McRaven v. McGuire*, 9 S. & M. 34, 48; *Mass. Gen. Stat. c. 17, § 93*; *Horsley v. Garth*, 2 Gratt. 471; *Quirk v. Thomas*, 6 Mich. 76; *McCabe v. Grey*, 20 Cal. 509; *Anonymous, Quincy*, 375; *Kessler v. State*, 24 Ind. 315; *Bigelow v. Topliff*, 25 Vt. 274, 285; *Hine v. Robbins*, 8 Conn. 347.

¹ *Bates v. Norcross*, 14 Pick. 224, 231; *Tilton v. Hunter*, 24 Me. 35; *Little v. Megquier*, 2 Me. 176; *Crockett v. Maguire*, 10 Mo. 84. See *Flynt v. Arnold*, 2 Met. 619, for a practical application of this principle as to the remoteness of this grantor; *Whittington v. Wright*, 9 Ga. 23; *Shults v. Moore*, 1 McLean, 520; *Doe v. Beardsley*, 2 McLean, 412; *Walk. Am. Law*, 358; 4 Kent, Com. 174, note; 4 Greenl. Cruise, 452, note; *Story, Eq. Jur. § 403*; *Shaw v. Poor*, 6 Pick. 85, 88. But see *ante*, p. *488, in case of estoppel; *Miller v. Bradford* 12 Iowa, 18.

² *Holley v. Hawley*, 39 Vt. 532.

³ *Shults v. Moore*, 1 McLean, 520; *Isham v. Bennington Co.*, 19 Vt. 230; *Choteau v. Jones*, 11 Ill. 300; *Herndon v. Kimball*, 7 Ga. 432; *Tillman v. Cowand*, 12 S. & M. 262; *Blood v. Blood*, 23 Pick. 80; *De Witt v. Moulton*, 17 Me. 418; *Carter v. Champion*, 8 Conn. 549; *Story, Eq. Jur. § 404*; *Heister v. Fortner*, 2 Binn. 40; *Shaw v. Poor*, 6 Pick. 88; *Cheney v. Watkins*, 1 Harr. & J. 527; *Doe v. Smith*, 3 McLean, 362; *Lewis v. Baird*, 3 McLean, 56; *Kerns v. Swope*, 2 Watts, 75; *Graves v. Graves*, 6 Gray, 391; *Burnham v. Chandler*, 15 Texas, 441; *Bossard v. White*, 9 Rich. Eq. 483; *Galpin v. Abbott*, 6 Mich. 17; *McKean v. Mitchell*, 35 Penn. St. 269; *Dussaume v. Burnett*, 5 Clarke (Iowa), 95; *Peck v. Mallams*, 10 N. Y. 518; *Harper v. Barsh*, 10 Rich. Eq. 149; *Ely v. Wilcox*, 20 Wis. 529; *Stevens v. Hampton*, 46 Mo. 408.

is not entitled to registration at all.¹ So a record of a deed in a wrong county has no effect as a notice.²

55. The record of a deed itself limits by its terms the extent to which it constitutes constructive notice to others. Thus, where the condition of a mortgage-deed, as written, was to pay \$3,000, but the record showed the condition to be the payment of \$300, it was held to be a constructive notice of an incumbrance of \$300 only.³

56. In some of the States, there is a time prescribed within which a deed, when recorded, takes effect by relation back from its delivery, and gives it precedence over intermediate conveyances, even as to persons ignorant of such unrecorded deed. In Ohio, this is six months for all deeds, with the exception of mortgages, which must be recorded forthwith. But a deed may be recorded after the six months; in which case, such record is constructive notice only from the time of its actually being made.⁴ In Kentucky, the time is the recording; ⁵ in Mississippi, three months. But if the deed is [*593] recorded after that, * it is notice from the time of its being registered.⁶ In Georgia, the time is twelve months; and if two successive deeds are made of the same land, and neither is recorded within the prescribed time, the recording of the second deed after that time, but prior to the first, does not give it precedence over the first.⁷ But when recorded, though after the expiration of twelve months, it is a notice from the time of its record, but does not relate back to any prior time.⁸ The same rule applies as to the effect of a record made in South Carolina; ⁹ while in Pennsylvania,

¹ *Isham v. Bennington Iron Co.*, 19 Vt. 245; *Harper v. Barsh*, 10 Rich. Eq. 149; *Meighen v. Strong*, 6 Miss. 177, a deed not properly witnessed.

² *Harper v. Tapley*, 35 Miss. 510; *Stewart v. McSweeney*, 14 Wis. 468.

³ *Beekman v. Frost*, 18 Johns. 544; *Frost v. Beekman*, 1 Johns. Ch. 299. See *Chamberlain v. Bell*, 7 Cal. 292; *Terrell v. Andrew County*, 44 Mo. 309.

⁴ *Walk. Am. Law*, 358, 359; 1 *Rev. Stat. c. 34*, § 8.

⁵ *Applegate v. Gracy*, 9 Dana, 217. Mortgages are to be recorded in sixty days. 4 *Greenl. Cruise*, Dig. 445; *M'Connell v. Brown*, *Litt. Sel. Cas.* 459, 462; *Dale v. Arnold*, 2 *Bibb*, 605; *Gen. Stat.* 1873, p. 256.

⁶ *McRaven v. McGuire*, 9 S. & M. 34; *Rev. Code* 1871, c. 52, p. 473.

⁷ *Thornt. Conv.* 157; *Doe v. Reddin*, *Dudl (Ga.)* 177; *Martin v. Williams*, 27 *Ga.* 406; *Rev. Code*, pt. 2, § 2705.

⁸ *Helms v. O'Bannon*, 26 *Ga.* 132; *Anderson v. Dugas*, 29 *Ga.* 440.

⁹ *Leger v. Doyle*, 11 *Rich. (Law)*, 109; *Belk v. Massey*, *Ib.* 614.

where the time is six months, in a case like the last, if the second deed were taken without actual notice of the first, and were recorded first, it would give it precedence of the one first executed.¹ And the same rule applies in Ohio.² The time in New Jersey, as stated in the case cited, is six months; though the deed may be recorded after that, but not so as to affect a subsequent *bona fide* deed lodged for record before the first is itself lodged: whereas, if the prior deed is lodged for record before the second, though after the expiration of the six months, it will take precedence of the second.³ In Alabama, the time is six months; but if the deed is recorded afterwards, it is notice from the time of the record.⁴ The times allowed for recording deeds in Delaware and Tennessee are twelve, in Indiana ninety days; in Virginia and North Carolina, no time is allowed; and in Maryland and South Carolina, six months.⁵ In Massachusetts, in determining the question of precedence between a purchaser or mortgagee and a creditor, no time is allowed for the former in which to record his deed.⁶ In Connecticut, the grantee has a reasonable time in which to record the deed, in order to take precedence of an attachment by a creditor of the grantor.⁷

57. In some States, a deed requires to be acknowledged, and the acknowledgment certified thereon, in order to its operating to pass a title. This is the case in Ohio; and where the certificate left the name of the grantor blank, it was held *that it was not competent to supply the [*594] defect by parol evidence.⁸ But a deed may convey a title as against the grantor and his heirs, though not acknowl-

¹ *Lightner v. Mooney*, 10 Watts, 407. Mortgages to be recorded in sixty days. 4 Greenl. Cruise, Dig. 445; *Poth v. Anstatt*, 4 Watts & S. 307; *Berg v. Shipley*, 1 Grant, Cas. 429; *Souder v. Morrow*, 33 Penn. St. 83.

² *Northrup v. Brehmer*, 8 Ohio, 392.

³ *Den v. Richman*, 1 Green, 43. Now fifteen days only are allowed for recording a deed of conveyance, but none for mortgages. *Nixon*, Dig. 1861, 132, § 18, 550, § 10.

⁴ *Mallory v. Stodder*, 6 Ala. 801. If to secure a debt, the time is three months. *Thornt. Conv.* 75.

⁵ 4 Kent, Com. 457; *Virg. Code*, 1870, tit. 33, c. 118; *Ind. Stat.* vol. 1, 1860, p. 261; *N. Car. Stat.* 1873, c. 35, § 1.

⁶ *Cushing v. Hurd*, 4 Pick. 252, 256. ⁷ *Goodsell v. Sullivan*, 40 Conn. 83.

⁸ *Smith v. Hunt*, 13 Ohio, 260, 268.

edged so as to be admitted to record.¹ But in South Carolina, Alabama, and Indiana, a mortgage signed by a married woman is not binding upon her unless properly acknowledged by her, and this acknowledgment must be properly certified.²

58. In some of the States, if a deed is properly admitted to record, it may be used in evidence without any further proof in the first place, as the courts will presume that all the circumstances necessary to give validity to the instrument have been complied with. The States in which this is true are New York, New Jersey, Pennsylvania, Virginia, North Carolina, Georgia, Alabama, Illinois, provided it had been duly acknowledged,³ Mississippi, California, Kansas, Texas, Delaware, Wisconsin, Kentucky, and Missouri.⁴ But in the other States the deed must be proved, as at common law, in order to be used by the holder in evidence in questions involving the validity of the deed. Where deeds are more than thirty years old, they come under the class of *ancient* instruments, and may be admitted as evidence without calling the attesting witnesses; but if executed by a power, by an agent or attorney, the power must be shown.⁵ In Maryland, the enrolment of a deed of bargain and sale is evidence of a title, without producing the original, in the trial of an ejectment.⁶ And the same is true in Maine.⁷ In several of the States, where it becomes necessary to make out a party's title through deeds between other persons than the immediate parties to his own deed, courts admit in evidence the original records or certified copies of recorded deeds, without requiring any

¹ *Blain v. Stewart*, 2 Iowa, 383; *Gibbs v. Swift*, 12 Cush. 393; *Ricks v. Reed*, 19 Cal. 571. See also *Doe v. Naylor*, 2 Blackf. 32; *Stevens v. Haxton*, 46 Mo. 408; *Lake v. Gray*, 30 Iowa, 415; s. c. 35 Iowa, 459.

² 5 Stat. 257; *Bruce v. Perry*, 11 Rich. 121; *McBryde v. Wilkinson*, 29 Ala. 662; *Perdue v. Aldridge*, 19 Ind. 290.

³ *Carpenter v. Dexter*, 8 Wall. 532.

⁴ 2 Greenl. Ev. § 299, note; *Hutchison v. Rust*, 2 Gratt. 394; *Young v. Ringo*, 1 Mon. 30; *Toulmin v. Austin*, 5 Stew. & P. 410; *Ball v. McCawley*, 29 Ga. 355; *Clark v. Troy*, 20 Cal. 219; *Houghton v. Jones*, 1 Wall. (U. S.) 702; *Doe v. Prettyman*, 1 Houst. (Del.) 339; *Simpson v. Munde*, 3 Kans. 181; *Younge v. Guilbeau*, 3 Wall. (U. S.) 640; *Hinchliff v. Hinman*, 18 Wis. 135; *Landers v. Bolton*, 26 Cal. 405; *Samuels v. Borrowscale*, 104 Mass. 207.

⁵ 1 Greenl. Ev. § 21; *Fell v. Young*, 63 Ill. 106.

⁶ *Hurn v. Soper*, 6 Harr. & J. 276, 280.

⁷ *Hatch v. Bates*, 54 Me. 138.

further authentication thereof by witnesses;¹ and, if used in making out a chain of titles, such copy will be accepted as evidence that the person signing it as president of a company was such in fact.²

59. In some of the States, in which, as will be more fully stated, an unrecorded deed, if known to a subsequent purchaser, will be valid and effectual as to him, will not be so against creditors, although known to them. To give a purchaser preference over a creditor, it requires that his deed should be recorded. Such is the case in Tennessee,³ Kentucky,⁴ and Virginia.⁵

60. With the few exceptions above referred to, the proposition may be regarded as applicable to all the States, that actual notice has the same effect in determining the right of precedence between persons claiming under different deeds from the same grantor as a record thereof regularly made would itself have. The question of priority of rights, arising from a priority of record of two or more deeds, arises, properly, between those from the grantor.⁶ And in order that one whose deed is prior in record, but subsequent in date, to another, should claim precedence of right thereby, he must show that he is a purchaser for a consideration actually paid: the recital of such payment in the deed is not enough.⁷ If two deeds of the same land have been made and recorded, and one only has been delivered, the latter takes precedence in point of time over the other.⁸ In Pennsylvania the record of a deed is not notice to a stranger, unless it is also indexed;⁹ and the same is true in Missouri, and, to a qualified

¹ *Dixon v. Doe*, 5 Blackf. 106; *Scanlan v. Wright*, 13 Pick. 523; *Ward v. Fuller*, 15 Pick. 185; *Eaton v. Campbell*, 7 Pick. 10; *Farrar v. Fessenden*, 39 N. H. 268; *Harvey v. Mitchell*, 11 Foster (N. H.), 582; *Cogan v. Frisby*, 36 Miss. 178; *Samuels v. Borrowscale*, *sup.*

² *Chamberlain v. Bradley*, 101 Mass. 190.

³ *Washington v. Trousdale*, Mart. & Y. 385, 391; *Lillard v. Rucker*, 9 Yerg. 61, 73.

⁴ *Edwards v. Brinker*, 69 Dana, 9; *Ring v. Gray*, 6 B. Mon. 368, 374.

⁵ *Guerrant v. Anderson*, 4 Rand. 208. ⁶ *Long v. Dollarhide*, 24 Cal. 227.

⁷ *Watkins v. Edwards*, 23 Tex. 447; *Boone v. Chiles*, 10 Peters, 211; *Parker v. Foy*, 43 Miss. 260; *Shotwell v. Harrison*, 22 Mich. 410; *Bishop v. Schneider*, 46 Mo. 472; *Maupin v. Emmons*, 47 Mo. 304.

⁸ *Parmelee v. Simpson*, 5 Wall. (U. S.) 81.

⁹ *Speer v. Evans*, 47 Penn. 144.

extent, in Iowa.¹ If the grantee in a second deed which is recorded knew of a prior unrecorded deed when he took it, the latter will take precedence of the former, though the real purchaser, and the one who paid the consideration, and had the deed made to such grantee, did not know of the prior deed.² If one when he purchases knows that his grantor has no title, he cannot set up his deed against the real owner, although he did not know who he was when he took his deed.³ And to give one a precedence as a *bona fide* purchaser, he must not only not have notice of a prior title when he purchases, but when he pays the consideration also. If he pays after such knowledge had, he cannot claim the rights of a *bona fide* purchaser.⁴ Between the parties, and against the heirs or devisees of the grantor, an unrecorded deed is as effectual to pass a title as one duly registered.

This extends to creditors and subsequent purchasers, who are bound in * the same manner, if they have actual notice. Out of the numerous cases sustaining these propositions, a few only have been selected to illustrate its application in different States; ⁵ and where there are several grantees, notice to one of them, when he takes the deed, is notice to all.⁶

¹ Bishop v. Schneider, 46 Mo. 472; Barney v. M'Carty, 15 Iowa, 522; Whatley v. Small, 25 Iowa, 188.

² Murphy v. Nathans, 46 Penn. St. 512.

³ Fitzhugh v. Barnard, 12 Mich. 110. ⁴ Blanchard v. Tyler, 12 Mich. 339.

⁵ Alabama, Ohio Life Insurance Co. v. Ledyard, 8 Ala. 866; Wells v. Morrow, 38 Ala. 125. — Illinois, Doe v. Reed, 4 Scamm. 117; Doe v. Reed, 2 Scamm. 371. — Indiana, Givan v. Doe, 7 Blackf. 210; Doe v. Beardsley, 2 McLean, 421. — Iowa, Hopping v. Burnham, 2 Greene, 39, 48. — Kentucky, Applegate v. Gracy, 9 Dana, 224; Boling v. Ewing, Id. 76. — Maine, Nason v. Grant, 21 Me. 160. — Massachusetts, Trull v. Bigelow, 16 Mass. 406, 418; Flynt v. Arnold, 2 Met. 622. — Mississippi, Dixon v. Doe, 1 S. & M. 70. — New Hampshire, Rogers v. Jones, 8 N. H. 264; Wark v. Willard, 13 N. H. 389. — New Jersey, Den v. Richman, 1 Green, 43. — New York, Schutt v. Large, 6 Barb. 373; Jackson v. Leek, 19 Wend. 339. — Ohio, Irvin v. Smith, 17 Ohio, 226. — South Carolina, Martin v. Quattlebam, 3 McCord, 205. — Tennessee, Lillard v. Rucker, 9 Yerg. 64, 73. — Vermont, Corliss v. Corliss, 8 Vt. 373. — Virginia, Turner v. Stip, 1 Wash. 319. See also Sicard v. Davis, 6 Pet. 124; Van Rensselaer v. Clark, 17 Wend. 25; Swan v. Moore, 14 La. An. 833; Morrison v. Kelly, 22 Ill. 610; Burkhalter v. Ector, 25 Ga. 55; Miller v. Chittenden, 2 Clarke (Iowa), 315; Blain v. Stewart, 13 378; Ricks v. Reed, 19 Cal. 571.

⁶ Stanley v. Green, 12 Cal. 148

60 *a.* A question has been raised, whether, if an ancestor has conveyed his estate to one whose deed has not been recorded, and has died, and his heir has conveyed the same estate to an innocent purchaser who has had his deed recorded, he can hold it against the grantee of the ancestor. Some of our courts, carrying out the idea that a purchaser may be governed by what he finds on the record, and, if he finds no deed there recorded from the ancestor, has a right to presume that his title descended to his heir, hold that the purchaser from the heir, whose deed is recorded, will hold in preference to the grantee of the ancestor whose deed is not recorded.¹ Other courts hold such second deeds valid as against the ancestor's unrecorded deed, on the ground that an unrecorded deed is a mere nullity against all persons but the grantor therein, his heirs and devisees, and persons having notice of the deed, as well as the right which a purchaser has to rely upon what appears upon the registry of deeds.² Other of our courts, holding the deed of the ancestor effectual to divest him of the title, maintain that he had no estate at his decease which could descend to his heir, and therefore a deed from the heir could not take effect to defeat the title of the grantee of the ancestor.³ But in one case, where one made a deed of all his right and interest in land which was not recorded, and then made a deed "of all his estate" to another who was ignorant of the prior deed, it was held that the grantee took nothing as against the first deed, although the second deed was recorded.⁴ In Iowa, a quitclaim-deed which is recorded takes precedence of an unrecorded prior deed of which the former had no notice.⁵

61. As a deduction from these principles, if one purchases of another who holds a recorded deed, he will acquire thereby a precedence over one holding a prior unrecorded deed of

¹ *Youngblood v. Vastine*, 46 Mo. 239; *Kennedy v. Northrup*, 15 Ill. 148; *McCulloch v. Eudaly*, 3 Yerg. 346.

² *Earle v. Fiske*, 103 Mass. 491; *Powers v. McFerron*, 2 S. & R. 47.

³ *Hill v. Meeker*, 24 Conn. 211; *Hancock v. Beverly*, 6 B. Mon. 532; *Harlan v. Seaton*, 18 B. Mon. 312.

⁴ *Marshall v. Roberts*, 18 Minn. 405.

⁵ *Pettingill v. Devin*, 35 Iowa, 354, which cites *Doe v. Reed*, 4 Scamm. 117; *Rowe v. Becketts*, 30 Ind. 154.

which he was not cognizant, although the holder of such recorded deed knew of the existence of such prior deed when he took his own, and could not himself have claimed any precedence. But if the holder of the earlier deed have it recorded before the holder of a deed of a later date, but an earlier record, who took it with knowledge of the prior deed, shall have actually conveyed the estate to another, though he is ignorant of such earlier deed, the record would be constructive notice to such purchaser from the holder of the later deed, and defeat his precedence of title.¹

62. The certificate which an officer taking the acknowledgment of a deed is required to make upon the deed, if it is in proper form, is received as evidence of its own genuineness, without its first being shown affirmatively by whom the certificate is made.² Where it failed to state the county of which the certifying justice was a magistrate, it was held it might be shown *aliunde*.³ And to uphold such certificates, courts will resort to the instrument itself; as where the certificate mentioned the county, but not the State, reference was had to the deed which recited that the county mentioned was in such a State.⁴ But still the act of taking and certifying an acknowledgment of a deed is a ministerial, and not a judicial one; and he may, moreover, be required to testify as to facts bearing upon the capacity of the maker of the deed to execute it.⁵ If he omit to insert the requisite facts in his certificate, so as to make the record valid, he may render himself liable in damages for such neglect.⁶ But a certificate that a married woman acknowledged that she freely, &c., *executed*

¹ *Trull v. Bigelow*, 16 Mass. 406, 418; *Flynt v. Arnold*, 2 Met. 619, 627. See *Coffin v. Ray*, 1 Met. 212; *Adams v. Cuddy*, 13 Pick. 460; *Hagthorp v. Hook*, 1 Gill & J. 270; *Boynton v. Rees*, 8 Pick. 329; *Baylis v. Young*, 51 Ill. 127; *Bracket v. Ridlon*, 54 Me. 434.

² *Thurman v. Cameron*, 24 Wend. 87, 92; *Merrick v. Wallace*, 19 Ill. 486; *Tracy v. Jenks*, 15 Pick. 468; *Thompson v. Morgan*, 6 Minn. 295; *People v. Snyder*, 41 N. Y. 402; *Keichline v. Keichline*, 54 Penn. St. 76; *Dolph v. Barney*, (Oregon), 23 Am. L. Reg. 748.

³ *Graham v. Anderson*, 42 Ill. 514.

⁴ *Carpenter v. Dexter*, 8 Wall. 528; *Brooks v. Chaplin*, 3 Vt. 281. See also *Luffboro v. Parker*, 12 S. & R. 48.

⁵ *Truman v. Lore*, 14 Ohio St. 151; *ante*, *590.

⁶ *Fogarty v. Finlay*, 10 Cal. 239.

a deed, was held to be equivalent to saying that she signed, sealed, and delivered it, and implies every necessary act to make it valid.¹ But it is competent to contradict the effect of what it states; as where the deed was executed and acknowledged before the proper officer, it was held that it was competent for a party contesting the deed to show with what intent * the grantor acknowledged it, in [*596] order to establish that the deed was only inchoate, and never fully executed and delivered.² It has been held in Minnesota, Pennsylvania, Iowa, and California, that the certificate of acknowledgment of a married woman, made by a magistrate upon a deed, may be controlled or contradicted by evidence.³ It may be impeached for fraud, duress, or undue influence exercised by the husband over the wife.⁴ But, in Indiana, such certificate is conclusive evidence;⁵ and it might be generally said, that, in the absence of fraud and duress, it is conclusive of every material fact appearing on its face. But it would not be so as to facts which the magistrate is not required to certify; and though it is not conclusive between the parties, it is as to subsequent purchasers for a valuable consideration without notice.⁶

63. In regard to the extent to which a purchaser is bound by constructive notice, and what a purchaser by a subsequent deed is presumed to know, the rule is, that the law imputes to such purchaser a knowledge of all facts relating to the same land appearing at the time of his purchase upon the muniments of title which it was necessary for him to inspect in order to ascertain the sufficiency of such title.⁷ Thus, if

¹ *Smith v. Williams*, 38 Miss. 56; *Graham v. Anderson*, 42 Ill. 514.

² *Hutchison v. Rust*, 2 Gratt. 394; *ante*, *590.

³ *Dodge v. Hollinshead*, 6 Minn. 25. See also *Jackson v. Schoonmaker*, 4 Johns. 161; *Jackson v. Hayner*, 12 Johns. 472; *Annan v. Folsom*, 6 Minn. 500; *Landers v. Bolton*, 26 Cal. 406; *Hall v. Patterson*, 51 Penn. St. 289; *Borland v. Walrath*, 33 Iowa, 130.

⁴ *Eyster v. Hatheway*, 50 Ill. 522.

⁵ *M'Neely v. Rucker*, 6 Blackf. 391. So it is in Illinois and Oregon, unless impeached on the ground of fraud alleged and proved. *Graham v. Anderson*, 42 Ill. 514; *Dolph v. Barney* (Oregon), 23 Am. L. R. 751.

⁶ *Williams v. Baker*, 71 Penn. St. 482.

⁷ *Blackw. Tax Tit.* 84, 85; *Baltimore, &c. v. White*, 2 Gill, 444, 457; *Laussat*, Fonbl. Eq. 518, note; *Jackson v. Livingston*, 10 Johns. 374; *Brush v. Ware*,

one takes a deed which refers to another of the same estate, in which are contained restrictive covenants as to the mode of using the estate, and this deed has been recorded, it is notice to the purchaser of such restrictive clause.¹ So if, in a recorded deed, reference is made to another deed, also on record, in which it is stated that the trees growing upon the land had been sold, it was held to be a notice of such sale, although the deed by which they were conveyed was not itself upon record.² What would be constructive notice in such cases may be said to be a knowledge by the purchaser of some facts which would put him upon inquiry, and require him to examine other matters that would generally unfold the true title. All deeds referred to on which the title is based must be examined as to any facts which they may contain at the purchaser's peril. A recital in a deed, forming a link in the chain of title, of any facts which shall put a subsequent grantee or mortgagee upon inquiry, and cause him to examine other matters by which a defect in the title would be disclosed, is constructive notice of such defect.³ And if an ordinarily diligent search would bring to the inquirer a knowledge of a prior incumbrance or alienation, he is presumed to know of them.⁴ Thus where, in the deed of a purchaser under whom a party claimed land through sundry mesne conveyances, a restriction as to building thereon was imposed; but, though mentioned and referred to in several of the intermediate deeds, it was not mentioned in that of the present owner, nor in several of the next preceding mesne conveyances; and the question was, if the present owner was chargeable with notice, the court held, that though he was not shown to have had actual notice, "yet, as the conveyances under which he holds refer to deeds in which it (the restric-

15 Pet. 93, 113; Story, Eq. Jur. § 403; Daughaday v. Paine, 6 Minn. 452, 453; 2 Spence, Eq. 757; Fitzhugh v. Barnard, 12 Mich. 110; Mason v. Payne, Walker, Ch. 459; Jumel v. Jumel, 7 Paige, 591; Harris v. Fly, Ib. 421; Moore v. Bennett, 2 Ch. Cas. 246; Reeder v. Barr, 4 Ohio, 446; Burch v. Carter, 44 Ala. 115.

¹ Gibert v. Peteler, 38 N. Y. 165.

² White v. Foster, 102 Mass. 375.

³ Hamilton v. Nutt, 34 Conn. 501; Aeer v. Westcott, 46 N. Y. 384; Baker v. Matcher, 25 Mich. 53; Cambridge Valley Bank v. Delano, 48 N. Y. 326.

⁴ Flynt v. Arnold, 2 Met. 619, 625; 4 Greenl. Cruise, Dig. 452, note.

tion) is contained, and these deeds are recorded, he must be taken to have had notice of the existence of such restriction in the original deeds, and of its consequences." ¹

64. Under the head of capacity to make a deed whereby to pass a title may be considered the seisin, or want of seisin, in the grantor. From an early date, the policy of the law has not admitted of the conveyance, by any one, of a title to land which is in the adverse seisin and possession of another. This is considered, not as passing a title, but as the transfer of a right of action in violation of the early laws against champerty and maintenance, and, therefore, not to be sustained by the courts. The statute upon this subject is 32 Hen. VIII. c. 9. In Georgia, a conveyance of land by one against whom the land conveyed is held adversely by claim of title is void.² And in Massachusetts this is true, though the grantor may have been out of possession only four months.³ By the deed of one disseised being void is intended only that it is inoperative to convey legal title and seisin, or a right of entry upon which the grantee may maintain an action in his own name against one who has actual seisin. It is not void as a contract between the parties to it.⁴ But the possession of a tenant at will is no objection to a valid grant by the lessor of the estate held by him.⁵ So if the grantor out of possession enter upon the land, and deliver the deed thereon, it purges the seisin, and passes a good title.⁶ And the doctrine above laid down is in accordance with that of the civil law, which "forbids a thing which is litigious to be alienated."⁷ But by such a deed the grantor does not lose his right of seisin, and an action will lie in the name of the grantor to recover the land. The title to the land is unaffected by the transaction.⁸ The doctrine is extended to mortgages. If the mortgagee is disseised, he cannot assign his mortgage.⁹ But the principle does

¹ *Gibert v. Peteler*, 38 Barb. 488, 512.

² *Jones v. Monroe*, 32 Geo. 188.

³ *Sohier v. Coffin*, 101 Mass. 179.

⁴ *Farmer v. Peterson*, 111 Mass. 151.

⁵ *Alexander v. Carew*, 13 Allen, 72.

⁶ *Farwell v. Rogers*, 99 Mass. 36.

⁷ *Ayliff*, 245.

⁸ *Brinley v. Whiting*, 5 Pick. 348, 355; *Barry v. Adams*, 3 Allen, 493; *Loud v. Darling*, 7 Allen, 206; *Kincaid v. Meadows*, 3 Head, 192; *Shortall v. Hinckley*, 31 Ill. 219; *Sohier v. Coffin*, 101 Mass. 179.

⁹ *Dadmun v. Lamson*, 9 Allen, 88.

not seem to apply, except in relation to that of which seisin may be predicated; as, where one wrongfully diverted a stream from its channel through the land which the owner conveyed to a third person, it was held, that, by such conveyance, a right to the flow of the water passed, the doctrine of being out of seisin not applying to such natural easements as watercourses.¹ And, until the law was altered in Maine by statute, a disseisin of the mortgagor rendered his deed void, as well as an assignment by the mortgagee.² In Indiana, a deed by one while disseised is void against the one in possession, not upon the ground of champerty or maintenance, but by force of early and uniform usage.³ In Vermont, a deed under such circumstances is void as to strangers, but good between the parties to it, and is good in equity.⁴ But it is always in the power of the disseisee to make a good deed of the premises by making an entry upon the land, and then delivering his deed.⁵ The effect of a disseisin by construction upon the disseisee's right to convey, by reason of the disseisor being in under color of title, seems to be this: If he enters under a deed which he believes to be a valid one to convey title, he will be so far in possession of all the land described in his deed, that the owner would be disseised, and could not convey till he regained his seisin by entry; but if the deed under which he holds is void, and he knows it, the owner would be no further disseised than the actual possession and occupation extends of him who enters under such a deed.⁶ With a wise regard for the peace and protection of titles, this principle has been generally adopted as the law of the several States, although a different rule prevails in some of them. Among the States where this principle of law has been held to prevail are New York, North Carolina, Vermont, Indiana, Kentucky, New

¹ *Corning v. Troy Iron Factory*, 40 N. Y. 191.

² *Williams v. Buker*, 49 Me. 428.

³ *Webb v. Thompson*, 23 Ind. 432. In *German Ins. Co. v. Grim*, 32 Ind. 257, the court hold such a deed "void for maintenance."

⁴ *Park v. Pratt*, 38 Vt. 553; *White v. Fuller*, 38 Vt. 204.

⁵ *Warner v. Bull*, 13 Met. 4.

⁶ *Livingston v. Peru Iron Co.*, 9 Wend. 511, 522, 523; *Moore v. Worley*, 24 Ind. 83.

Hampshire, Massachusetts, Michigan,¹ Georgia, and Mississippi.² But the principle applies only as to * the [*597] one holding adversely at the time the deed is made, and those claiming under him. As to all the rest of the world, the deed would be valid and effectual.³ Merely being out of possession on the part of the grantor does not avoid a deed, when it arises from a mistaken arrangement in respect to the dividing-line between him and the adjacent owner, where each supposes he is rightfully occupying his own land, without intending to interfere with the rights of the other.⁴ And this further effect would follow from such conveyance, that though no title is thereby created in the grantee as against the tenant holding adverse possession, and the original title remains in the grantor, still he holds it as trustee for the use of his grantee, so far that his grantee may sue for possession of the land in the grantor's name; and the possession, when thus gained, enures to the benefit of the grantee.⁵ There are exceptions to the rule as to the effect of adverse possession upon the validity of a deed, among which is the case of the State granting lands. As the State cannot be disseised, no adverse possession can affect its right to convey its lands.⁶

¹ Co. Lit. 214 a; Lalor, Real Prop. 253; *Den v. Shearer*, 1 Murph. 114; *Hoyle v. Logan*, 4 Dev. 495; *Thurman v. Cameron*, 24 Wend. 87; *Ewing v. Savary*, 4 Bibb, 424; *Hathorne v. Haines*, 1 Me. 238; *Dame v. Wingate*, 12 N. H. 291; *Gresham v. Webb*, 29 Ga. 320; *Helms v. May*, *ib.* 121; *Betsey v. Torrance*, 34 Miss. 132; *Parker v. Proprietors, &c.*, 3 Met. 98; *Galbreath v. Doe*, 8 Blackf. 366; *Wade v. Lindsey*, 6 Met. 407, 414; *Selleck v. Starr*, 6 Vt. 198; *Stockton v. Williams*, 1 Doug. (Mich.) 546. As to the character of adverse possession which renders a deed void, see *Foxcroft v. Barnes*, 29 Me. 128. In Wisconsin, in order to have such a deed void, the adverse claimant must be in actual possession, or in under color of title by deed clearly covering the land in question. *Granger v. Swart*, 1 Woolw. 91.

² *Helms v. May*, 29 Ga. 124.

³ *Livingston v. Peru Iron Co.*, 9 Wend. 511, 523; *Livingston v. Prosen*, 2 Hill, 526; *Edwards v. Roys*, 18 Vt. 473; *Wade v. Lindsey*, 6 Met. 407, 414; *Stockton v. Williams*, 1 Doug. (Mich.) 546; *Betsey v. Torrance*, 34 Miss. 138; *University of Vermont v. Joslyn*, 21 Vt. 61; *Farnum v. Peterson*, 111 Mass. 151.

⁴ *Sparhawk v. Bogg*, 16 Gray, 585; *Cleveland v. Flagg*, 4 Cush. 76.

⁵ *Wade v. Lindsey*, 6 Met. 413, 414; *Betsey v. Torrance*, 34 Miss. 138, 139; *Livingston v. Peru Iron Co.*, 9 Wend. 523; *Stockton v. Williams*, 1 Doug. (Mich.) 567; *Jackson v. Leggett*, 7 Wend. 380; *Wilson v. Nance*, 11 Humph. 191; *Edwards v. Parkhurst*, 21 Vt. 472.

⁶ *People v. Mayor, &c.*, 28 Barb. 240; *Ward v. Bartholomew*, 6 Pick. 409.

Nor does such possession affect the validity of a sale under a judicial decree, or by a public officer acting in that capacity.¹ The possession of a tenant holding over is not so adverse to his lessor as to render his deed of the estate invalid.² Among the States where a conveyance of lands, though in the adverse possession of another, will pass the grantor's title as a valid deed, are Pennsylvania, Maine, Michigan, Illinois, South Carolina, Wisconsin, and Ohio.³

65. In Ohio, a deed is valid, though made on Sunday.⁴ It would be void in Indiana if delivered on that day; but it may be good, though made on that day, if delivered upon another day.⁵ If one receive a deed on Sunday, and give back a declaration of trust at the same time, he cannot hold the estate independent of such trust.⁶ A deed given by the way of composition of a felony cannot be avoided for that reason by the grantor; but a deed obtained by duress of imprisonment may be avoided, by the grantor or his heirs, by a re-entry upon the premises.⁷ No influence short of fraud or duress, exerted upon the grantor, will avoid a deed, unless it amount to destroying his free agency.⁸ But a deed may be avoided at common law for fraud, in part or in full, depending upon circumstances. Thus, where a grantor is made by fraud to include three parcels of estate in a deed, when he had sold only one, he may recover back the parcels thus fraudulently conveyed without affecting the deed as to the other parcels.⁹

66. There is a class of conveyances of lands, which, though formal in all respects, and effectual between the parties, are, by the policy of the law or by statute, held to be void to a certain extent. This embraces what are known as fraudulent conveyances, where the intent of the parties to the same

¹ *Hanna v. Renfro*, 32 Miss. 130; *Frizzle v. Veach*, 1 Dana, 211, 216; *Jarrett v. Tomlinson*, 3 W. & S. 114.

² *Taylor v. Kelly*, 3 Jones, Eq. 240.

³ *Cresson v. Miller*, 2 Watts, 272; *Hall v. Ashby*, 9 Ohio, 96; *Bennet v. Williams*, 5 Ohio, 461; Me. Rev. Stat. c. 73, § 1; *Shortall v. Hinckley*, 31 Ill. 219; *Fetrow v. Merriweather*, 53 Ill. 279; *Crane v. Reeder*, 21 Mich. 82; *Stewart v. McSweeney*, 14 Wis. 471; *Poyas v. Wilkins*, 12 Rich. 420.

⁴ *Swisher v. Williams, Wright (Ohio)*, 754. See *Tracy v. Jenks*, 15 Pick, 465

⁵ *Love v. Wells*, 25 Ind. 506.

⁶ *Faxon v. Folvey*, 110 Mass. 396.

⁷ *Worcester v. Eaton*, 11 Mass. 368; s. c. 13 Mass. 371.

⁸ *Howe v. Howe*, 99 Mass. 99.

⁹ *Bartlett v. Drake*, 100 Mass. 177.

is to defraud the creditors or the subsequent purchasers of the grantor by means of such conveyance. The questions arising under these are usually referred to the statutes of 13 Eliz. c. 5, and 27 Eliz. c. 4; though these are said to be in affirmance of the common law, and, in one form or the other, prevail over all the United States. The first of these statutes relates to creditors, and provides, in general terms, that all conveyances of lands intended to defraud or delay creditors, shall, as to such creditors, be void.¹ It was held in New Hampshire, that if one conveys his land to defraud his creditors, and this is known to a subsequent purchaser from the same grantor, he can hold nothing by his deed, although made for a valuable consideration.² But in Massachusetts, such second purchaser would hold against the fraudulent purchaser, although cognizant of the deed when he took his own.³ But, in order to be fraudulent as to creditors, it must be a conveyance of something which is subject to be levied upon for debt. If, therefore, a debtor, with ever so fraudulent intent in respect to his creditors, convey what the law exempts as a homestead, it could not be avoided on that account.⁴ As the question in these cases depends upon the *bona fides* with which the transaction takes place, it would be transcending the purposes of this work to attempt to present in detail the cases wherein the questions considered related to what should be deemed evidence of good or bad faith. But this may be stated, that no declarations made by the grantor after the conveyance has been completed will be admitted to impeach the deed for fraud.⁵ A few general principles may, however, be properly stated. In the first place, such conveyance, though fraudulent, is, if otherwise sufficient, and for a valuable consideration, valid as to all innocent purchasers not privy to the fraudulent intent. Thus, if a fraudulent grantee con-

¹ Burton, Real Prop. §§ 221-228; Story, Eq. §§ 352-356; Sands v. Codwise, 4 Johns. 536, 559; 1 Am. Lead. Cas. 68; Penniman v. Cole, 8 Met. 499; Coolidge v. Melvin, 42 N. H. 525.

² Stevens v. Morse, 47 N. H. 531-557.

³ Ricker v. Ham, 14 Mass. 141; Clapp v. Leatherbee, 18 Pick. 137.

⁴ Wood v. Chambers, 20 Tex. 254; Drentzer v. Bell, 11 Wis. 114; Gassett v. Grout, 4 Met. 490; Story, Eq. § 367; Danforth v. Beattie, 43 Vt. 138.

⁵ Bridge v. Eggleston, 14 Mass. 250; Steinbach v. Stewart, 11 Wall. 581.

vey the estate to a *bona fide* purchaser for a valuable consideration, the conveyance is good, and the first grant will be purged of the fraud.¹ So, though the grantor makes the conveyance with a fraudulent intent, it will not affect the validity of the transaction unless the grantee was cognizant of his intent, or participated in it.² And though the design be originally fraudulent as to creditors, and known to the grantee so as to be void as to creditors so long as the transactions had that character, yet it may become valid by being purged of the fraud by matter *ex post facto*, if the fraudulent intent is abandoned.³ But if vendor and vendee participate in the purpose of the vendor to defraud or delay creditors by conveying his land, it will be void as to such creditors, though a full and valuable consideration may have been paid for the same.⁴ Whether the intent be to defraud present or future creditors, it will be void as to them if the grantee participate in the intent, although the grantor may have been paid the full value of the estate, or may have other property to any amount.⁵ In respect to conveyances that are voluntary, that is, made without a valuable consideration, the cases are very numerous, but not uniform. And it may be remarked in passing, that the consideration of marriage, or an express promise to marry, if the marriage ultimately be prevented by the death of the grantor, is regarded in law as a valuable one, and takes the case out of the category of voluntary conveyances.⁶ The editors of the American Leading Cases have collected these cases, accompanied by discriminating comments upon the classes into which they divide themselves. That such conveyances are not void as against subsequent

¹ *Oriental Bank v. Haskins*, 3 Met. 340; *Jackson v. Henry*, 10 Johns. 185; *Somes v. Brewer*, 2 Pick. 184, 198. See *Clapp v. Tirrell*, 20 Pick. 247; *Wright v. Howell*, 35 Iowa, 292.

² *Bridge v. Eggleston*, 14 Mass. 250; *Harrison v. Trustees, &c.*, 12 Mass. 462; *Carpenter v. Muren*, 42 Barb. 300; *Hughes v. Monty*, 24 Iowa, 499.

³ *Oriental Bank v. Haskins*, 3 Met. 340; *Verplank v. Sterry*, 12 Johns. 552; *Sterry v. Arden*, 1 Johns. Ch. 261; *Smyth v. Carlisle*, 17 N. H. 418.

⁴ *Story*, Eq. § 369; *Wright v. Brandis*, 1 Ind. 336; *Ruffing v. Tilton*, 12 Ind. 260; *Chapel v. Clapp*, 29 Iowa, 194.

⁵ *Wadsworth v. Williams*, 100 Mass. 131.

⁶ *Smith v. Allen*, 5 Allen, 458; *Sterry v. Arden*, 1 Johns. Ch. 261; *Huston v. Cantril*, 11 Leigh, 176; *Prodgers v. Langham*, 1 Sid. 133.

creditors, where no intent exists to defraud such creditors, seems to be admitted law.¹ And, if not fraudulent at the time, no subsequent creditors can disturb the title.² While, as to previous creditors, different courts have applied different degrees of stringency in the rule, it may be laid down as a general proposition, that, if such conveyance be made to any person other than a child, it will be void as to existing creditors; and when made to a child, or as a settlement upon a wife, whether it shall be void or not depends upon the condition of the grantor as to his ability to pay his debts out of his remaining property at the time of its being made. And it may be added, that such voluntary conveyances are uniformly recognized as valid between the parties and their representatives.³ Thus a deed by a father to his daughter at his wife's request, in consideration of her having joined with him in conveying her estate, of which he had the benefit, was held good; and, in the absence of an intent to defraud, did not come within the category of voluntary conveyances.⁴ Even cases of voluntary conveyances, for consideration of blood or affection, are only presumptive evidence of fraud, if the grantor be then in debt, which may be rebutted by evidence.⁵ Thus it is laid down as a general proposition, that a voluntary conveyance for the benefit of one's wife, for the consideration of love and affection, will be void as against existing creditors, if he is insolvent.⁶ In other cases, such a conveyance has been held to be fraudulent as to future as well as present creditors.⁷ The same principle was

¹ *Trafton v. Hawes*, 102 Mass. 541; *Beal v. Warren*, 2 Gray, 447; *Lormore v. Campbell*, 60 Barb. 62.

² *Thacher v. Phinney*, 7 Allen, 150.

³ *Sexton v. Wheaton*, 8 Wheat. 229; *Salmon v. Bennett*, 1 Conn. 525; 1 Am. Lead. Cas. 49-85; *Doe v. Hurd*, 7 Blackf. 510; *Bullitt v. Taylor*, 34 Miss. 708, 737, and cases cited in the argument; *Story*, Eq. §§ 362, 364, 371; *Reade v. Livingston*, 8 Johns. Ch. 500, 501; *Hinde's Lessee v. Longworth*, 11 Wheat. 199. See *Washband v. Washband*, 27 Conn. 424, for the distinction between an inadequate and no consideration, in its effect where grantor owes existing debts: in the former the deed will be good, unless made with a fraudulent intent. *Lerow v. Wilmarth*, 9 Allen, 386; *Mercer v. Mercer*, 29 Iowa, 557.

⁴ *Brooks v. Dalrymple*, 12 Allen, 102.

⁵ *Lerow v. Wilmarth*, 9 Allen, 386; *Pomeroy v. Bailey*, 43 N. H. 118.

⁶ *Baldwin v. Tuttle*, 23 Iowa, 74.

⁷ *Redfield v. Buck*, 35 Conn. 329, 338; *Case v. Phelps*, 39 N. Y. 164; *Paulk v. Cooke*, 39 Conn. 566; *Savage v. Murphy*, 34 N. Y. 508.

applied in a case where a debtor, in failing circumstances, bought land and took a deed in his wife's name, and they together conveyed to B, who knew enough facts to create a reasonable ground for belief that the deeds were designed to enable the purchaser to defraud his creditors. It was held that B could not hold the estate against the purchaser's creditors.¹ There is a pretty large class of cases, in which, whether a settlement of his land by one in debt shall be held fraudulent or not as to his creditors, depends upon the circumstances under which it is done. Thus one, having more property than enough to pay his debts, provided a house for his wife and children by a voluntary conveyance for that purpose, and it was held to be valid;² and nobody but his creditors could call such a transaction in question.³ But the proposition is subject to the limitation, that the transaction is fair, and not with a view of defrauding his creditors at the time, or with a view to future indebtedness.⁴ It is good, though voluntary in favor of a son or wife, if he still has property, which, in the common course of dealing, is amply sufficient to secure his creditors.⁵ Where the conveyance is made with an actual fraudulent intent, it may be avoided by subsequent as well as previous creditors.⁶ The cases cited below fully sustain the foregoing proposition.⁷ The law in *Case v. Phelps* is stated thus, in substance: If a man about to engage in hazardous business convey his estate, without consideration, for the benefit of his wife and family, if the same shall prove disastrous it would be a fraud even as to future creditors, and may be avoided by them. In Pennsylvania it was held, that whether such a settlement would be fraudulent or not depended on whether the husband, in such case, did engage in

¹ *Baker v. Bliss*, 39 N. Y. 70, 80.

² *Gridley v. Watson*, 53 Ill. 193.

³ *Bridgford v. Riddel*, 55 Ill. 261; *Moritz v. Hoffman*, 35 Ill. 553.

⁴ *Pratt v. Myers*, 56 Ill. 24; *Van Wyck v. Seward*, 6 Paige, 62.

⁵ *Miller v. Pearce*, 6 W. & S. 101; *Posten v. Posten*, 4 Whart. 42; *Stewart v. Rogers*, 25 Iowa, 395; *Sedgwick v. Place*, *Blatchford, J.*, 6 Am. Law Rev. 181.

⁶ *Parkman v. Welch*, 19 Pick. 231. But see *Bullitt v. Taylor*, 34 Miss. 740, 741; *Coolidge v. Melvin*, 42 N. H. 521, 522; *Herschfeldt v. George*, 6 Mich. 466; *Beach v. White*, *Walker*, Ch. 496; *Ib.* 437.

⁷ *Marston v. Marston*, 54 Me. 476; *Bridgford v. Riddel*, 55 Ill. 264; *Redfield v. Buck*, 35 Conn. 329, 338; *Case v. Phelps*, 39 N. Y. 164; *Freeman v. Pope*, L. R. 9 Eq. 206.

such business. A mere intent to contract future debts would not be sufficient, if it was not carried out. The point turns upon whether his motive in making the conveyance was to withdraw the property from the reach of the debts subsequently incurred.¹ But in England, the case cited, of *Freeman v. Pope*, seems to maintain, that if, when one makes a voluntary settlement, he is indebted, and a prior creditor is delayed in the payment of his debt, it might be set aside by a subsequent creditor, however solvent the debtor might have been when he made the settlement, or however free from any fraudulent intent in making it. But in Minnesota, no one can object to a fraudulent conveyance who was not a creditor at the time it was made.² But that a voluntary conveyance, made in good faith, will be good against a subsequent purchaser with notice, seems to be the better rule of law as now prevailing in the United States, though held otherwise in England; and it would not be good against a subsequent purchaser without notice, if for a valuable consideration.³ Another class of conveyances which were good at common law have been declared fraudulent by statute under the doctrine of modern bankrupt and insolvent laws; and that is, conveyances intended to give undue preferences to creditors, and to prevent an equal distribution of a bankrupt's assets among his creditors.⁴ In such case, the assignee of the insolvent debtor may go on and sell the estate as his, and will pass a good title without doing any thing to set aside the conveyance.⁵ But though a debtor be insolvent, and convey his whole estate to satisfy a single *bona fide* debt, it will be a valid conveyance at common law, though both parties knew it; nor can the other creditors disturb it, except by process in bankruptcy or insolvency.⁶ It may be added, that,

¹ *Williams v. Davis*, 69 Penn. St. 21-28.

² *Stone v. Myers*, 9 Minn. 311.

³ *Story*, Eq. §§ 427, 428; *Cathcart v. Robinson*, 5 Peters, 264, 280; *Beal v. Warren*, 2 Gray, 447; *Doe v. Rusham*, 17 A. & E. n. s. 724; *Jackson v. Town*, 4 Cow. 603; *Sterry v. Arden*, 1 Johns. Ch. 261. See *Upton v. Bassett*, Cro. Eliz. 445; *Buckle v. Mitchell*, 18 Ves. 100; *Smith v. Allen*, 5 Allen, 456; *Trafton v. Hawes*, 102 Mass. 541.

⁴ *Penniman v. Cole*, 8 Met. 500; *Nary v. Merrill*, 8 Allen, 451; *Mass. Gen. Stat. c. 118, § 91*.

⁵ *Freeland v. Freeland*, 102 Mass. 478.

⁶ *Giddings v. Sears*, 115 Mass. 505.

though the deed be voluntary and fraudulent in its intent, it is, nevertheless, valid and effectual against the grantor and his heirs.¹ It may also be added, that, in *Bunn v. Winthrop*, a voluntary deed settling lands, in which the grantor had a chattel interest, upon a natural daughter, was sustained in a court of equity, although after executing it, but without delivery, the grantor sealed it up with his will, and retained the custody of it till his death.² The court, in the first case cited, say: "The instrument is good as a voluntary settlement, though retained by the grantor in his possession until his death." And in the other case the court say: "A voluntary settlement fairly made is always binding in equity upon the grantor, unless there be a clear and decisive proof that he never parted, nor intended to part, with the possession of the deed." An important, and what must be, when published, a leading case upon the subject of voluntary conveyances, has recently been decided by Bates, Chancellor, in Delaware, in which the question was, whether equity would interpose and set aside a voluntary conveyance of his estate made by a man in contemplation of marriage, and while under a marriage engagement. The Chancellor goes fully and with discrimination into the consideration of the English and American cases, and comes to a clear and satisfactory conclusion, that for a man or woman, on the eve of marriage, to convey away his or her estate (in this case it was the entire property of the husband), if done without a valuable consideration, and not disclosed to the other party before the marriage, would be so far a fraud *per se* upon the marital rights of the other party, that equity would set it aside so far as it conflicted with these rights, although the party so defrauded did not know whether the person he or she was about to marry had been possessed of the property in question or not. In that case, the husband having died, the widow and children applied to have the voluntary conveyance made by him in trust for himself for life, and after his death to go to his sisters, set aside in their favor. The Chancellor held the conveyance void as to her right of dower, but

¹ *Jackson v. Garnsey*, 16 Johns. 189; *Upton v. Basset*, Cro. Eliz. 445.

² *Bunn v. Winthrop*, 1 Johns. Ch. 329; *Souverbye v. Arden*, 1 Johns. Ch. 255.

linding upon his children and heirs, and decreed accordingly.¹ So where a woman, on the eve of her marriage, conveyed her lands without the knowledge of her intended husband, and without consideration, it was held fraudulent as to him.² In respect to deeds obtained by duress or fraud at common law, if the party so obtaining a deed, which is duly executed in matter of form, convey the estate to a *bona fide* purchaser, ignorant of the duress or fraud, for a valuable consideration, the latter will hold the estate purged of such fraud or duress.³ And this applies to cases where wives have been induced to join with their husbands in conveying lands of the wife; where, for example, she is induced, by undue influence of her husband or others, to join in a deed, it will not affect the validity of the grantee's title, unless he was party or privy to such influence.⁴

67. The instances are numerous where an innocent purchaser will hold an estate as against another owner, although the person of whom he purchased could not have held against such owner. Thus, if one purchase an estate of one who holds a recorded deed, and was not cognizant of a prior unrecorded deed, he holds by a good title, and may convey it even to one who was cognizant of such deed;⁵ but if one, having made a deed of land which is unrecorded, make a second one which is recorded to one who was cognizant of the first, and the holder of the first deed gets the same recorded before the holder of the second has conveyed the estate, whoever purchases of the second will be bound by the record of the first deed, and cannot claim the rights of an innocent purchaser without notice.⁶

¹ *Chandler v. Hollingsworth*.

² *Robinson v. Bush*, 71 Penn. St. 386.

³ *Somes v. Brewer*, 2 Pick. 184, 203; *Worcester v. Eaton*, 11 Mass. 379; *Deputy v. Stapelford*, 19 Cal. 302.

⁴ *White v. Graves*, 107 Mass. 325.

⁵ *Bumpus v. Platner*, 1 Johns. Ch. 219; *Story, Eq. § 410*; *Bell v. Twilight*, 18 N. H. 159; *Harrison v. Forth, Prec. Chanc. 51*; *Lowther v. Carlton*, 2 Atk. 139; *Trull v. Bigelow*, 16 Mass. 406.

⁶ *Flynt v. Arnold*, 2 Met. 619.

SECTION III.

WHAT PROPERTY MUST BE CONVEYED BY DEED.

IT remains only, while considering the constituent elements of a deed as a means of creating a title by private grant, to inquire what is embraced under "a thing to be contracted for," — one of the requisites, as given by Lord Coke, in the passage already cited.¹ In other words, in the conveyance of what property is a deed necessary? and to what property does it apply?

"As a general rule, where a man has a property, he may grant to others estates in and rights of enjoyment of it, and the grantees may maintain actions against those who disturb these. A man entitled to land may grant leases, may grant exclusive herbage, a right of depasturing, a right of way, or a right to game. He may grant the mines underneath, or the right to get at the minerals, and other rights in and over the property, or enjoyment of it. So, if the land is covered with water, he may grant rights of fishing. So the grantees of mines may regrant; and in all these cases, the grantee may maintain actions in respect of the rights granted."² The owner of land adjoining a bridge across a river, over which people were accustomed to pass to cross the river, and thus avoid using the bridge, granted by deed, to the bridge company, a right to obstruct this travel over his land for the purpose of avoiding payment of toll, and also a right to occupy his land for a road. It was held to be an interest in the land which might be granted by deed, under which the grantees might prevent persons passing across it, and maintain an action against a stranger who should use the land for that purpose.³

It will be borne in mind, that the former distinction, as to the necessity of a deed, between what lies in livery and what

¹ Co. Lit. 35 b; *ante*, pp. *553, *554.

² Per Bramwell, *Nuttall v. Bracewell*, L. R. 2 Ex. 11.

³ *Claremont Bridge v. Royce*, 42 Vt. 730.

lies in grant, has, at last, been practically abolished in England by the *statute of 8 and 9 Vict. c. 106, [*598] § 2, and was never in force in this country. Since the statute of frauds, 29 Charles II. c. 3, A. D. 1676, a deed has been required, in order to convey a freehold interest “in, to, or out of any messuages, manors, lands, tenements, or hereditaments.”¹

The subject of what property lies in grant, and requires a deed to create or transfer a title to it, was minutely considered by the early writers, to some of whom reference is here made, rather by way of example and illustration than with a view of giving a complete summary of what may and must be so conveyed. It is laid down as a proposition, having few and only special exceptions, that such things as lie in grant, and not in livery, generally cannot be granted, or given without deed; and therefore rents and services, and such like things, which are in gross, and not incident to some other thing, may not be granted without deed.²

Whatever it requires a deed to create at first, requires a deed to transfer from one grantee to another. And the same is true in respect to surrenders; as in the case of a conveyance, or surrender of an existing rent charge, or rent seck.³ Remainders and reversions in fee, or for life, are grantable only by deed, and can be surrendered only by deed.⁴ A grant by deed of an acre of land, covered by water, would be good.⁵ So a grant of a way, either *de novo* or of one already existing, must be by deed.⁶ But a mere license to do something upon another's land, like hunting or walking upon it, is not the subject of a grant by one to another, unless it be a license to take the property in another's land, which cannot pass without a deed.⁷ It may be added, in general terms, that every easement or servitude in lands, being an interest

¹ Browne, Stat. Frauds, § 6.

² Shep. Touch. 230; 1 Wood, Conv. 176, 177.

³ 1 Wood, Conv. 175, 185; Bennet v. Westbeck, Poph. 137; Shep. Touch. 229.

⁴ 1 Wood, Conv. 177, 178; Perkins, § 61; Co. Lit. 338 a; 2 Rolle, Abr. 62, Grant, 6; Shep. Touch. 230.

⁵ 1 Wood, Conv. 176; Co. Lit. 4.

⁶ 1 Wood, Conv. 177; Beaudely v. Brook, Cro. Jac. 189.

⁷ 1 Wood, Conv. 182; Perkins, 98; Monk v. Butler, Cro. Jac. 574

therein, can be acquired only by grant, or what is deemed to be evidence of an original grant; and in this are embraced rights in one man to take away the soil, or profits of the soil, of another, called *profit à prendre*, if such right be of a freehold or inheritable character.¹ A question has of late been raised, how far there may be a property in ice formed upon ponds and streams which would be the subject of sale or larceny distinct from the ownership of the land covered by the water of the stream or ponds. In Indiana it was held, that, if ice be made upon a public canal, the owner of the land might take the same, if, by so doing, he do not injure the banks or tow-path.² In another case it was held, that ice formed in a stream or pool, caused by a dam, upon one's land, belongs to the owner of the land; and, being of value, if one take it without right, he would be liable to an indictment for so doing.³ In Connecticut it was held, that ice formed upon an artificial mill-pond belonged to the owner of the pond, and not to the riparian land-owner.⁴ In Massachusetts the court left the question undecided in one case;⁵ but in another⁶ they held, that if a mill-owner flow another's land by his mill-pond, and ice forms upon it, the land-owner may cut and carry it off, provided he do not thereby appreciably diminish the head of water at the dam of the mill-owner. And the value of such a right is to be taken into estimate in fixing the damages occasioned to the land-owner by flowing his land. In the matter of water, the owner of the bed of a stream may grant a certain quantity of water to be taken out of it, or a certain amount of water-power measured and ascertained; but if the grant be of a *water-power*, it can only be taken or used for the propulsion of machinery.⁷ But where the grant was of a privilege to draw so many inches of water under so many feet of head, it was held to be an admeasurement of the quantity of water, and not of the power granted.⁸

¹ Washburn, Easements, 24, 3d ed., and cases cited.

² Edgerton v. Huff, 26 Ind. 35; State v. Pottmeyer, 30 Ind. 287.

³ State v. Pottmeyer, 33 Ind. 402.

⁴ Mill River v. Smith, 34 Conn. 462

⁵ Cummings v. Barrett, 10 Cnsh. 139.

⁶ Paine v. Woods, 108 Mass. 173. See also Lorman v. Benson, 8 Mich. 32.

⁷ McDonald v. Askew, 29 Cal. 207.

⁸ Torrance v. Conger, 46 N. Y. 340, 347.

A man may grant trees growing on his own land without deed; so he may corn on the ground, or fruit upon trees * standing on his land, although these may not [*599] have been severed. And the same is true of the timber, stone, or other materials, of a house then standing upon his estate; and the donee, in such a case, may take it away after the donor's death. The law regards these things as so much of the character of chattels, as not to require the formality of a deed to pass property in them.¹ But the grant of the vesture of land, such as the herbage and the like, can only be made by deed.²

The true question in the sale of trees and growing crops by parol, whether the property therein passes or not, is, Does such sale come within the fourth or the seventeenth section of the statute of frauds? If the latter, the sale is effectual and complete as soon as the property bargained for, or any part thereof, has been accepted and received by the vendee, even before the trees or crops are severed, and the purchaser has thereby acquired an *irrevocable* license to enter upon the vendor's land, and cut and carry them off as chattels. If, on the other hand, they come within the fourth section, on the ground, that, until severed, they form a part of the realty or an interest in the land, the sale of them, to be effectual, must be evidenced by some writing signed by the vendor; and a parol license to enter and cut them might be revoked. A very recent case in England, *Marshall v. Green*, has been decided while the present edition of this work has been passing through the press, in which there had been a sale by parol of twenty-two growing trees, whereof the purchaser had cut and disposed of six. The vendor then forbade his entering to cut the remainder, and fastened the gate by which the purchaser could gain access to the trees. The vendee broke

¹ 1 Wood, Conv. 179; 3 Id. 16, note; Perkins, §§ 57, 59; Shep. Touch. 231. But see *Trull v. Fuller*, 28 Me. 545, and *ante*, p. *573, that a deed is necessary to convey a fixture, like a shingle-mill. *Claffin v. Carpenter*, 4 Met. 580; *Smith v. Surman*, 9 B. & C. 561; *Evans v. Roberts*, 5 B. & C. 829; *Whitmarsh v. Walker*, 1 Met. 313. But see *Rodwell v. Phillips*, 9 M. & W. 501; and *Green v. Armstrong*, 1 Denio, 550; *M'Gregor v. Brown*, 10 N. Y. 117, that a sale of standing trees can only be by writing, and not by parol.

² 1 Wood, Conv. 179, cites *Noy*, 54.

open the gate, cut the remaining trees, and carried them away; and for this the vendor brought trespass: but the court held that the action would not lie, inasmuch as the vendee did no more than he had a right to do under the license given him by the sale of the trees as chattels, which license the vendor could not revoke. The trees were, by the contract, "to be got away as soon as possible."¹ The case turned upon the fact, that the trees were to be at once cut and severed from the realty; and the cutting and disposing of a part was accepting and receiving the whole, under the seventeenth section. If, as a part of the contract of sale, they were to stand upon the land for any period of time, definite or indefinite, it would not be a sale of chattels, but of an interest in land. The court held, also, that the sale of growing grass would be that of an interest in land; but if it were of growing crops of annual culture, whether fit for harvesting or requiring to stand upon the soil and derive their nutriment from it to bring them to maturity, the sale would come under the head of chattels. In undertaking to compare or reconcile the rulings in the above-mentioned case with the English and American cases upon the same subject, the language of the court in *Rodwell v. Phillips*² may be adopted: "It must be admitted, taking the cases altogether, that no general rule is laid down in any one of them that is not contradicted by some other." In that case it was held, that a sale of growing fruit is the sale of an interest in land, and is distinguished from that of crops of annual culture. In *Smith v. Surman*,³ the contract was to purchase certain growing trees at a certain price per foot, to be cut by the vendor. It was held not to be within the fourth section of the statute, but within the seventeenth. Parke, J., says, "The defendant could take no interest in the land by this contract, because he could not acquire any property in the trees *till they were cut.*" It is to be borne in mind, that whatever is growing upon the soil, if belonging to the owner of the freehold, passes with it if the land is conveyed;⁴ and a freehold interest in growing trees

¹ *Marshall v. Green*, 33 L. T. Rep. n. s. 404.

² 9 B. & C. 561.

³ 9 M. & W. 505.

⁴ *Ante*, p. *625.

may be conveyed like any other freehold interest in land.¹ The bearing of this will be perceived when the effect of a vendor's deed is considered, whereby he conveys lands having upon them growing trees which he had previously sold by parol, but of which sale the grantee had no notice. What passes, if any thing, by a parol sale of growing trees, has been differently held by different courts in the United States. In Connecticut, a sale of a part of the freehold which may be separated therefrom, as of gravel, stones, timber, trees, the boards and bricks of houses to be pulled down and carried away, is held not to be within the statute of frauds.² In New Jersey, the court hold standing trees to be "a part of the inheritance, and can only become personalty by actual severance, or by severance in contemplation of law as the effect of a *proper instrument in writing*."³ So the court of New York say, "Trees form a part of the land, and, as such, are real property; and a contract for the sale of them is a contract for the sale of an interest in the land."⁴ In Vermont, so long as trees are annexed to the land, and are not, in contemplation of law, severed therefrom, they cannot be sold by verbal contract.⁵ The construction given by the courts of Massachusetts to such a sale, when the several cases upon the subject are analyzed and compared, seems to be this: It is not a sale of an interest in land, but a passing of an interest in the trees *when they are severed from the freehold*; in other words, it is "an executory contract for the sale of chattels as they shall be thereafter severed from the real estate, with a license to enter on the land for the purpose of removal." "And so far as it implies a license to enter upon the land, the license may be *revoked before it is executed*." "Before they are cut, the license may be revoked, otherwise it would, *ex propria vigore*, convey an interest in the land."⁶ But the cases all seem to agree, that if, by the terms of the

¹ Clap v. Draper, 4 Mass. 266; Green v. Armstrong, 1 Denio, 554.

² Bostwick v. Leach, 3 Day, 476, 484.

³ Slocum v. Seymour, 36 N. J. 139, 140.

⁴ Vorebeck v. Roe, 50 Barb. 305.

⁵ Buck v. Pickwell, 27 Ver. 164.

⁶ Claffin v. Carpenter, *sup.*; Parsons v. Smith, 5 Allen, 580; White v. Foster, 102 Mass. 378; Delaney v. Root, 99 Mass. 548; Poor v. Oakman, 104 Mass. 316; Giles v. Simonds, 15 Gray, 441, 444; Whitmarsh v. Walker, *sup.*

sale, the trees are to remain upon the soil for a period of time, definite or uncertain, it would be a sale of an *interest in the land* within the terms of the statute.¹ So a parol sale of the "underwood" standing upon land is that of a part of the freehold, and in violation of the statute of frauds.² Mr. Benjamin, in his treatise on Sales,³ says, when speaking of soil, grass, timber, fruit on trees, &c., as distinguished from *fructus industriales*, "The former are interests in land embraced in the fourth section." But although a sale of growing crops of annual culture not yet mature would seem to carry with it an interest in land, since such crop must stand upon and draw nutriment from the soil until it shall have grown and matured for the harvest, the cases appear to be quite uniform in holding that the property in the crop would pass, with a license to enter and sever the same; and some of the English cases put it upon the same ground as that by which one may hold emblements growing upon the soil of another.⁴ In Illinois, though the court held, at first, that the sale of an immature crop was that of an interest in land, requiring a memorandum in writing,⁵ in a subsequent one they held it would be a good sale as of personal chattels if the crop were severed and set apart by metes and bounds in the field, and accepted as such by the vendee, as being within the seventeenth section of the statute.⁶ In determining whether the doctrine as laid down in the case of *Marshall v. Green*, or that maintained by the courts of Massachusetts, is most in accordance with the prevailing spirit of the American law, one test is the effect to be given to an absolute deed of the

¹ *Howe v. Batchelder*, 49 N. H. 208; *Kingsley v. Holbrook*, 45 N. H. 313; *Sterling v. Baldwin*, 42 Ver. 308; *Huff v. McCauley*, 53 Penn. St. 210; *Pattison's Appeal*, 61 Penn. St. 297; *Green v. Armstrong*, *sup.*

² *Scovell v. Boxall*, 1 Y. & J. 398.

³ P. 90. The sale of growing grass is a sale of the realty; *Crosby v. Wadsworth*, 6 East, 602. So of hops; *Waddington v. Bristow*, 2 B. & P. 452. See also Notes on Saunders by Williams, ed. of 1871, p. 394, and the language of *Littledale, J.*, in *Smith v. Surman*, *sup.*

⁴ *Whipple v. Foot*, 2 Johns. 418; *Stewart v. Doughty*, 9 Johns. 108; *Austin v. Sawyer*, 9 Cow. 40, 42; *Green v. Armstrong*, *sup.*; *Parker v. Staniland*, 11 East, 362; *Warwick v. Bruce*, 2 M. & S. 205; *Evans v. Roberts*, 5 B. & C. 836; *Jones v. Flint*, 10 Ad. & El. 753. But a different doctrine is maintained in *Emmerson v. Heelis*, 2 Taunt. 38.

⁵ *Powell v. Rich*, 41 Ill. 469.

⁶ *Graff v. Fitch*, 58 Ill. 377.

freehold by the owner thereof to a *bona fide* purchaser without notice of any sale of the trees growing thereon. If the vendor shall have given a third person a *revocable* license to do certain things upon his land, his conveyance of the land to a stranger, who has no notice of such license, would be a revocation thereof.¹ It is accordingly held in Massachusetts, that if the vendor of trees revoke the license before they are severed, and "the party to whom it is granted is injured by its withdrawal, his remedy is by an action against the licenser for a *breach of contract*. It cannot be held to extend further, so as to confer a right to use the land of another without his consent."² If, then, such vendor, after such sale of trees, conveys the soil and freehold by deed to one who is not cognizant thereof, the system of conveyancing is not disturbed, since the grantee of the soil takes it free from any secret prior conveyance of any interest therein; whereas, if the license to enter and cut and carry off the growing trees is *irrevocable*, the consequence would be, that a purchaser of the soil without notice might find himself holding a deed, absolute in its terms, of land, the chief value of which belongs to another by a mere parol bargain; although, if the purchaser of the trees had taken a deed of the entire estate, soil and trees, and had failed to put his deed on record, the taker of the second deed without notice would hold both land and trees against such prior purchaser. It is not, therefore, too strong to say, that the doctrine of the Massachusetts courts is much more in harmony with the American system of conveying lands than that at present held by the English courts.

In speaking of deeds above, no distinction is made between an indenture and a deed-poll as a means of conveyance; the form, in that respect, being immaterial.³ Another familiar principle is applicable to surrenders, or revocations of grants; namely, that they must be of as high a nature as the instrument by which the interests granted were created, so that, if any interest is created by deed, it must be surrendered or revoked by deed.⁴

¹ *Ante*, vol. 1, p. *399.

² *Giles v. Simonds*, 15 Gray, 441, 444; *Whitmarsh v. Walker*, 1 Met. 313, 316.

³ 1 Wood, Conv. 185.

⁴ *Ibid*.

But every right is not the subject of grant, though it relates to land or an interest therein. Thus, a bare possibility of an interest which is uncertain is not grantable; though a possibility, coupled with a present interest, may be granted.¹ It has accordingly been held, that a grant by an heir apparent of his interest in his ancestor's estate, so long as his ancestor is living, conveys nothing, and is inoperative.² But where an heir apparent, who was indebted to another, assigned his interest in his ancestor's estate, with a power of attorney to make deeds, &c., necessary to receive the proceeds, it was held to give him such an interest that equity protected it against the claim of a creditor of the heir who attached the estate at the ancestor's death.³ So is a grant by a soldier of such land as may thereafter be given him by the government as a bounty.⁴ It must be an interest in the land existing in possession, reversion, remainder, by executory devise, or contingent remainder.⁵ An exception to this exists in many cases, where the grant is with a covenant of warranty, which would create an estate in the grantee by estoppel, whenever the grantor shall have acquired the estate which he has granted and warranted.⁶ So no possibility, right, or title to land in action can be granted to a stranger, though it may be released to the tenant by deed. Nor, generally, are things in action, as rights and titles of entry or action concerning inheritances, grantable, except in special cases; as, for instance, if one be disseised, he may not grant the land, or a right of action to recover it. Nor can one who has a right to defeat a freehold granted to another, upon failure to perform a condition, grant over this right to a stranger, except in such cases as the benefit of the condition passes with the reversion.⁷ And yet a deed by one who has a right of entry for condition broken at common law, though it will not pass any right to his grantee

¹ 1 Wood, Conv. 182, 185; Fulwood's case, 4 Rep. 66; in Thomas Palmer's case, 5 Rep. 24 b; Jackson v. Catlin, 2 Johns. 261.

² Davis v. Hayden, 9 Mass. 519; Dart v. Dart, 7 Conn. 255; Bayler v. Commonwealth, 40 Penn. St. 37; Lit. § 446; Co. Lit. 265 a.

³ Stover v. Eycleshimer, 46 Barb. 84. ⁴ Jackson v. Wright, 14 Johns. 198.

⁵ Jackson v. Catlin, 2 Johns. 261.

⁶ Ante, pp. *473, *474; Trull v. Eastman, 3 Met. 121; Co. Lit. 265 a.

⁷ 1 Wood, Conv. 183; Perkins, § 86; Lampet's case, 10 Rep. 51 · Lit. § 347, Co. Lit. 214 a, 214 b; Shep. Touch. 231.

to enter and defeat the estate, will so far extinguish his own, that his heir could not enter for such breach; and if the grant were by the ancestor to the heir himself, the right of entry to defeat the original estate would be extinguished altogether.¹

¹ *Rice v. Boston & W. Railroad*, 12 Allen, 141.

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CHAPTER V.

FORMS OF CONVEYANCE BY PRIVATE GRANT.

- SECT. 1. Deeds at Common Law, and their Characteristics.
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* SECTION I.

DEEDS AT COMMON LAW, AND THEIR CHARACTERISTICS.

- 1. Of deeds of feofment, and when first required.
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1. IN considering the forms of deeds used in this country to effectuate private grants of lands, it may be well to recapitulate briefly the names and general characteristics of those of England, which have, to a greater or less extent, been adopted as modes of conveyance in this country. So much, however, has already been said of the doctrine of seisin, and livery of seisin, at common law, as well as of uses and the forms of conveyance to which the statute of uses gave rise, that it would be little more than repetition to attempt to analyze, or give in detail, the grounds upon which these various forms of conveyance originally depended for their adoption and use. The form employed for ages in England until the statute of uses, and which continued to be one of the modes of conveyance there until a comparatively recent period, was that of feofment. It did not require any deed

until the time of Charles II., and consisted of a gift of a feud, evidenced and consummated by an actual or symbolical livery of seisin. It, of course, applied to corporeal hereditaments, or such incorporeal hereditaments as remainders or reversions, where the seisin which perfects the estate is committed to the holder of the particular estate as a kind of bailiff of the reversioner or remainder-man. It was always incumbent upon the feoffor to indicate in his gift the nature and duration of the estate which he intended to give the *feoffee in the lands; and if no estate were limited [*604] therein, it was, constructively, an estate for the life of the feoffee. In carrying out the intention of the parties to the feofment, it became customary to make written deeds, expressing the terms of the gift, though these did not obviate the necessity of livery of seisin. But the possession of a deed by one purporting to be grantee of an estate is no evidence of title in the grantor, unless shown *aliunde* to have been at some time in possession of the land granted, or his ownership is shown by some other evidence.¹

A conveyance by "gift" is simply a feofment, wherein the estate thereby limited or created is one in tail.² This is applying the term in its stricter sense; for, in its broader meaning, the word *gift* imports no more than the transferring of the property of a thing from one to another without a valuable consideration.³

2. The effect of a conveyance by feofment was, that as it passed the actual seisin, if it proposed to convey a fee-simple, it created an actual fee-simple in the feoffee, by right or by wrong, according as the feoffor was or was not seised in fee. Thus the feofment, even of an idiot or lunatic, was held effectual till avoided by process of law. The effect upon contingent remainders of a feofment made by him who had the particular estate has been heretofore considered. It was to do away with this form of conveyance, as a means of injuriously affecting the rights of third parties, that a recent statute in England has declared that no feofment shall have any tortious operation.⁴

¹ *Smith v. Lawrence*, 12 Mich. 434.

² 2 Bl. Com. 310-317.

³ 3 Wood, Conv. 1.

⁴ Stat. 8 & 9 Vict. c. 106, § 3; Wms. Real Prop. 121, 122; 4 Kent, Com. 481.

3. The deed or charter of feofment was, originally, exceedingly brief and simple, as the reader may perceive by recurring to Appendix No. I. to the second volume of Blackstone's Commentaries.¹

4. Conveyance by grant was the common-law mode of transferring or creating estates or interests in incorporeal hereditaments of which there could be no livery of seisin. This was always by deed, and these interests passed only by a delivery of the deed. And such is the law now. Thus a right to take coal or timber from one's land, or any easement in or over his land, being an interest in the land, can be effectually created or conveyed only by deed.² The difference between these two modes of conveyance gave rise to the expression with reference to the two classes of property, one "lying in livery," the other "in grant." The words made use of in a grant, in creating or passing the estate, differed but little from those employed in a feofment; and the two modes varied from each other only in the subject-matter of the conveyance. By the statute above cited, it is [*605] now declared * that the conveyance of an immediate estate of freehold in corporeal hereditaments shall be deemed to lie in *grant* as well as *livery*.³

5. One essential difference between a feofment and a grant has already been referred to, — namely, their effect upon the interests of third persons; since grants cannot, like feofments, create a tortious fee, but operate only upon the estate or interest which the grantor has in the thing conveyed, and can lawfully convey.⁴ A feofment visibly operated upon the *possession*: a grant could operate only on the *right* of the party conveying. As *possession* and *freehold* were convertible terms at the common law, a conveyance which was considered as transferring the possession was considered as transferring an estate of freehold, or as transferring the fee. But as grants only transferred a right, a conveyance of this kind could only transfer whatever estate the party had a right to convey. It is in this sense that a feofment is said to be a tortious, and a

¹ See 4 Kent, Com. 480.

² Huff v. McCauley, 53 Penn. St. 206; Drake v. Wells, 11 Allen, 143.

³ 2 Sharsw. Bl. Com. 317, and note.

⁴ 4 Kent, Com. 490.

grant to be a *rightful*, conveyance.¹ And where "give and grant" are followed by "bargained and sold," it qualifies the mode of gift and grant, and converts it into a bargain and sale, without its being a feofment.²

6. Grant is no longer confined to the conveyance of incorporeal hereditaments; and the term has been applied, by statute in New York, to the forms of deeds adopted there, though retaining, in all but name, the characteristics of the deeds previously in use in that State.³ In New York, "grant" embraces conveyances of the inheritance of freehold and deeds of bargain and sale; in Vermont, it applies to all conveyances by deed, except those of gift; and in New Jersey, it means every ordinary mode of acquiring property by deed, including such as operate by way of uses.⁴ Wood, in his treatise on Conveyancing, says, "The word *grant*, taken largely, is where any thing is granted or passed from one to another; and in this sense it comprehends feofments, bargains and sales, gifts, leases in writing or by deed, and sometimes by word without writing."⁵ Nor does the calling an instrument a lease affect the quantity of estate conveyed by it, although it is usually applied to a term for years. It may convey a fee.⁶ *Dedi et concessi* may amount to a grant, a payment, a gift, a release, a confirmation, a surrender; and it is in the election of the party to use which of these purposes he will.⁷

¹ Co. Lit. 271 b; n. by Butler, § 1.

² Matthews v. Ward's Lessee, 10 Gill & J. 448.

³ 4 Kent, Com. 491; Cornish, Purch. Deeds, 208.

⁴ Ross v. Adams, 4 Dutch. 165.

⁵ 3 Wood, Conv. 7

⁶ Jamaica Pond v. Chandler, 9 Allen, 168.

⁷ Co. Lit. 301 b; Knight v. Dyer, 57 Me. 177; Shep. Touch. Prest. ed. 91.

SECTION II.

DEEDS UNDER THE STATUTE OF USES.

1. How the law gives effect to such deeds.
2. Difference between bargain and sale, and covenant to stand seised.
3. Mode of operation of lease and release.
4. Form and effect of "quitclaim" deeds.
5. English forms of deeds may be used here.

1. THE forms of conveyance which took their rise from the construction given to the statute of uses were considered at length in their character and effect in the chapter treating of Uses, to which the reader is referred.¹ The names of these, it will be recollected, were Bargain and Sale, Covenant to stand Seised, and Lease and Release. They all dispense with an actual livery of seisin; and, while they all recognize a seisin as essential to give effect to the conveyance, the statute transfers this, and *executes the use* by uniting the legal seisin with the equitable use, and thereby creating an entire legal estate of the two. Thus where a deed conveyed land to A and six other persons *nominatim*, and their heirs, giving an exclusive control of the granted premises and the income thereof to A for life, it was held, that, as to one-seventh, the use was executed in A in fee; and as to the six parts, the use was executed in A for life, with a remainder to the other grantees named.²

2. The difference theoretically between a bargain and sale and a covenant to stand seised consisted in the consideration * out of which the use was raised to which the law united the seisin. In bargain and sale, it required this to be money, or something representing money. In covenant to stand seised, it consisted of relationship by consanguinity or affinity; though, as will hereafter appear, this distinction seems to have been sometimes lost sight of by the courts. Thus, in Massachusetts, it has been settled that a deed of covenant to stand seised may be good, although the consideration may be other than the relationship of blood

¹ *Ante*, pp. *127-*156; *Bedell's case*, 7 Co. 40 b.

² *Chenery v. Stevens*, 97 Mass. 77.

or marriage between the grantee and grantor, or no such relationship exists.¹ And in Pennsylvania it is held, that, if a deed cannot take effect as a bargain and sale for a want of pecuniary consideration, it may do so as a covenant to stand seised, if a consideration of blood exists; and a recorded deed will have the effect of a deed of feofment with livery of seisin, or as a deed under the statute of uses, as will best accomplish the intention of the parties.² But in New York it was held, that, if a deed be made without a pecuniary consideration, it cannot operate as a bargain and sale; and if without any tie of blood between the grantor and grantee, it cannot take effect as a covenant to stand seised.³

3. In a lease and release, the transfer of the seisin and estate from the grantor to the grantee was by a bargain and sale for a year, for example, for some valuable consideration, whereby a use for that time was raised in the bargainee, and the statute passed to him the legal possession of the land, and then by a release from the owner of the reversion, which did not require a formal livery of seisin. This last had to be done by deed, being a simple common-law conveyance of a reversion. Both the lease and release were known to and in use under the common law. But, for the latter to become operative, it had to be made to one having an estate in or possession of the land; while a lease, before entry under it, created no estate in the lessee, but a mere *interesse termini*, as it was called. So that this mode of conveyance by lease and release derived its vital energy and effect from the possession which the law, under the statute of uses, gave to the lessee or bargainee for the year, thereby rendering him capable of acquiring the inheritance by a simple deed of release.* It

* NOTE. — In treating of the application of the doctrine of uses to conveyances by lease and release in an earlier part of this work (*ante*, p. *130), the remarks were confined to the simplest form of such a conveyance, where it is intended that the seisin and use should unite in the releasee, creating in him an estate of freehold. But it seems, from the language of Mr. Butler, that a seisin may, through such a conveyance, be united with a use in a third

¹ Trafton v. Hawes, 102 Mass. 533; see also *post*, *618.

² Eckman v. Eckman, 68 Penn. St. 460.

³ Jackson v. Cadwell, 1 Cow. 639, 640

consequently required two deeds, and became the usual mode of conveyance in England till the recent statute 7 and 8 Vict. c. 106, above referred to; though the necessity of a formal lease had been removed by statute in 1841.¹ The statute speaks of persons having a use "in fee-simple, fee-tail, for a term of life, or for years," and declares that they "shall henceforth stand, and be seised, deemed, and adjudged, in lawful seisin, estate, and possession, of and in the same," "of and in such like estates as they had or shall have in use in the same." In this way the interest is made an estate by the statute, without the prerequisite, at common law, of an actual entry.² But though a sufficient estate is thereby created to give effect to a subsequent deed of release, it is still true that a lessee cannot maintain trespass before he shall have made an entry and gained actual possession.³

4. While thus enumerating the forms of conveyance by deed heretofore in use, it may be remarked, that while a deed of simple release, made to one who has neither an estate in, nor possession of, land, would be merely void, a form of deed of the nature of a release, containing words of grant as well as release, commonly known as a "quitclaim-deed," has long been in use in this country, and has not only been regarded practically as a mode of conveying an inde-

[*607] pendent title to real property, but * is, by the statutes of some of the States, declared to be effectual for that

purpose.⁴ But a quitclaim-deed does not pass any more title than the grantor has, and does not give the one who claims

person, in which respect it operates like a feofment as a mode of conveying to uses. "The bargain and sale, therefore, or the lease for the year as it is generally called, operates, and the bargainee is in the possession, by the statute. The release operates by enlarging the estate or possession of the bargainee to a fee: this is at the common law; and if the use be declared to the releasee in fee-simple, it continues an estate at the common law; but if the use is declared to a third person, the statute again intervenes, and annexes or transfers the possession of the releasee to the use of the person to whom the use is declared." Co. Lit. 271, note 231, §§ 2, 3; 4 Cruise, 116; Id. 131. See *ante*, p. *150.

¹ Wms. Real Prop. 146; *Rogers v. Eagle F. Ins. Co.*, 9 Wend. 611, 628; *Lalor*, Real Estate, 249.

² *Burton*, Real Prop. § 131, p. 43, note.

³ *Lutwich v. Milton*, Cro. Jac. 604.

⁴ *Post*, § 3, pl. 2.

under it the rights of a *bona fide* purchaser without notice.¹ If, therefore, one take such a deed, and pay a consideration for it, and the title fails, he has no remedy against his grantor in the absence of fraud on his part.² Yet, if the grantor have a title to land, a deed of quitclaim is just as effective to pass that title as a deed with covenants of warranty: and where one agreed to convey a good title to a certain parcel of land, and he had such a title, the tender of a deed of quitclaim of the land would be a performance of his agreement; the other contracting party cannot insist upon a covenant of warranty in his deed.³

It may be furthermore remarked, that courts, both in England and in this country, are very liberal in construing deeds, so as to give them effect, if possible; and, although intended to come within one class, if they cannot be made operative in that form, on account of some defect, they are often found capable, and permitted to accomplish the purposes of the parties, by a construction that brings them within some other class of deeds known to the law. Among the cases that might be selected as illustrations of this is the case of *Exum v. Canty*, where one made a deed whereby he covenanted with a trustee that he would stand seised of the estate to his own use during his own natural life, and, immediately on his death, to the use of the trustee in trust, that he should convey it to A B, his heirs, &c. The consideration stated in the deed was the love and affection he had for A B, and in consideration that he had before supported the grantor, and had agreed to do so thereafter. But there was no relationship between the grantor and A B. The court sustained the deed, saying, "The instrument was in effect a conveyance which took effect upon its execution and delivery, vesting an interest in them to take effect in possession at the death of the grantor. It was plainly a covenant to stand seised to the use of the parties for whose benefit the property was intended to be conveyed, whose estate vested in possession at the determination of his estate for life reserved in it."⁴ So in Alabama, a deed made for love

¹ *May v. Le Clair*, 11 Wall. 282.

² *Thorp v. Keokuk Coal Co.*, 48 N. Y. 253.

³ *Kyle v. Kavenagh*, 108 Mass. 356.

⁴ *Exum v. Canty*, 34 Miss. 569. See also *Wall v. Wall*, 30 Miss. 91, held to

and affection for a grandchild was held to be good, under the doctrine of uses, as a covenant to stand seised, if not good as a bargain and sale for want of a pecuniary consideration; although the words used were "give, grant, bargain, sell, alien, enfeoff, and convey."¹ In *Steel v. Steel*, a memorandum was attached to a deed granting the premises in terms, which stated that the grantor did not intend to convey the same until after his decease and that of his wife; and it was held to postpone the right of the grantees to have possession of the estate conveyed until after the death of the grantor or his wife.²

5. With this brief reference to the different kinds of deeds which have, at times, been in use in England and in this country, and most if not all of which may still be practically employed here, it will be unnecessary to do more than refer the reader to what may be found upon the subject in former parts of this work, except as particular cases may be cited to illustrate the laws of particular States.³

SECTION III.

DEEDS IN USE IN THE UNITED STATES.

1. Of forms of deeds recognized by State statutes.
2. Where deeds of quitclaim are in use.
3. Bargain and sale, &c., forms are in use in South Carolina.
4. What deeds are in use in Rhode Island and Kentucky.
5. Forms prescribed and in use in Tennessee.
- 6, 7. Deeds used in Maryland and Minnesota.
- 8, 9. Deeds in use in New York and Georgia.

1. MANY of the States have prescribed forms of deeds in their statutes; but this has generally been regarded rather as

be a covenant to stand seised, though in many respects like a testamentary declaration. See also *Edwards v. Smith*, 35 Miss. 197, where the question was, whether the instrument should take effect as a will or a deed. 2 Lomax, Dig. 141; *Eckman v. Eckman*, 68 Penn. St. 460; *ante*, *606.

¹ *Horton v. Sledge*, 29 Ala. 478, 496. ² *Steel v. Steel*, 4 Allen, 417, 424.

³ *Ante*, pp. *142-*156

a matter of direction and declaration that such a form would be sufficient, than that it should be required. Most of these statutes, in fact, directly or indirectly refer to the common-law modes as familiar and effectual forms of conveyance. Thus, while the form of deed in common use in Massachusetts is borrowed from the ancient charter of feofment, modified by a declaration of the uses to which the estate is to be held, the statute expressly refers to "bargain and sale," and "other like conveyance of an estate," and declares that "a deed of quitclaim and release, of the form in common use in this State, shall be *sufficient to pass all the [*608] estate which the grantor could lawfully convey by a deed of bargain and sale."¹

2. A deed of quitclaim in common use is not only a conveyance at common law, but is recognized as valid in Connecticut, and in several of the States besides Massachusetts, by express statute.² In Connecticut, a quitclaim-deed is a primary conveyance, and vests the releasee with all the interest which the releasor has; even a fee.³ So it is good, though it do not contain words of sale or conveyance; and the words "assign, transfer, and set over," were held to convey the land described in a deed containing those words.⁴ But a deed, in order to be effectual to convey land, must contain words of grant, release, or transfer, of the land intended to be conveyed.⁵

3. In South Carolina, bargain and sale is regarded as a valid mode of conveyance; though lease and release was usually employed till 1795, when a form was prescribed by

¹ Mass. Gen. Stat. c. 89, §§ 3, 8; *Hunt v. Hunt*, 14 Pick. 374, 381; *Wade v. Howard*, 6 Pick. 499; *Bayer v. Cockerill*, 3 Kans. 282, 294.

² *Rogers v. Hillhouse*, 3 Conn. 398, 402. In Minnesota, Comp. Stat. 1858, c. 35, § 3; Stat. at Large, 1873, vol. 1, c. 35, § 4; in Maine, Rev. Stat. c. 73, § 14; Rev. Stat. 1871, c. 73, § 14; in Mississippi, Code, 1857, p. 309, art. 17; Rev. Code, 1871, § 2300; in Ohio, *Hall v. Ashby*, 9 Ohio, 96; in Illinois, *McConnel v. Reed*, 4 Scamm. 117; *Kerr v. Freeman*, 33 Miss. 292; *Dart v. Dart*, 7 Conn. 255; *Jackson v. Hubble*, 1 Cowen, 618; *Jackson v. Bradford*, 4 Wend. 619; *Bogy v. Shoab*, 13 Mo. 380; *Brown v. Jackson*, 3 Wheat. 452; *Touchard v. Crow*, 20 Cal. 150; *Ante*, § 2, pl. 4; *Hamilton v. Doolittle*, 37 Ill. 482; *Downer v. Smith*, 24 Cal. 123; *Carpentier v. Williamson*, 25 Cal. 168.

³ *Sherwood v. Barlow*, 19 Conn. 471.

⁴ *Fash v. Blake*, 38 Ill. 367.

⁵ *Johnson v. Bontock*, 38 Ill. 114.

statute embracing both these, though not invalidating those previously in use.¹

4. In Rhode Island it is expressly declared, that a deed of bargain and sale, of lease and release, covenant to stand seised, "or any other deed," signed, &c., shall transfer the possession of the grantor, &c., without livery of seisin; and a like declaration is found in the revised statutes of Kentucky, with a provision that a release shall be effectual without a previous lease.²

5. In some States, as already remarked, forms of deeds are prescribed by statute; as in Tennessee, for instance, it is enacted, that "the following or other equivalent form, varied to suit the precise state of facts, are sufficient for the purposes contemplated, without further circumlocution." For a deed in fee with a general warranty: "I hereby convey to A B the following tract of land (describing it), and I warrant the title against all persons whomsoever." Other forms are given, to be used for special covenants, for deeds of quitclaim, of mortgage and deeds of trust, of a brevity as remarkable as that of the form above given.³ It has been held by the court, that though the title to land under the statute of Tennessee does not, on the one hand, pass by operation of the statute of uses, but by deed registered, yet still, on the other hand, such deed does not, like an ancient feofment, work a disseisin.⁴

6. So in Maryland, while there is a form of deed, which, it is declared, "shall be sufficient to convey real or personal estate," * and in which the operative word is "grant," there is a general provision as to "all deeds conveying real estate," that they shall contain the names of the "grantor and grantee," "bargainor and bargainee."⁵ And it is a remark of the court, "By the usage and practice of the State, bargains and sales, as a mode of passing estates, have nearly superseded all other modes of conveyance."⁶

7. On the other hand, in some States, and among them

¹ *Craig v. Pinson*, 1 Cheves, 272.

² R. I. Rev. Stat. c. 146, § 1; Gen. Stat. 1872, c. 162, § 2; Ky. Rev. Stat. Stant. ed. 1850, c. 24, § 4; Gen. Stat. 1873, c. 24, § 3.

³ Tenn. Code, 1858, p. 410, § 2013.

⁴ *Miller v. Miller*, Meigs, 484, 496.

⁵ 1 Md. Code, 1860, p. 133, art. 24, § 9.

⁶ *Matthews v. Ward*, 10 G. & Johns. 449.

Minnesota, certain requisites in deeds are prescribed by statute, more or less contravening the common law; as, for instance, that deeds must be made directly to the person in whom the possession and profits are intended to be vested, and not to the use of or in trust for such person. This, of course, excludes feofments to uses; but the statute of that State no further interferes with the forms of deeds than by simply declaring that "conveyances of lands may be made by deed executed," &c.¹

8. So in New York, feofments with livery of seisin, as a mode of conveying lands, are expressly abolished; but deeds of bargain and sale, and of lease and release, may continue to be used. But it is declared that they shall be deemed to be "grants;" and deeds must be made directly to the person in whom the possession and profits are intended to be vested.²

9. In Georgia, no prescribed form is essential to the validity of a deed of lands or personalty. If sufficient in itself to make known the transactions between the parties, no want of form will invalidate it.³ In Indiana, deeds are sustained as deeds of bargain and sale, upon the same ground as that upon which they were held valid by the English courts under the statute of uses. In *Givan v. Doe*, the court regards the deed "as a deed of bargain and sale of the land in controversy. By that deed, the use of the premises passed to the bargainee, and the statute of uses transferred to him the possession." The English statute of enrolments was never in force in that State; and deeds of bargain and sale are held valid between the parties, though never acknowledged or recorded.⁴ In Iowa, there are forms of conveyance prescribed by statute. But the court remarks: "The form is not prescribed to be used by those who do not choose to prefer it; nor, having adopted it, are parties precluded from inserting other covenants of warranty, or from restraining in express terms those adopted, as they may desire."⁵ So a deed of release and quit-

¹ Minn. Comp. Stat. 1858, c. 35, § 1; Stat. at Large, 1873, vol. 1, c. 35, § 1.

² 2 New York, Rev. Stat. 4th ed., p. 148, §§ 149, 155; Stat. at Large, vol. 1, p. 689, §§ 136, 142; *Rogers v. Eagle Fire Ins. Co.*, 9 Wend. 611; *Lalor, Real Estate*, 237, 248.

³ Code, 1873, p. 463, § 2692.

⁴ *Givan v. Doe*, 7 Blackf. 212.

⁵ *Funk v. Creswell*, 5 Iowa, 68.

claim may convey the interest of the releasor without words of grant, although the releasee has no prior interest in or possession of the estate.¹ A deed of all the grantor's right and title to land conveys the land itself; and this is the proper form of release or quitclaim of an estate in lands.² The words "give, grant, and release," in Mississippi, are sufficient in a deed to convey an estate, although the grantor is not in possession.³ "So in Iowa, forms in the same words are prescribed by statute."⁴

¹ *Russell v. Coffin*, 8 Pick. 143; *Pray v. Pierce*, 7 Mass. 381. See *Berry v. Billings*, 44 Me. 416; *Bronson v. Paynter*, 4 Dev. & Bat. 395; *Jackson v. Fish*, 10 Johns. 456.

² *Webster v. Webster*, 33 N. H. 22.

³ *Fairley v. Fairley*, 34 Miss. 18.

⁴ Iowa "Revision, 1860, § 2240;" Code, 1873, § 1970.

SECTION IV.

COMPONENT PARTS OF DEEDS.

1. General forms of deeds, whether poll or indentures.
2. Parts of deeds enumerated.
3. A simple grant sufficient without other parts of a deed.
4. Sundry clauses usual in deeds.
5. Of the *tenendum*.
6. Of the "premises."
7. Effect where the premises are repugnant to the *habendum*.
8. Of the consideration of the deed.
- 9, 10. What consideration necessary under the statute of uses.
- 11, 12. Consideration sufficient if a valuable one.
13. When bargain and sale may operate as a feofment.
- 14-16. Construction as to covenant to stand seised as a conveyance.
17. Of contradicting or controlling the consideration stated in a deed.
18. Inserting consideration prevents a resulting use, &c.
19. Of the granting words in a deed.
20. Operative words in lease and release.
21. Deeds take effect according to the intent of parties.
22. Of defining the estate in the granting part of the deed.
23. Of the description of the thing granted.
- 24-28. Rules and maxims as to what passes under a description.
29. Principal carries incident, but not the converse.
- 30, 31. All the constituents of a thing pass under a general grant of it.
32. What can pass as appurtenant: land cannot.
33. What passes as *parcel*, though nominally appurtenant.
34. What passes under the term *messuage*.
35. Punctuation not regarded in a deed.
- 36-38. Rules applied, if parts of deeds are vague or contradictory.
39. Quantity of land mentioned regarded as a description.
- 40, 41. How far distances, and points of compass, are regarded.
42. "Northerly," as a course, means north.
43. Boundary-lines held to be straight between monuments.
44. How far monuments must exist when the deed is made.
45. What may be referred to as monuments in a deed.
46. Of streams of water.
- 46 a. What are navigable streams.
47. Of ponds and lakes.
48. Of navigable streams.
49. Of sea and shore.
50. Of the ordinance of Massachusetts as to flats.
51. Of highways as boundaries.
52. Parol evidence, when admissible to identify boundaries.
53. Effect of boundaries may not be controlled by parol.
54. A reference by one deed to another adopts its description.
55. Of the effect of reference to a place.

56. Of recitals in deeds, and their effect.
57. Exceptions in deeds, how made, and of what.
58. What are the incidents to an exception.
59. Limitations of what is excepted the same as of what is granted.
60. Of the *habendum*.
61. Construction and effect of an *habendum* in a deed.
62. *Habendum* has no effect on what is not granted.
63. If repugnant to a grant, it yields to the grant.
64. It serves to limit and declare the uses of a deed.
65. Of the clause as to passing title-deeds.
66. Of the *reddendum*.
67. Reservations must be to the grantor.
68. Must be out of the estate granted.
69. Case of *Dyer v. Sanford*, a reservation construed a grant.
70. Where conditions in deeds are usually inserted.

1. ILLUSTRATIONS of the foregoing kind, showing a general recognition of the common-law forms of conveyance, even where the subject has been regulated by legislation, might be multiplied by reference to the statutes of other States. [*610] But, as it is not proposed * to describe these in detail, it has been thought sufficient for the purposes of this work to consider the parts of some one of the deeds in use in this country, in which such parts will be presented in the most simple form. And, for distinctness and brevity, the form in use in Massachusetts, known as that of a "warranty-deed," has been adopted, premising that the deeds in use in New England are deeds-poll, while those in New York, Maryland, and many of the States, are, or have been, in form, indentures; and further, that, though there are usually inserted, in deeds, covenants in respect to title, the conveyance results from the granting part of the deed, independent of these, and may be good without them. A deed, the form of which is given below, may, when recorded, have the effect of a feofment at common law by force of the statute.^{1*}

* NOTE. — Know all men by these presents, that I, A. B., in consideration of — to me paid by C. D., &c., the receipt whereof is hereby acknowledged, do hereby give, grant, bargain, sell, and convey unto the said C. D. the following-described, &c. — To have and to hold the aforegranted premises, with all the privileges and appurtenances to the same belonging, to the said C. D., bis heirs and assigns, to his and their use and behoof for ever. (Then

¹ *Marshall v. Fisk*, 6 Mass. 24; *Emery v. Chase*, 5 Me. 232; *Green v. Thomas*, 11 Me. 318.

* 2. The principal object in transcribing this form [*611] was to exhibit to the reader such parts as are now retained of those into which Lord Coke and other early writers divided the deeds then in use. These were distinguished as the premises, the *habendum*, the *tenendum*, the *reddendum*, condition, warranty, and covenants.¹

3. It is usual to follow a division, somewhat like the one above given, when considering the constituent elements of a good deed, and the rules of construction applicable to them. A deed now, however, may be effective to all intents to pass a title, though not written in the order here indicated, or wanting, in fact, every thing but the briefest possible expression of an intent to convey the land described, if it is signed, sealed, and delivered as the deed of the party making it. And it is accordingly stated by Lord Coke, that if a deed of feofment is without premises, *habendum*, *tenendum*, *reddendum*, clause of warranty, date, &c., it is good; for if one by deed give lands to another and to his heirs without saying any thing more, and put his seal to the deed, and deliver it, and make livery where necessary, it is good.² And Judge Kent gives a form,

usually follow these covenants:) And I, the said A. B., for myself, my heirs, executors, and administrators, do covenant with the said C. D., his heirs and assigns, that I am lawfully seised in fee-simple of the aforegranted premises; that they are free from all incumbrances; that I have good right to sell and convey the same to the said C. D., his heirs and assigns for ever, as aforesaid; and that I will, and my heirs, executors, and administrators shall, warrant and defend the same to the said C. D., his heirs and assigns for ever, against the lawful claims and demands of all persons. In witness whereof, I, the said A. B., with E. F., wife of the said A. B., in token of her release of all right of dower in the granted premises, have hereunto set our hands and seals, this — day of —, in the year, &c.

Signed, sealed, and delivered
in presence of

A. B. [SEAL.]
E. F. [SEAL.]

— ss. — 18 .

Then personally appeared the above-named A. B., and acknowledged the foregoing instrument to be his free act.

Before me, —, Justice, &c.

Where, as in Massachusetts, a right of homestead exists in the land, the deed should contain a special release of the same by the wife.

¹ Shep. Touch. 74; Co. Lit. 6 a, 7 a; 1 Wood, Conv. 236, Powell's note.

² Co. Lit. 7 a; 1 Wood, Conv. 236, 237, and Powell's note; Shep. Touch. 75; Moore, Abst. 3

which he thinks would be good all over the United States, which is quite as brief.¹ Indeed, the form hereinbefore copied from the statute of Tennessee² serves to show in how few words the simple operation of passing a title by deed may be accomplished.

4. But though such a thing is possible, few are willing to take a bare, naked title, without some covenant of assurance, that, if it fails, they shall be indemnified for what they thereby lose; and comparatively few deeds are made in which there are not either recitals, exceptions, conditions, or reservations, as well as covenants respecting the title. While,

therefore, courts are, as is said by Hobart, *astuti* in [*612] finding out some mode by * which the intentions of parties in making deeds should not be defeated from mere defect in form, it is always safer, in a matter of so grave importance, to have a proper regard for the forms, as well as the phraseology, which have become settled by long-continued use, as well as adjudicated cases.³

5. It is, therefore, proposed to follow the usual course of analysis, in considering the parts of deeds in common use; though it may be remarked, that the *tenendum*, limiting and defining the tenure by which the lands are to be held, and once an important clause in the deed, is useless in this country, and practically so in England, since the statute of *Quia Emptores*.⁴

6. First, then, of the *premises*. This part of the deed embraces all that precedes the words "to have and to hold," or, in other words, all before the *habendum*, including, therefore, the parties, the consideration, whatever recitals it may be proper to insert by the way of explanation, the description of property granted, with such exceptions out of the same as the parties intend to make. Besides these, not only the words of grant, but usually the estate or quantity of ownership, are also mentioned in connection with the grant, though not given in the form inserted in the foregoing note, as such mention may be dispensed with, where it is followed by the *habendum*,

¹ 4 Kent, Com. 461.

² *Ante*, p. *608.

³ *Roe v. Tramarr*, Willes, 682, 684. See Maine, Anc. Law, 276

⁴ 1 Wood, Conv. 227; Shep Touch. 52, and note.

whose purpose, as it will appear, it is to limit and define the estate or amount of interest or ownership in the land or property granted, and which it is intended to transfer to the grantee.¹ In the case of *Berry v. Billings*, while the court adopt the above definition of "premises" as applied to a deed, they hold, that though the premises do not contain the name of the grantee, nor the limitation of the estate intended to be granted, these may be supplied by the *habendum*, and the deed thereby be made good.² So where the premises, though they acknowledge the receipt of the consideration and the name of the intended grantee, contained no words of grant, but were followed by an *habendum* to J. B. in fee, with covenants of seisin, &c., to J. B., it was held to pass the estate described in the deed.³ In one case, the grantor, by indenture, granted, bargained, and sold certain interests in real estate to another, without limiting the estate, and added a clause *binding* himself and heirs "to ratify and confirm" to the grantee and his heirs the subject of the grant. It was held that this clause did the office of an *habendum*, in limiting the estate granted.⁴

7. Sometimes there is an apparent repugnancy between the granting part of the deed and the *habendum*, in respect to the estate which the grantee is to take in the property granted, which courts reconcile, if possible, so as to give effect to both; but, as will be seen when considering the *habendum*, if the language of the grant be definite in limiting the estate, and that of the *habendum* is clearly repugnant to the grant, the *habendum* yields to the terms of the grant.⁵

8. It is not proposed to add to what has been said upon the *subject of the parties to the deed; but [*613] the consideration requires a somewhat more extended examination. This subject presents itself in two points of view: first, as to a deed considered as a thing executed, with its purposes accomplished; and, second, as to whatever is

¹ Co. Lit. 6 a; Shep. Touch. 74.

² *Berry v. Billings*, 44 Me. 416, 423. See *Sumner v. Williams*, 8 Mass. 174; *Budd v. Brooke*, 3 Gill, 235.

³ *Bridge v. Wellington*, 1 Mass. 219.

⁴ *Kenworthy v. Tullis*, 3 Ind. 96.

⁵ *Farquharson v. Eichelberger*, 15 Md. 63; *Budd v. Brooke*, 3 Gill, 236; 2 Lomax, Dig. 215.

executory in the deed, especially the covenants contained therein. Perhaps to these may be added a third, — the extent of the right to explain or control the statement in the deed in respect to the actual thing or amount paid, or agreed to be paid, as the consideration for the same. In the absence of fraud towards the grantor or his creditors, there does not seem to be any occasion to allege or prove any consideration in order to give effect to a deed of feofment or any properly common-law conveyance. Such a conveyance, properly consummated, operates to pass the title from the grantor to the grantee, which will be as effectual, if a voluntary gift, as if done for a valuable consideration.¹ Therefore a want or failure of consideration is no ground of avoidance of a deed.² Thus where, in consideration of a promise to marry him, the grantor gave a deed of land, but died before the marriage took place, it did not affect the validity of the deed.³ To bring a conveyance within the category of “voluntary conveyances,” there must be a total want of any substantial consideration for the same: mere inadequacy of consideration would not be enough. In the one case, if the grantor is indebted at the time of making it, his creditors may avoid it; whereas, if it is only an inadequate consideration, the deed will not be void as to creditors, unless made with a fraudulent intent.⁴ A deed made upon a *good* consideration only is a voluntary conveyance; but if made upon a consideration deemed *valuable* in law, it is of a different character.⁵

9. But, for reasons heretofore explained, in order to give effect to deeds deriving their force and validity from the statute of uses, there must, as a general proposition, be a consideration, acknowledged or proved, such as would, before the statute, have raised a use in favor of the party intended to be benefited, since it is by the union of the seisin with this

¹ Den v. Hanks, 5 Ired. 30, 32; Jackson v. Dillon, 2 Overt. 261, 264; Perry v. Price, 1 Mo. 553-555; Rogers v. Hillhouse, 3 Conn. 398, 402.

² Taylor v. King, 6 Munf. 358; Green v. Thomas, 11 Me. 318. See Thompson v. Thompson, 9 Ind. 331; Doe v. Hurd, 7 Blackf. 510; Winans v. Peebles, 31 Barb. 380; Boynton v. Rees, 8 Pick. 332; Pierson v. Armstrong, 1 Clarke (Iowa), 282; Laberee v. Carleton, 53 Me. 212.

³ Smith v. Allen, 5 Allen, 458.

⁴ Washband v. Washband, 27 Conn. 424.

⁵ Rockhill v. Spraggs, 9 Ind. 32.

use by act of law that these deeds become operative.¹ But a deed, "in consideration of lawful money well and truly paid," &c., was held to convey a good title, although no use is declared; since, though it do not state the number of pounds paid, it acknowledges the payment of value.² The application of this doctrine, with greater or less stringency in different States, has given rise to a direct conflict, in some instances, in the decisions of the courts upon substantially the same state of facts. But it may be stated as the prevailing doctrine, *first*, that to sustain a deed of bargain and sale requires a pecuniary or valuable consideration; *second*, to sustain a deed of covenant to stand seised requires a good consideration, using that term in its technical sense, as denoting the regard which is supposed to arise from consanguinity or marriage between the parties; *third*, that if no consideration is expressed in the deed, whatever * the [*614] consideration was, may be proved *aliunde*; and if one consideration be expressed, any other not inconsistent with or repugnant to the one expressed may be proved in a similar manner; and, *fourth*, that although it is always competent to control the fact stated in the deed as to the amount or thing paid, in a question involving the recovery of the purchase-money, or as a measure of damages in an action upon the covenants in the deed, it is not competent to contradict the acknowledgment of a consideration paid, in order to affect the validity of the deed, in creating or passing a title to the estate thereby granted.³ A few cases, it is believed, will establish the doctrines here stated, although some of them will be found inconsistent with each other in other respects.

10. In New York, before the system now prevailing was adopted, it was held that a pecuniary consideration was essential to give validity to a deed of bargain and sale, and that a deed could not be sustained where the only consideration

¹ *Den v. Hanks*, 5 Ired. 30; *Jackson v. Dillon*, 2 Overt. 264, 265. How far the acknowledgment of consideration in a deed is taken as evidence of its having been paid, see *Galland v. Jackman*, 26 Cal. 86.

² *Wortman v. Ayles*, 1 Hannay (N. B.), 65.

³ *Kinnebrew v. Kinnebrew*, 35 Ala. 636; *Webb v. Webb*, 29 Ala. 606; *Good speed v. Fuller*, 46 Me. 141.

was that the grantee was to do certain things therein recited, one of which was to pay money, but did not bind himself to their performance by executing the deed himself.¹ A similar doctrine is sustained in Maryland, that the consideration for bargain and sale must be a pecuniary one, or expressed in such general terms that a money consideration may be averred.²

11. But the better doctrine seems to be, that any valuable consideration, a *quid pro quo*, acknowledged or proved, will be sufficient to sustain a deed of bargain and sale.³ Thus, in *Jackson v. Pike*, the consideration was the benefit to the grantor's other lands, to result from the use to be made of that conveyed to the grantee.⁴ In another case, the conveyance was stated to be made "for value received."⁵ In another, for "a certain sum in hand paid," but no amount [*615] mentioned.⁶ In yet *another, while a consideration was necessary, and was stated to be "—— dollars," it was held that the grantee might supply the blank by proof.⁷ In one case, a covenant to render services was held a sufficient consideration for a deed.⁸ In Pennsylvania, in a case where no consideration was expressed in the deed, the grantee was allowed to make it good by proof *aliunde*.⁹ It is also laid down, in the case of *Boardman v. Dean*, that a deed of bargain and sale differs from that of gift or release, and that "the payment of the consideration was necessary to transfer the use and make the instrument operative." But though the language is broad enough to admit evidence, as was done in that case, to avoid the deed for the non-payment of the consideration, the circumstances of the case were so peculiar, that it can hardly be a guiding authority in other cases.¹⁰

¹ *Jackson v. Florence*, 16 Johns. 47; *Jackson v. Sebring*, Id. 528; *Jackson v. Delancey*, 4 Cow. 427; *Jackson v. Cadwell*, 1 Cow. 622; *Corwin v. Corwin*, 9 Barb. 219.

² *Cheney v. Watkins*, 1 Harr. & J. 527, 532. So in Pennsylvania, *Okison v. Patterson*, 1 W. & S. 395.

³ *Den v. Hanks*, 5 Ired. 30; *Jackson v. Leek*, 19 Wend. 339, 341.

⁴ *Jackson v. Pike*, 9 Cow. 69. ⁵ *Jackson v. Alexander*, 3 Johns. 434, 492

⁶ *Jackson v. Schoonmaker*, 2 Johns. 230; *Shep. Touch.* 223.

⁷ *Wood v. Beach*, 7 Vt. 522, 528.

⁸ *Young v. Ringo*, 1 Mon. 30, 32.

⁹ *White v. Weeks*, 1 Penn. 486.

¹⁰ *Boardman v. Dean*, 34 Penn. St. 252.

And in Alabama it was held, that, if one consideration was expressed, any other not inconsistent with that might be proved.¹ In Missouri, it is regarded as doubtful whether it is necessary to allege or prove any consideration to sustain a deed of bargain and sale; while it is clear, that, if none is expressed, one may be proved. Indeed, in Tennessee, under the operation of their statute, it has been held that the acknowledgment of a consideration in a deed is a mere ceremony, and not essential to its validity.² In Illinois, by a properly drawn deed, the title, whatever it is, will pass to the grantee without reference to the consideration paid.³ No one but a creditor of the grantor in a deed can object the want of consideration for the deed. The acknowledgment of consideration is sufficient *prima facie* evidence of its having been paid.⁴

12. In Connecticut, a quitclaim-deed "for divers good causes and considerations" is good; and, being a conveyance at common law, would be good without any consideration.⁵ A deed was held good in Maine, where the consideration was a condition subsequent to support a third person, a stranger to the deed.⁶ In New Hampshire and Massachusetts, a general indebtedness, or a liability of the grantee as surety for the grantor, was held a sufficient consideration for an absolute deed.⁷ But the only consideration which will support a covenant to stand seised is blood-relationship or marriage.⁸

13. A deed intended as one of bargain and sale may nevertheless operate as a feoffment, if it contain among its operative words "give and grant," and is accompanied by a livery of seisin proved or presumed.⁹ So a deed of "gift" may be good without consideration, being, in effect, a deed of feoffment.¹⁰

¹ Toulmin v. Austin, 5 Stew. & P. 410.

² Perry v. Price, 1 Mo. 553-555; Jackson v. Dillon, 2 Overt. 261, 264.

³ Fetrow v. Merriwether, 53 Ill. 278.

⁴ Hutch v. Bates, 54 Me. 142.

⁵ Rogers v. Hillhouse, 3 Conn. 398, 402.

⁶ Green v. Thomas, 11 Me. 320

⁷ Buffum v. Green, 5 N. H. 71; Bissell v. Strong, 9 Pick. 562; McWhorter v. Wright, 5 Ga. 555. But see Den v. Hampton, 8 Ired. 457.

⁸ Rollins v. Riley, 44 N. H. 11.

⁹ Cheney v. Watkins, 1 Harr. & J. 527, 532.

¹⁰ Den v. Hanks, 5 Ired. 30, 31.

[*616] * 14. From the doctrine mentioned by many of the courts, where no statute has been made upon the subject, that no estate of freehold *in futuro*, other than by way of remainder, could be created or conveyed by a deed of bargain and sale, but that this could be done by one of covenant to stand seised,¹ rules differing widely in their stringency have been applied by different courts in construing what relationship will constitute a *good* consideration sufficient to sustain a covenant to stand seised. In *Jackson v. Sebring* it was held, that no use could be raised in favor of any one not connected with the grantor by blood or marriage, so as to sustain a deed of covenant to stand seised, even though the grant were in trust for the benefit of one thus connected.² So, in *Green v. Thomas*, it was assumed by the court that blood or marriage alone would sustain a covenant to stand seised.³ In *Cheney v. Watkins*, the requisite consideration is said to be "natural love and affection."⁴ But in *Jackson v. Delancey*, the rule is more positively stated, and as given in that case, as well as in *Jackson v. Cadwell*, will be found to be directly at variance with the rule as recognized in Massachusetts in more than one particular. Thus the former case holds, that a consideration of blood or marriage is requisite; and that if one consideration, like money, be expressed, another, like consanguinity or marriage, may not be shown. In the latter, the deed was to the grantor's daughter-in-law till her son was of age, the remainder to her son, the grantor's grandson; and the deed was held void, because there was neither a pecuniary consideration, nor such a relationship with the daughter-in-law as to sustain the deed as a covenant to stand seised.⁵

¹ *Jackson v. Delancey*, 4 Cow. 427; *Welsh v. Foster*, 12 Mass. 93, 96; *Marden v. Chase*, 32 Me. 329; *Brewer v. Hardy*, 22 Pick. 376, 380; *Wallis v. Wallis*, 4 Mass. 135; *Barrett v. French*, 1 Conn. 354. See *Bell v. Scammon*, 15 N. H. 331, that it may be done by either form of conveyance. In Vermont, a freehold *in futuro* may, by statute, be expressly granted. *Gorham v. Daniels*, 23 Vt. 600.

² *Jackson v. Sebring*, 16 Johns. 528, 535. ³ *Green v. Thomas*, 11 Me. 321.
⁴ *Cheney v. Watkins*, 1 Harr. & J. 527, 532.

⁵ *Jackson v. Delancey*, 4 Cow. 427; *Corwin v. Corwin*, 9 Barb. 219; *Jackson v. Cadwell*, 1 Cow. 622. But in *M'Crea v. Purmort*, 16 Wend. 460, the princi-

*15. In Massachusetts, on the contrary, it has been [*617] held, that where the consideration in a deed was stated to be \$400, but the deed could not take effect as a common-law conveyance, because the estate was to be had and held after the death of the grantor, and it appeared in evidence that the grantor was father to the grantee, the court held, that it was a good deed of covenant to stand seised, and the consideration of natural affection might be averred, notwithstanding the pecuniary one stated in the deed.¹ In the case of *Gale v. Coburn*,² where the consideration in the deed was \$3,000, it was held that the deed could not take effect as a feofment, or a bargain and sale, because of its being, in terms, a conveyance of a freehold *in futuro*; but that it might be a covenant to stand seised, although the only relationship between the grantor and grantee was that the latter had married the daughter of the former, by whom he had children then living, but who were not mentioned in the deed, and the wife had died many years previously.

16. Although considerable has already been said upon whether an estate of freehold, to commence *in futuro*, can be created by a deed of bargain and sale,³ and any attempt to reconcile the decisions bearing upon that point may be ineffectual, yet the reasoning of Walworth, Ch., in *Rogers v. Eagle Fire Ins. Co.*,⁴ in which he maintains the affirmative of the proposition, and the authorities upon which he rests, would seem to leave little doubt in the matter beyond what arises from the circumstances, that other courts have taken a different view of the law. After analyzing the two modes of raising uses before the statute of 27 Henry VIII., and

ple, that, where one consideration is expressed, another may not be proved, was entirely and distinctly overruled, and unlimited latitude of inquiry into the consideration of deeds allowed. *Frink v. Green*, 5 Barb. 455, 457; *Rockhill v. Spraggs*, 9 Ind. 30; *Andrews v. Andrews*, 12 Ind. 349; *Lewis v. Brewster*, 57 Penn. St. 410

¹ *Wallis v. Wallis*, 4 Mass. 185; *Brewer v. Hardy*, 22 Pick. 380; *Parker v. Nichols*, 7 Pick. 111. See *Potter v. Everitt*, 7 Ired. Eq. 152.

² *Gale v. Coburn*, 18 Pick. 397; and see *Welsh v. Foster*, 12 Mass. 93; *Den v. Hanks*, 5 Ired. 3.; *Bell v. Scammon*, 15 N. H. 381; *Marden v. Chase*, 32 Me. 329, 332. See *Bryan v. Bradley*, 12 Conn. 474; s. c. 16 Conn. 475.

³ *Ante*, pp. *123, *124.

⁴ *Rogers v. Eagle Fire Ins. Co.*, 9 Wend. 611, 626-631

[*618] referring to the statute requiring deeds of bargain *and sale to be enrolled, he remarks: "This distinction under the statute of enrolments afterwards became very important; although the bargain and sale previous to the statute of uses was, in fact, nothing but a covenant to stand seised to the use of the bargainee. It will be seen, from this examination of the uses of the common law, that there could not be any good reason why the same springing, contingent, or future uses might not be created by a bargain and sale, founded upon a valuable consideration, as were allowed to be raised by the less meritorious consideration of blood or marriage; and there was not, in fact, at the time of the passing of the statute of uses, any such distinction as is contended for in this case." He then considers the forms of conveyance, which had their origin in the statute of uses; and, remarking that the statute of enrolments was not in operation in this country, concludes: "As the statute of enrolments was never in force in this State (New York), I have no doubt, that, at the date of the deed in question, a future freehold might be created by this conveyance, operating as a bargain and sale merely, provided it was founded on a sufficient consideration to raise a use." He cites, in support of this general position, 4 Kent, Com. 298; Burt. Real Prop. § 145; Jackson v. Swart, 20 Johns. 87; and Cornish, Purch. Deed, 35. And to these may be added, besides the authorities cited, *ante*, Chapter II., on Uses; 2 Bl. Com. 166, Archbold's note; 2 Prest. Conv. 157, whose language is, "A bargain and sale, or covenant to stand seised to uses, will be free from objection, although it is to give an estate of freehold to commence at a future day, or upon an event," &c.; and Davies v. Speed,¹ where Holt, J., says: "The first use may be a springing use; for if I bargain and sell to the use of another five years hence, this is a good future use." This subject has undergone a searching and discriminating examination by the court of Maine, who fully sustain the doctrine, that a freehold *in futuro* may be conveyed by a deed of bargain and sale; and in this position they are sustained by the

¹ Davies v. Speed, 12 Mod. 39

court of New Hampshire, confirming the reasoning in *Rogers v. Eagle F. Ins. Co.*¹ And the same doctrine is now established, after a full examination of the question, in Massachusetts.² A deed cannot be defeated by a failure on the part of the purchaser to pay the consideration agreed on.³ And Wood, in his *Institutes*, in speaking of this mode of conveyance, says: "On the bargain and sale of lands no use may be declared but what the law doth make; viz., to the use of the bargainee." "A covenant to stand seised to uses may be to the use of a stranger; but then it must be for money, or other valuable consideration" (p. 266).

17. There is a class of cases relating to the consideration stated in deeds, in which there is a conflict of opinion, more seeming than real, if a proper discrimination is made as to the grounds upon which several decisions rest. These cases relate to how far it is competent to contradict the receipt acknowledging *the payment of consideration usually [*619] contained in a deed, and how far the facts as to a consideration may be proved, where one, other than that proposed to be shown, is stated in the deed. The consideration stated and acknowledged in a deed is presumed to be the true value agreed to be paid, until the contrary is proved.⁴ Therefore a deed executed by the party in whom the title is vested, expressing a consideration received, need never be supported by additional evidence as against him, or those claiming under him.⁵ Or, in other words, between grantee and grantor, in the absence of fraud, in a controversy for title, there is no question open in relation to the nature or existence of the consideration.⁶ But the amount named is only *prima facie* evidence of what was paid; and the true consideration may be shown, though it differ from that in the deed.⁷ It is com-

¹ *Wyman v. Brown*, 50 Me. 150; *Jordan v. Stevens*, 51 Me. 79; *Drown v. Smith*, 52 Me. 141; *Bell v. Scammon*, 15 N. H. 394. See *ante*, *606.

² *Trafton v. Hawes*, 102 Mass. 533.

³ *Lake v. Gray*, 35 Iowa, 462.

⁴ *Clements v. Landrum*, 26 Ga. 401; *Belden v. Seymour*, 8 Conn. 310.

⁵ *Rockwell v. Brown*, 54 N. Y. 213.

⁶ *Trafton v. Hawes*, 102 Mass. 541.

⁷ *Lawton v. Buckingham*, 15 Iowa, 22; *Morris Canal v. Ryerson*, 3 Dutch. 467; *Rabsuhl v. Lack*, 35 Mo. 316; *Drury v. Tremont, &c. Co.*, 13 Allen, 171; *Paige v. Sherman*, 6 Gray, 511; *Miller v. Goodwin*, 8 Gray, 542; *Pierce v. Brew*, 43 Vt. 295; *Harper v. Perry*, 28 Iowa, 63; *Parker v. Foy*, 43 Miss. 260.

petent to prove by parol what the real consideration agreed to be paid was, and to show that the same, or some part of it, remains unpaid, though not thereby to impeach the title conveyed by the deed.¹ In Delaware, the vendor may prove the consideration to be unpaid, and recover the same in an action, although he has acknowledged the receipt of it in his deed. So in Illinois.² But in North Carolina, the acknowledgment of payment of a consideration in a deed is held to be conclusive, and not open to be contradicted or controlled by parol evidence.³ And in the case cited of *Kimball v. Walker*, the court say, the same rule, as above stated, is adopted in England and Maine and Maryland, as well as in North Carolina.⁴ In Massachusetts, the courts leave the matter open to be tried in an action of assumpsit to recover the consideration money which the purchaser promised to pay, and has not, although the plaintiff's deed recites its having been done; and a grantor, who had made and delivered a deed with this recital, was permitted to recover in an action of assumpsit, although the promise of his grantee was, in fact, to convey land in payment for the same instead of money.⁵ The vendor in such case may recover, if the purchaser, on demand made of the deed, refuses to deliver it, or puts it out of his power to do so by conveying the land to a third person.⁶ And assumpsit may lie to recover back a part of the consideration paid, and the receipt thereof is acknowledged by the deed of land, where there is a parol agreement of the parties, at the time of delivering the deed to repay a part, if there is a deficiency in the quantity of the land sold and paid for. Thus, where the vendor agreed to sell a farm, called a hundred acres, at so much per acre, and the deed

¹ *Wilkinson v. Scott*, 17 Mass. 257; *Kumler v. Ferguson*, 7 Minn. 442; *Irvine v. McKeon*, 23 Cal. 475; *Coles v. Soulsby*, 21 Cal. 47; *Bullard v. Briggs*, 7 Pick. 537; *Rhim v. Ellen*, 36 Cal. 362.

² *Callaway v. Hearn*, 1 Houst. 610; *Kimball v. Walker*, 30 Ill. 511.

³ *Brockett v. Foscue*, 1 Hawks, 64; *Mendenhall v. Parish*, 8 Jones, L. 106; *Lowe v. Weatherley*, 4 Dev. & B. 212.

⁴ 30 Ill. 511.

⁵ *Basford v. Pearson*, 9 Allen, 393; *Nutting v. Dickinson*, 8 Allen, 540.

⁶ *Bassett v. Bassett*, 55 Me. 127, 130; *Goodspeed v. Fuller*, 46 Me. 141; *Murdock v. Gilchrist*, 52 N. Y. 246

was made, calling the land a hundred acres "more or less," and a consideration was paid accordingly, but, at the time this was done, the vendor agreed to have the quantity ascertained, and to take pay accordingly, it was afterwards ascertained to contain but eighty-nine acres, and the vendee was held entitled to recover for this deficit. It was held not to contradict the terms of the deed by admitting this evidence, because the recital of the consideration in a deed is not conclusive as to its amount.¹ But the promise to pay, in order to be good within the statute of frauds, must be to be performed within one year, where it is merely oral.² But this is to be taken subject to the restrictions created by the statute of frauds. Thus, where one made a deed acknowledging the receipt of a valuable consideration, he was not allowed to show that the consideration was an agreement on the part of the grantee to convey the premises to a third party, since such an agreement, not being in writing, came within the statute of frauds.³ This belongs rather to the department of evidence than of deeds of conveyance; for it is believed, that, however the cases may conflict, they all agree, in effect, in this, — that it is not competent to prove that no consideration has been paid, where one has been acknowledged in the deed, for the purpose of impeaching the validity of the deed, unless it is for the purpose of establishing fraud against the grantor. The true doctrine is stated in *Grout v. Townsend*, that where a deed acknowledges the receipt of a consideration, the grantor and all claiming under him are estopped from denying that one was paid. They may disprove the payment for the purpose of recovering the consideration money; but they cannot do so for the purpose of destroying the effect and operation of the deed.⁴ The design

¹ *Murdock v. Gilchrist*, 52 N. Y. 242.

² *Marcy v. Marcy*, 9 Allen, 8.

³ *Griswold v. Messenger*, 6 Pick. 519.

⁴ *Grout v. Townsend*, 2 Hill, 554, 557; *McCrea v. Purmort*, 16 Wend. 460; *Barnum v. Childs*, 1 Sandf. 58, 62; *Meriam v. Harsen*, 2 Barb. Ch. 232, 267; *Bank of the U. S. v. Houseman*, 6 Paige, Ch. 526; *Doe v. Beardsley*, 2 McLean, 412, 414; *Harvey v. Alexander*, 1 Rand. 219; *Goodwin v. Gilbert*, 9 Mass. 310; *Winans v. Peebles*, 31 Barb. 371, 380; *Farrington v. Barr*, 36 N. H. 86; *Graves v. Graves*, 9 Foster, 129; *Philbrook v. Delano*, 29 Me. 410; *Wilt v. Franklin*,

of the clause acknowledging payment of consideration is not to fix the precise amount paid, "but to prevent a resulting trust in the grantee."¹ It cannot be contradicted or varied by parol, so as in any way to affect the purpose of the deed; that is, its operation as a conveyance.² In *Rockhill v. Spraggs*, in a deed from father to son, in which a consideration of \$300 was acknowledged, the court permitted the other heirs of the father, after his decease, to show that this was by way of advancement, and that no valuable consideration was paid. But this, it should be stated, did not avoid the deed.³

18. It may be stated, therefore, that one of the purposes of inserting the acknowledgment of a valuable consideration in a deed is to prevent the resulting of any use or trust to the grantor, as was explained in a former part of this work.⁴

19. Another part of the premises of a deed consists of the operative words of grant or conveyance. In the form given, these are, "give, bargain, sell, and convey," which [*620] *cover almost any form of conveyance, whether at common law, or under the statute of uses. Nor does the use of the wrong tense, as "has given and granted," instead of "do," or "does give and grant," make any difference: either would be sufficient.⁵ So where the grant was to A and his heirs, provided if A die in his minority without issue, then the property "to go" to the issue of B, it was held to be sufficient to convey it to such issue as a remainder.⁶ And, as has been before said, such a deed, duly recorded, is regarded in Massachusetts, Maine, Rhode Island, Mississippi, and several other States, as equivalent to a feofment with livery of seisin.⁷ The elementary writers insist upon the

1 Binn. 502, 518. But see *Boardman v. Dean*, 34 Penn. St. 252. It seems that, in England, one is estopped to claim the purchase-money by suit against his acknowledgment in the deed that it has been paid. *Baker v. Dewey*, 1 B. & C. 704.

¹ *Meeker v. Meeker*, 16 Conn. 383, 387; *Kimball v. Walker*, 30 Ill. 511; *Sprigg v. Mt. Pleasant Bank*, 14 Peters, 206; *Stackpole v. Robbins*, 47 Barb. 219.

² *Beach v. Packard*, 10 Vt. 96, 100. See *Grout v. Townsend*, 2 Denio, 336; *Hurn v. Soper*, 6 Harr. & J. 276; *Shep. Touch.* 223.

³ *Rockhill v. Spraggs*, 9 Ind. 30.

⁴ *Ante*, p. *134.

⁵ *Pierson v. Armstrong*, 1 Iowa, 292. ⁶ *Folk v. Varn*, 9 Rich. Eq. 303, 310.

⁷ *Miss. Code*, 1857, p. 308, art. 11; *Code*, 1871, § 2294; *Rhode Island*, *Rev. Stat. c. 146*, § 1; *Chalker v. Chalker*, 1 Conn. 79, 89.

importance of the words of grant being suitable to the nature of the deed; and it is accordingly stated, that, for a feofment, the proper words are "give," "grant," "enfeoff," &c.; and for bargain and sale, "grant, bargain, and sell," &c.¹ But the words "bargain and sell" are not essential to such a conveyance: any words of equivalent signification which would, at common law, raise a use, will be sufficient if they show the intent of the parties.² Thus a deed, though in terms a covenant to stand seised, if indented and enrolled, and its consideration was a pecuniary one, would be a good deed of bargain and sale.³ But it is essential to a valid deed that it should contain words which show clearly an intent to grant the maker's interest or estate in the premises in question; and where the only words in the deed indicating such intent were "sign over," it was held to be inoperative as a grant.⁴

20. The usual operative words in a deed of lease and release are "grant, bargain, and sell," which give effect to the *lease*, and for this a pepper-corn is a sufficient consideration; while the words "grant, bargain, sell, remise, release, and for ever quitclaim," give effect to the *release*; though, if it were regarded as a simple release, the words "remise," "release," and "quitclaim," would be the proper and sufficient words. In all these forms, it will be observed the word "grant," which seems to be a generic term, is made use of. And what the author cited remarks is fully sustained by multiplied cases, — that, if it is clear that it is the intent of the maker of the deed that the estate should pass thereby, it will, if possible, be so construed as to effect this, although it want formal words, if there be any word in the deed sufficient to convey the estate.⁵ It may * be remarked, however, that the word "grant" is [*621]

¹ 1 Wood, Conv. 203.

² 2 Wood, Conv. 15.

³ 1 Wood, Conv. 203; 2 Id. 15; Shep. Touch. 222.

⁴ McKinney v. Settles, 31 Mo. 541.

⁵ 1 Wood, Conv. 203, and Powell's note; 2 Rolle, Abr. 789, pl. 80; Shep. Touch. 82, 222, and Prest. note; Lynch v. Livingston, 8 Barb. 463, 485; Shove v. Pincke, 5 T. R. 124; Roe v. Tranmarr, 2 Wils. 75, 78; Clanrickard v. Sidney, Hob. 277; Marden v. Chase, 32 Me. 329; Young v. Ringo, 1 Monr. 30, 32; Cornish, Purch. Deeds, 29. The word "grant" is not necessary in making a grant, if the intention to make it be manifest by the deed.

sometimes omitted intentionally in deeds, from its being, in some cases, construed by the common law into a general warranty.¹ But this will be more properly considered under the head of Covenants in Deeds.

21. "The law," says Mr. Powell in his notes to Wood's Conveyancing, "is curious, and almost subtilizes to devise reasons and means to make assurances and deeds enure according to the just intent of parties, and to avoid wrong and injury, which, by abiding by rigid rules, may be wrought out of innocent acts."² Thus where a grantor, for love and affection, granted to his two sons-in-law, B and C, a certain estate, and signed and sealed the deed, and then added below, "N. B. D., half to be for the use of M. C., half for the use of N.," but did not sign this, though the attestation of the witnesses was made below it, and then there was added an acknowledgment of the receipt of one dollar consideration, which was signed by the grantor without annexing any seal, it was held to create a trust in favor of M. and N. in equal shares.³ In the text of the work above cited, reference is made to *Adams v. Steer*, where, in a deed of a reversion, the only words of conveyance were, "aliened, bargained, and sold;" and the word "grant" was not found in the deed, nor was the deed enrolled so as to operate as a bargain and sale. But it was held that the reversion would pass by force of the word *alien*.⁴ And the Touchstone says *dedi* or *concessi* may amount to a grant, a feofment, a gift, a lease or release, a confirmation, a surrender; and it is in the election of the party to whom the deed is made to use it to which of these purposes he will."⁵ Words of release, moreover, may avail as a grant or a covenant to stand seised.⁶ But a mere naked release to one not in possession of, or having a vested interest in, the premises, would be void.⁷ But though in the form of a release, if

¹ 1 Wood, Conv. 203.

² 1 Wood, Conv. 206, note.

³ *Ivory v. Burns*, 56 Penn. St. 300.

⁴ *Adams v. Steer*, Cro. Jac. 210.

⁵ Shep. Touch. Prest. ed. 91; *Pierce v. Armstrong*, 1 Clarke (Iowa), 292; *ante*, *605.

⁶ Shep. Touch. Prest. ed. 91; *Roe v. Tramarr*, 2 Wils. 75.

⁷ *Branham v. Mayor, &c.*, 24 Cal. 606; *Bennett v. Irwin*, 3 Johns. 366.

there are sufficient words, it may operate as a grant in order to make it good.¹

22. As has been already stated, it is common to define, by the granting words in the premises of a deed, the estate thereby intended to be created, by adding in connection therewith proper terms of limitation, as to C. D. "and his heirs," and the like. After what has been said upon the subject,² it is only necessary to add, that, at common law, words of grant to a man, without words of limitation or inheritance, were understood to create in him a life-estate, and that the word "heirs" * was indispensable to [*622] create an estate of inheritance. But this has been altered by statute in several of the States, as will be seen by reference to a note upon the page above referred to. And a grant to one is effectual to pass it to his "assigns," though the term is not used in the deed.³

23. The next matter in order, as one of the parts of the premises, is the description of the thing granted. This is, of course, a most important part of the deed, as its purpose is to identify that upon which the other clauses of the deed are designed to operate; and if the subject of the grant cannot be ascertained by its description, the grant becomes void from the necessity of the case.⁴ By statute now, courts are authorized to reform deeds, where, by mistake, the words of a deed are made to convey other estate than the parties intended, even though the mistake consists in the legal effect of the words used, while the words themselves were such as the scrivener intended to make use of. Thus, where a grant of an estate was made, excepting the widow's right of dower, it was held to be competent for the grantor to show that the exception was of the land set to the widow, and not, as the effect of the words of the deed implied, the widow's life-estate only in the land.⁵ In one case, the court reformed a deed where the grantor had fraudulently erased a covenant in respect to the quantity of land.⁶ And the court will reform a

¹ *Goodtitle v. Bailey*, Cowp. 601.

² *Ante*, vol. 1, p. *29.

³ *Metcalf v. Westaway*, 17 C. B. n. s. 667.

⁴ 1 Wood, Conv. 206; *Wofford v. McKinna*, 23 Tex. 44.

⁵ *Canedy v. Marcy*, 13 Gray, 373.

⁶ *Metcalf v. Putnam*, 9 Allen, 97

deed so as to correct a mistake in the point of compass stated in it, whether it be between the parties to the deed and their heirs, or any one purchasing with notice of the mistake. But if any intermediate owner of the estate had taken it without notice, he would have a right to stand upon the title as it appeared upon the deed; and if one purchase of another who had himself purchased without notice, he would have the rights of his vendor, though cognizant himself of the mistake.¹ Courts have reformed an absolute deed into a mortgage, the condition having been accidentally omitted.² In another case, a spring of water not having been excepted, by mistake, in a grant of land, as it should have been, the court compelled the grantee to quitclaim the use of it to his grantor.³ But it is only when material stipulations are erroneously framed, or wholly omitted by accident, mistake, or fraud, that equity will reform instruments, and make them conform to the original intention and agreement of the parties. If, therefore, an important reservation is omitted in a deed by consent of the parties, the grantee agreeing orally that the grantor should have the thing reserved, the court will not reform the deed by inserting the requisite clause.⁴ It is not, however, necessary that the deed should, in terms, convey the land or thing intended to be granted, if such grant is implied from what is described. Thus a grant of the rents, issues, and profits of a tract of land is the grant of the land itself. If the grant be of the uses of and dominion over land, it carries the land itself.⁵

23 *a*. The legislature cannot authorize a court to reform a will by changing the provisions of it.⁶ It would seem, that, in New York, the court would allow the defendant, in an action of ejectment, to show, by way of defence, such mistake in the deed under which claim is made to the premises as would

¹ Prescott v. Hawkins, 16 N. H. 122, 127. See Gray v. Hornbeck, 81 Mo. 400.

² Adams v. Stevens, 49 Me. 362.

³ Brown v. Lamphear, 85 Vt. 260; Story, Eq., Redf. ed. § 138.

⁴ Andrew v. Spurr, 8 Allen, 416; Story, Eq. § 154; Mills v. Lockwood, 42 Ill. 111; White v. White, L. R. 15 Eq. Cas. 247.

⁵ Co. Lit. 4 b; Caldwell v. Fulton, 31 Penn. St. 484; Clement v. Youngman, 40 Penn. St. 344; Keene's Appeal, 64 Penn. St. 274.

⁶ Alter's Appeal, 67 Penn. 341.

authorize a court of equity to reform the deed, without first having had a judgment for such a reform pronounced.¹ But in Massachusetts, it would seem to be necessary, in order to take advantage of such mistake in the trial of an issue depending upon the terms of a deed, that a decree for reforming the same should have been rendered. And in the hearing of a bill for reforming a deed, "and make it conform to a variant oral agreement, the proofs must be full, clear, and decisive, free from doubt or uncertainty;" and that, if the fact of the mistake is submitted to a jury, the proof of it "must be made beyond a reasonable doubt,"—such a degree of proof as a jury would act upon in the most important affairs of life.² In New York, the courts reformed the language of a mortgage as to the terms of paying the instalments of the debt thereby secured, in favor of the mortgagor, against the assignee of the mortgage.³ It is said generally in Pennsylvania, that mistakes of a scrivener may be proved by parol, and the deed reformed accordingly.⁴ In an English case, upon a hearing upon a bill to reform a deed by substituting an entirety of the granted estate for the undivided half as described in the deed, the court ordered the deed itself to be altered accordingly, and held that a new deed was not necessary.⁵ A mistake of law alone is not a ground for reforming a deed; but where a party is misled by the scrivener as to the effect of a certain form of expression made use of by him, and made to believe that it has the effect to carry out the agreement of the parties as they have stated it to him, and they sign it accordingly, and there is in this a mistake, the party injured thereby may have the deed reformed. But this excludes the case of a deed where there had been no previous settled agreement made until the deed was executed, and only covers cases where there has been an agreement of the parties distinct from the written agreement, and to which that may be made to conform.⁶

¹ *Cramer v. Burton*, 60 Barb. 225.

² *Stockbridge Iron Co. v. Hudson Iron Co.*, 107 Mass. 817.

³ *Andrews v. Gillespie*, 47 N. Y. 487. ⁴ *Huse v. Morris*, 63 Penn. St. 372.

⁵ *White v. White*, L. R. 15 Eq. Cas. 247.

⁶ *Hutchings v. Huggins*, 59 Ill. 32; *Stockbridge Iron Co. v. Hudson Iron Co.*, *sup.* 320. See also *Canedy v. Marcy*, 13 Gray, 373; *Glass v. Hulburt*, 102 Mass. 44.

24. The object of the descriptive part of the grant is to define what the parties intend, the one to convey, the other to receive; and, with the use of proper care in this respect, there would be little occasion for rules of construction for this part of a deed; because *quoties in verbis nulla est ambiguitas, ibi nulla expositio contra verba fienda est*.¹ But it has been found necessary to resort to many rules for determining the legal meaning and intention of such parties, some of which may seem to be artificial, but, from general use, have been adopted as canons of construction.² One of these is, that a deed is to be construed with reference to the actual, rightful state of the property at the time of its execution. The parties are supposed to refer to this for a definition of the terms made use of in their deed.³ Thus where one, owning land through which a stream of water flowed, changed the channel or course of the stream through his own land, and then sold it in separate parcels to different individuals, it was held that the purchasers took their estates in the condition they then were; and that if the old channel was within the land of one, and the new one within the land of the other, neither could restore the stream to its former channel against the consent of the other. And if the channel, as then used, became obstructed so as to flow the land of the other, the latter might enter and remove the obstruction, if necessary to prevent such overflowing.⁴ And one of the maxims resorted to by courts in construing deeds is, *Contemporanea expositio est optima et fortissima in lege*.⁵ In construing a deed, the court places itself, as nearly as possible, in the situation of the contracting parties; and their intent will be ascertained in the same manner as in the case of any other contract. If

¹ Broom's Maxims, 477; Hannum v. West Chester, 70 Penn. St. 372; Cole v. Lake Co., 54 N. H. 278.

² Walls v. Preston, 25 Cal. 65.

³ Richardson v. Palmer, 38 N. H. 218; Dunklee v. Wilton R. R., 4 Foster, 489; Stanley v. Greene, 12 Cal. 148; Pollard v. Maddox, 28 Ala. 325, 326. See Commonwealth v. Roxbury, 9 Gray, 493, and note, 525; Adams v. Frothingham, 8 Mass. 352; Rider v. Thompson, 23 Me. 244; Hall v. Lund, 1 H. & Colt. 684, per Marten, B.; Karmuller v. Kratz, 18 Iowa, 356; Lane v. Thompson, 43 N. H. 324; Abbott v. Abbott, 51 Me. 581.

⁴ Roberts v. Roberts, 55 N. Y. 275.

⁵ Connerly v. Brooke, 73 Penn. St. 84; Broom's Max. 532.

the intention is not then apparent from the deed, resort is to be had to the rules of construction, which give greater effect to those things about which the law presumes the parties are the least liable to make a mistake. But arbitrary rules are not to be invoked, if the intention of the parties can be plainly discovered without their aid.¹ Grants are to be construed according to the subject-matter, and the natural presumptions arising from their terms, and thus render these an exposition of a rational intention. If the grant, for example, be to dig coals, it implies that the grantee is to have them; if to dig an aqueduct, he would have no right to the earth excavated.² Thus, where a grant was made of a right to draw water from *springs* in the grantor's land, but there were no springs in it, but there was water enough to supply the grant in a swamp upon the grantor's land, it was held that the grantee had a right, under this grant, to draw the requisite quantity from the swamp.³ But in a subsequent case it was held, that a grant to take water from *springs* did not give the grantee a right to dig for water, because a "spring" is a place where the water, by natural force, usually issues from the ground; and water obtained by digging in the earth comes within the definition of a *well*, and not of a *spring*.⁴ It is the duty of the court to construe a deed; but it is the duty of the jury to apply its terms, when thus construed, to the land in question, to ascertain whether the premises in question are within the description.⁵ And where land was granted as being in M., but no State or county was mentioned, it would be presumed to be in the town of M., in the State in which the parties are, if there be a town of that name in the State.⁶ Some of the cases in which these rules have been applied were as follows: One granted all the land which a certain "milldam flows;" and it was held to cover all the land it flowed when in use, and not to be limited to the particular state of water at the date of the deed; the stream, in fact, being then hardly

¹ *Kimball v. Temple*, 25 Cal. 449.

² *Lyman v. Arnold*, 5 Mason, 198.

⁴ *Magoon v. Harris*, 46 Vt. 271.

⁶ *Bell v. Woodward*, 46 N. H. 337.

³ *Day v. Adams*, 42 Vt. 510.

⁵ *Harding v. Strong*, 42 Ill. 148.

above its banks.¹ On the other hand, a grant of "a mill-privilege," with a right to flow the water to a certain point, restricts the grantee from flowing it any higher, although such flowing would greatly benefit the privilege.² One conveyed an undivided half of an estate to A, and at a subsequent time conveyed the other undivided half to him, and took back a mortgage of "all the real estate" he had that day conveyed. It was held to be a mortgage of the entire land, the words "real estate" being used to describe the land, and not the interest in it which the mortgagee had conveyed by his deed.³ The parties, in describing what was granted, used the word "farm;" and it was held not to be restricted to one distinct parcel, but to embrace "all such premises as have been let together," as used in the English sense; and it is used in a corresponding sense in America, in respect to premises used and occupied together.⁴ In a case in Texas, where one granted another a hundred acres of land out of a larger tract, without describing it by metes and bounds, the court held that the grantee might select and locate his hundred acres in any part of this tract.⁵ But the court of Illinois held a grant of thirty acres out of a larger parcel, but without giving any boundaries, void for uncertainty.⁶ Where one owning lands in C., and also a right to enforce a condition subsequent by entry for condition broken, the condition not having yet been broken, mortgaged all his lands and all his right and claim to land in C., it was held not to carry this possibility of reversion.⁷ Among the most prominent of these is the rule, that, where a thing is granted, all the means to attain it are also granted, and all its fruits and effects pass with the thing as appurtenant or belonging to it, though not specially named.⁸ The maxim embodying this rule and its translation, as given by Broom, is, — *Cuiusque aliquid quid concedit, concedere*

¹ *Morse v. Marshall*, 11 Allen, 230; s. c. 13 Allen, 288.

² *Pray v. Great Falls Co.*, 38 N. H. 442.

³ *Carpenter v. Millard*, 38 Vt. 9.

⁴ *Bell v. Woodward*, *sup.*

⁵ *Wofford v. McKinna*, 23 Tex. 45.

⁶ *Shackleford v. Bailey*, 35 Ill. 391. See vol. 1, p. *415.

⁷ *Richardson v. Cambridge*, 2 Allen, 118.

⁸ *Shep. Touch.* 89; 4 *Cruise*, Dig. 265; *Pomfret v. Ricroft*, 1 Wms. Saund 323; *Broom*, Max. 362.

videtur, et id sine quo res ipsa esse non potuit, — “Whoever grants a thing, is supposed also, tacitly, to grant that without which the grant itself would be of no effect.”¹ And this is sometimes construed to carry land itself.² There are various illustrations of this proposition to be found in the cases which have been decided. Thus, if one grant a parcel of land which is surrounded by his other lands, he thereby grants a right to pass over his land to reach the parcel granted, if it is *necessary* in order to its enjoyment.³ And the converse of the proposition is maintained, that if one sells land which surrounds his other land, and can only reach *the [*623] latter by passing over that which he has granted, he will have a right thus to pass, though no right of way is reserved.⁴

25. So the grant of land passes with it all *usual and accustomed* ways, as appurtenant easements, whether named or not. But, in order to pass as appurtenant, the way must, as a general proposition, be an *existing easement*, in the technical sense of this word; meaning thereby a right to use another's land for special and limited purposes, in connection with land for the use and enjoyment of which the right is exercised.⁵ In one case, where a grantor had two parcels, A and B, and used a way over A to reach B, and then granted B “and appurtenances,” it was held, that the way which had thus been used passed with the estate B.⁶

26. So the grant of a mill carries the use of the water by which it is worked, the flood-gates, dam, and all things necessary for its use, as well as the soil and freehold of the land on which it stands and that over which it projects; and such

¹ Liford's case, 11 Rep. 52; Broom, Max. 362.

² Sheets v. Selden, 2 Wall. U. S. 187.

³ Shep. Touch. Prest. ed. 89, and note, 96; Broom, Max. 362; Pomfret v. Ricroft, 1 Wms. Saund. 323 a, note.

⁴ Brigham v. Smith, 4 Gray, 297; Broom, Max. 362; 3 Kent, Com. 422; Packer v. Welsted, 2 Sid. 39; Dutton v. Tayler, 2 Lutw. 1487; ante, p. *31; Washburn. Easements, *32, and cases cited.

⁵ Shep. Touch. 96; Broom, Max. 362; Leonard v. White, 7 Mass. 6; Jackson v. Hatnaway, 15 Johns. 447, 454; Harris v. Elliott, 10 Pet. 25, 54; Whalley v. Tompson, 1 Bos. & P. 371; Kent v. Waite, 10 Pick. 188, Murphy v. Campbell, 4 Penn. St. 484; Pickering v. Stapler, 5 S. & R. 107.

⁶ James v. Plant, 5 A. & E. 749.

grant may embrace land adjoining it which is necessary for its use, and is actually used with the mill. It would include, also, a right to build and maintain a dam.¹ But, in respect to what would pass as privileges under such a grant, it would depend upon the circumstances and condition of the property at the time of the grant. If, therefore, the grant be of one of several mills, it will not be held constructively to pass so much as to destroy the other mills.² And though the grant of a mill passes the head of water by which it is carried, so far as it belongs to the grantor, and is, properly, appurtenant to the mill, it carries nothing beyond what the grantor owns, unless covered by the express words of the grant.³ The adjacent land, in such case, does not pass as *appurtenant* to, but as *parcel* of, the principal thing granted.⁴ The same rule applies in making a partition between tenants in common.⁵ The grant of a "mill-site" or a "mill-privilege" carries the land itself, with the use of the water and appendages belonging to the mill; but it gives no right to use a reservoir when the grant is by metes and bounds, which do not include the reservoir.⁶ But where the grant was to build a dam on the grantor's land, and flow his land to a certain extent, and the grantee built his dam below the grantor's land, and thereby flowed it to the defined extent, it was held he had a right so to do. He was not obliged to build on the grantor's land.⁷

¹ *Thompson v. Banks*, 43 N. H. 540; *Richardson v. Bigelow*, 15 Gray, 156; *Prescott v. White*, 21 Pick., 343.

² *Haggood v. Brown*, 102 Mass. 453; *Crittenden v. Field*, 8 Gray, 621.

³ *Bliss v. Kennedy*, 43 Ill. 71; *Rackley v. Sprague*, 17 Me. 281; *Wilcoxon v. McGhee*, 12 Ill. 381.

⁴ *Shep. Touch.* 89, 90; *Allen v. Scott*, 21 Pick. 25; *Blake v. Clark*, 6 Me. 436; *Whitney v. Olney*, 3 Mason, 280; *Forbush v. Lombard*, 13 Met. 109. See *post*, as to exception of a mill, or house, &c., out of a grant. *Bardwell v. Ames*, 22 Pick. 333, 358; *Blaines v. Chambers*, 1 S. & R. 169; *Swartz v. Swartz*, 4 Penn. St. 353, 359. See *Murphy v. Campbell*, 4 Penn. St. 480; *Hathorn v. Stinson*, 10 Me. 224; *Atkins v. Bordman*, 2 Met. 463; *Rackley v. Sprague*, 17 Me. 281; *Washb. Ease.* *34, *35; *Thompson v. Banks*, 43 N. H. 540.

⁵ *Munroe v. Stickney*, 48 Me. 458. See *Seavey v. Jones*, 43 N. H. 441, as to the effect of a deed by one tenant in common of an undivided half of certain land, "with the mill," &c. It passed only an undivided half of the mill, &c.

⁶ *Moore v. Fletcher*, 16 Me. 63; *Crosby v. Bradbury*, 20 Me. 61; *Jackson v. Vermilyea*, 6 Cow. 677; *Washb. Ease.* 35, 36; *Brace v. Yale*, 4 Allen, 393.

⁷ *Kilgour v. Haswell*, 21 Mich. 502

So if the grant be of land "on which a mill stood," or "a mill with appurtenances," it carries whatever is necessary for the mill; and the actual use by successive owners would be evidence of what this is. The necessity of the mill for its full and free enjoyment controls in the matter of what and how much shall pass as an incident, appurtenant to what is in terms granted, and might include a mill-yard, and right of way.¹ So the grant of a house passes the land on which it stands.² And where one granted a building and the land on which it stood, it was held to carry a veranda in front of the building, the stairs upon the outside of it, and the stone foundations on which they rested, together with the land in front of the building to the centre of the highway;³ and a grant of a dwelling-house, and "out-buildings belonging thereto," not only carries the land on which they stand, but includes a barn which was used with the house, with the land under it.⁴ By the grant of a "rope-walk," such land of the grantor passes as is actually used with it.⁵ So the grant of "a well" carries the land itself which it occupies,⁶ though the grantor reserves the right to use the pump therein. The term "house," or "cottage," or "wharf," or "town pound," when granted and used as a general term of description, carries the land which is thereby occupied. Such would be the case with the grant of a "pool," or a "pit:" it would pass the land as well as the water in it.⁷ But the grant of springs, or the use of springs, would ordinarily convey only a right to take the water of the same by aqueducts, and would not carry the soil and freehold.⁸

27. If a man grants to another a right to dig a trench in his land, and lay a pipe for conveying water, he thereby grants a * right to enter, dig, and repair the [*624] same;⁹ but if he grant a right to dig a canal through

¹ *Voorhies v. Burshard*, 55 N. Y. 102.

² *Shep. Touch.* 90; *Esty v. Currier*, 98 Mass. 501; *Allen v. Scott*, 21 Pick. 25; *Brown v. Bowdoin*, 2 Met. 598; *Webster v. Potter*, 105 Mass. 414.

³ *Gear v. Barnum*, 37 Conn. 229.

⁴ *Woodman v. Smith*, 53 Mo. 81.

⁵ *Davis v. Handy*, 37 N. H. 65.

⁶ *Mixer v. Reed*, 25 Vt. 254.

⁷ *Johnson v. Rayner*, 6 Gray, 107; *Shep. Touch.* 94; *Whitney v. Olney*, 3 Mason, 282; *Wooley v. Groton*, 2 Cush. 305; *Co. Lit.* 5.

⁸ *Owen v. Field*, 102 Mass. 104.

⁹ *Shep. Touch.* 96; *Broom*, Max. 364; *Pickering v. Stapler*, 5 S. & R. 110.

his premises, it does not pass a right of property in the rocks or soil excavated, unless they may be used in constructing the canal.¹ So if he grants a piece of land to build a mill-dam upon, with a right to build such dam and maintain it for a water-privilege, of a certain height, he thereby grants the right, if necessary, to place a part of this dam upon his adjacent land.² The grant or reservation of "a way," or "a road," embraces only an easement, but not the soil, although the boundaries of the same are given. And the same rule would apply to any grant of a non-continuous right to, or use of, a thing.³ But where the exception was of "all and so much and such parts as have been taken for public roads," it was held to exclude from the grant all the land within the highways which would remain the property of the grantor, subject to the easement which the public have over it.⁴

28. So, if one grants the mines in his land, he grants thereby the right to dig for and work them.⁵ So where a grantor excepted out of his grant of the land all coal-mines, with sufficient *way leave* and *stay leave* to and from the mines, and the right of sinking pits, it was held, that, as incident to the liberty to sink pits, the right to fix such machinery as would be necessary to drain the mines, and draw coal from the pits, was reserved; and that a pond to supply the engine and an engine-house, being essential accessories to such engine, were lawfully constructed by the grantor upon the premises.⁶ This case will serve to illustrate the extent to which courts are disposed to carry the doctrine of implied grants when it is necessary to carry any direct grant into effect. Another example is found in the case of a grant by one, through whose land a stream flowed, to an owner above, of a right to throw the washings of ore into the stream, and to deposit themselves on the grantor's meadow below. The conse-

¹ Washb. Ease. 42, 3d ed.

² Dryden v. Jepherson, 18 Pick. 385, 390; Swartz v. Swartz, 4 Penn. St. 353.

³ Graves v. Amoskeag Co., 44 N. H. 464; Leavitt v. Towle, 8 N. H. 97; Peck v. Smith, 1 Conn. 103; Jamaica Pond v. Chandler, 9 Allen, 164.

⁴ Munn v. Worrall, 53 N. Y. 46.

⁵ Shep. Touch. 96.

⁶ Dand v. Kingscote, 6 M. & W. 174; Broom, Max. 365. See Bardwell v. Ames, 22 Pick. 333, 358; Green v. Putnam, 8 Cush. 21; Turner v. Reynolds 23 Penn. St. 199.

quence was, that, in time, the meadow became so raised, that the washings flowed off on to his adjoining pasture. But it was held that the right to do this passed as an incident to the principal grant.¹

29. But while a grant of the principal passes the incident in the manner above suggested, the converse of the proposition is not true. The maxim is, *Accessorium non ducit sed sequitur suum principale*.² Thus the grant of a reversion carries a rent; but the grant of a rent does not carry the reversion.³ So a grant of land carries all mines within it, if not previously granted; but the grant of a man's lead or iron mines, for instance, does not pass the land.⁴

30. Another rule is, that, where the grant is a general one, whatever belongs to the thing granted, as a constituent part or element, passes thereby. Thus the grant of a house passes the doors, windows, locks, keys, window-blinds, and the like, although, at the time of the grant, they may have been severed from the same for a temporary purpose, if they had previously * been fitted and applied.⁵ So the [*625] grant of a "saw-mill," with privileges and appurtenances, passes the machinery used in it, and would include a mill-chain, *dogs* and *bars* therein, by which logs are drawn in and secured for sawing; and, generally, whatever things are fitted and prepared to be used with real estate, and have been applied thereto, pass with the realty to which they have thus become accessory.⁶

31. So the grant of land carries houses, trees, and every thing standing or growing upon the surface; and this would include trees blown down and lying upon the ground, except such as are cut into logs or hewed into timber,⁷ with mines, quarries, and whatever is contained beneath the surface; though it is competent for the owner to convey his mines by a separate and distinct grant, so as to create one freehold in the soil, and another in the mines.⁸ Questions have arisen,

¹ Bushnell v. Proprietors, &c., 31 Conn. 150.

² Broom, Max. 368; Shep. Touch. 89; Worcester v. Green, 2 Pick. 425, 428.

³ Shep. Touch. 89; Broom, Max. 370.

⁴ Shep. Touch. 96.

⁵ Shep. Touch. 90.

⁶ Farrar v. Stackpole, 6 Me. 154.

⁷ Bracket v. Goddard, 54 Me. 313; Cook v. Whiting, 16 Ill. 481.

⁸ Mott v. Palmer, 1 Comst. 564, 569; Goodrich v. Jones, 2 Hill, 142; Noble

and been variously settled, as to how far it is competent for a grantor of premises to except by parol what is growing thereon at the time. In one case, the court held that he might thus reserve growing corn.¹ But in another case, where the grantor reserved, in that way, wine-plants growing upon the premises, it was held to be inoperative.² Crops standing in the field, ready for harvest, pass with a grant of the land, unless, as suggested by a member of the court might be the case, the crop, like that of corn, was left upon the land as a kind of storehouse till needed for use.³ And a parol reservation of crops then upon the land at the time of conveying the same by deed would be repugnant to the deed, and of no effect; and the same rule applies to manure upon the land.⁴ But where the mortgagor, after making the mortgage, sowed a crop of rye, which was upon the ground at his death, and was sold by his administrator as personal property. The mortgagee then foreclosed the mortgage by sale of the estate, and orally excepted the crop of rye, and it was held not to pass with the land in the foreclosure sale.⁵ A deed, in the following terms, was held to pass an interest in the mines under the grantor's land, as distinguished from a right of easement in another's land; "also the full right, title, and privilege of digging and taking away stone-coal, to any extent the said (grantee) may think proper to do, or cause to be done, under any of the land now owned and occupied by the (grantor)." The *habendum* and covenants were as to "the aforesaid right to the stone-coal," and "the right of

v. Bosworth, 19 Pick. 314; *Shep. Touch.* 90; *ante*, vol. I, p. *5; *Terhaw v. Ebberson*, 1 Penn. 726. But see *Smith v. Johnston*, 1 Penn. 471, as to growing corn not passing. But Kent holds, that growing crops do pass by a grant of the land, 4 Kent, Com. 468; and is sustained by authority, as well as by well-settled principles. *Foote v. Colvin*, 3 Johns. 216; *Kittredge v. Wood*, 3 N. H. 503; *Chapman v. Long*, 10 Ind. 465; *McIlvaine v. Harris*, 20 Mo. 457; *Turner v. Reynolds*, 23 Penn. St. 199, mines.

¹ *Baker v. Jordan*, 3 Ohio, n. s. 438; *post*, *645; *Bond v. Coke*, 71 N. Car. 97.

² *Wintermute v. Light*, 46 Barb. 283. See also *Wilkins v. Vashbinder*, 7 Watts, 378; *Gibbons v. Dillingham*, 5 Eng. (Ark.) 9.

³ *Tripp v. Hasceig*, 20 Mich. 254.

⁴ *Brown v. Thurston*, 56 Me. 127; *Powell v. Rich*, 41 Ill. 466; *Austin v. Sawyer*, 9 Cow. 40; *Smith v. Price*, 39 Ill. 28; *Ring v. Billings*, 51 Ill. 475.

⁵ *Sherman v. Willett*, 42 N. Y. 146.

stone-coal hereby given ;” and it was held, that the grantee might, by his deed, convey an undivided share of this coal to another.¹ The same is true of trees growing upon land.² The clause, therefore, often inserted in deeds, conveying the buildings standing upon the granted premises, can be of no avail, except as a part of the description of what is granted.³ Upon the same principle, manure made upon a farm in the ordinary course of husbandry, and lying in heaps or manurebeds upon it, will pass by a grant of the farm, although susceptible of being easily removed and sold.⁴ In respect to mines of gold and silver, there was, by the English as well as the Continental law, this peculiarity, — that they belonged to the crown, though found in the land of an individual proprietor.⁵ In “the charter of the Colony of Massachusetts Bay,” there is, in addition to the ordinary description of the * lands granted, the clause, “and also all mines [*626] and minerals, as well royal mines of gold and silver as other mines and minerals whatsoever.” It appears, from Chancellor Kent’s Commentaries, that the statutes of New York assert the right of the State as sovereign over mines, to the extent of the English statutes. In a case decided by Mr. Justice Clayton of Georgia, which is found in a note to the same work,⁶ it was held, that the mines contained in the public lands in Georgia passed with the lands to individuals upon a grant thereof, unless expressly excepted. And such is held to be the law in California; and it is further held in that State, that though the gold and silver mines belonged to the crown of Spain, and passed with the sovereignty and the soil to the government of Mexico, and subsequently by treaty to the United States, they were, in the hands of the latter government, mere incidents to the ownership of the soil itself; and when the territory became a State, the United

¹ Caldwell v. Fulton, 31 Penn. St. 475. See Clement v. Youngman, 40 Penn. St. 346.

² Clap v. Draper, 4 Mass. 266.

³ Crosby v. Parker, 4 Mass. 110.

⁴ Daniels v. Pond, 31 Pick. 367, 371; Fay v. Muzzey, 13 Gray, 53; Goodrich v. Jones, 2 Hill, 142; Lewis v. Lyman, 22 Pick. 436, 442; Wetherbee v. Ellison, 19 Vt. 379; *ante*, vol. 1, p. *6.

⁵ Queen v. Northumberland, 1 Plowd. 310, 336; 2 Inst. 578.

⁶ 3 Kent, Com. 378 and note.

States continued to hold the public lands as proprietors by the right of ownership, and their title to the mines accordingly passed with the lands when conveyed to individual purchasers.¹

32. Although it is an undoubted proposition, that whatever is properly *appurtenant* to the principal thing granted passes with it, it is not always easy to apply the term so as to determine, in a given case, whether the thing under consideration is appurtenant or not. A thing appendant or appurtenant is defined to be "a thing used with and related to, or dependent upon, another thing *more worthy*, and agreeing in its nature and quality with the thing whereunto it is appendant or appurtenant." It results, therefore, that land can never be appurtenant to other land, or pass with it, as belonging to it.² It was accordingly held, in the case of *Leonard v. White*, just cited, that where one granted a mill,

with its appurtenances, it did not pass the soil of a [*627] way which had been long used for access to *the mill, though a right to pass over it as a way would have passed thereby.³ Among the things to which the term "appurtenant," or "appurtenance," is applied, are *easements* or *servitudes* used and enjoyed with the lands for whose benefit they were created; and, in respect to these, the language of the court in one case is, "Nothing is more clear, than that, under the word 'appurtenances,' according to its legal sense, an easement which has become extinct, or which does not exist in point of law by reason of unity of ownership, does not pass."⁴ A grant of a thing will include whatever the grantor had power to convey which is reasonably necessary to the enjoyment of the thing granted. Thus a grant of a house with appurtenances passes a conduit by which water is conducted to it. But this depends upon whether the

¹ *Moore v. Smaw*, 17 Cal. 199, 222; *Boggs v. Merced Co.*, 14 Cal. 279, 375.

² *Leonard v. White*, 7 Mass. 6, 8; *Harris v. Elliott*, 10 Pet. 25, 54; Co. Litt. 121 b; *Jackson v. Hathaway*, 15 Johns. 447, 454; *Blaine's Lessee v. Chambers*, 1 S. & R. 169; *Tyler v. Hammond*, 11 Pick. 193; *Ammidown v. Granite Bank*, 8 Allen, 293; *Riddle v. Littlefield*, 53 N. H. 508.

³ *Hoboken Land, &c. Co. v. Kerrigan*, 30 N. J. Law, 16.

⁴ *Plant v. James*, 5 B. & Ad. 791; *Washb. Ease.* *22, *38, *39, *161, and cases cited. *Pope v. O'Hara*, 48 N. Y. 455.

grantor owns the conduit. Thus one conveyed a house and land by a warranty-deed, but said nothing of an aqueduct which conducted the water from a main pipe of an aqueduct company to the house by a lead pipe laid across an intervening parcel of land belonging to a third person, by oral license of the owner. By a contract between the grantor of the house and the aqueduct company, he had a right to draw water by paying a certain sum annually. After selling the house, he went upon the adjacent land and cut off the pipe at the line, and dug it up, and carried it away. It was held that this pipe was a fixture to the estate granted, and passed by the deed; but the deed conveyed no right to draw water by it, because that did not belong to the grantor.¹ But it would not pass a way of convenience when there is another way of access, unless specifically mentioned.² But when there is a grant of a servitude in one parcel which is not designed to be enjoyed with another parcel granted in the same deed, it does not become appurtenant to the second parcel. Thus, where one granted twenty acres of land, and a right to dig ore in another parcel of ten acres, in the same deed, the right to dig the ore did not thereby become appurtenant to the other parcel, not being necessary or intended to be used therewith.³ And whether a thing shall pass as appurtenant to another depends upon the condition of the latter estate at the time it is granted, and how far it is necessary to its enjoyment.⁴ And "it is now well settled, that where a grantor conveys land bounding on a street or way, he and his heirs are estopped to deny the existence of such street or way, and the grantee acquires by the deed a perpetual easement or right of passage on, upon, or over it."⁵ But this, it would seem, must be limited to cases where the grantor has a title to the soil of the way by which the land is bounded.⁶

¹ *Philbrick v. Ewing*, 97 Mass. 133.

² *Parker v. Bennett*, 11 Allen, 388; *Brown v. Nichols*, Moore, 682.

³ *Grubb v. Guildford*, 4 Watts, 223, 244, 246. See *Brace v. Yale*, 4 Allen, 393.

⁴ *Gayetty v. Bethune*, 14 Mass. 49; *McDonald v. Lindall*, 3 Rawle, 492.

⁵ *Stetson v. Dow*, 16 Gray, 373; *Cox v. James*, 45 N. Y. 562.

⁶ *Brainard v. B. & N. Y. Central R.R.*, 12 Gray, 410; *Howe v. Alger*, 4 Allen, 206; *Wash. Easem.* 3d ed. 243, 244.

33. But land or buildings may be so necessary to the use and enjoyment of that which is granted as to pass with it, where they are, in effect, *parcel* of the thing granted, necessary to its enjoyment, and intended to pass with it like the other parts or parcels, though termed appurtenant, and described accordingly. Thus a devise of a "paper-mill, together with all the machinery and appurtenances to said mill," was held to pass all the land under the mill, and necessary for the use of it, and commonly used with it, as *parcel* thereof, on the ground, that though land cannot be appurtenant to land, so as to pass by that form of expression, yet, where the intention is clearly expressed that land should pass under that name, the law will give effect to the grant.¹ But the grant of a certain parcel of land, with a description of the same, together with a mill-house, mill-dam, races, watercourses, and other appurtenances, did not pass the soil and freehold of the land flowed by the mill-pond.² But where the grant was of a mill-privilege in C., in the county of N., including all the land flowed by the dam mentioned, it was held to convey all the lands flowed by the dam, though a part lay in the county of P.³ The same principle was applied in regard to land under a house and around it, under a devise of the house, the same having been used with it, and being convenient for its enjoyment.⁴ So with land to the centre of a highway, where the parcel adjoining the highway is conveyed: it passes as *parcel*, and not as *appurtenant*.⁵

¹ *Whitney v. Olney*, 3 Mason, 280; *Swartz v. Swartz*, 4 Penn. St. 353; *Archer v. Bennett*, 1 Lev. 131; *Bacon v. Bowdoin*, 22 Pick. 401; *Doane v. Broad Street Asso.*, 6 Mass. 334; *Case of a Private Road*, 1 Ashm. 417; *Greenwood v. Murdock*, 9 Gray, 20; *Johnson v. Rayner*, 6 Gray, 110; *Esty v. Baker*, 48 Me. 495; *Ammidown v. Granite Bank*, 8 Allen, 292; *Avon Co. v. Andrews*, 30 Conn. 476; *Esty v. Currier*, 98 Mass. 501.

² *Bartholomew v. Edwards*, 1 Houst. 25.

³ *Merritt v. Morse*, 108 Mass. 276.

⁴ *Eliot v. Carter*, 12 Pick. 436; *Murphy v. Campbell*, 4 Penn. St. 480, case of a privy passing with a house. *Ammidown v. Ball*, 8 Allen, 293; *Wilson v. Hunter*, 14 Wis. 687; *Gibson v. Brockway*, 8 N. H. 465; *Maddox v. Goddard*, 15 Me. 218; *Moore v. Fletcher*, 16 Me. 66; *Polden v. Bastard*, 4 B. & Smith, 257.

⁵ *Webber v. Eastern R. R.*, 2 Met. 147, 151. See also *Doe v. Collins*, 2 T. R. 498; *Allen v. Scott*, 21 Pick. 25; *Blake v. Clark*, 6 Me. 436; *Smith v. Martin*, 2 Wms. Saund 400, 401, n.; *Co. Litt.* 121, 122; *Codman v. Evans*, 1 Allen, 443

34. The term "message" is often used in describing what is intended to be conveyed, but seems to be very indefinite in its extent, in some cases including not only the dwelling-house, which always seems to be implied in the term, but whatever buildings are included within the curtilage around the house, and the curtilage itself, orchard, garden, &c., and even, in some cases, a farm, or a manor, when clearly intended to be described in that way; and the grant of a message or a house, and all lands thereunto appertaining, will pass all lands usually occupied therewith.¹

35. It should be borne in mind, as a rule in reading and construing *deeds, that no regard is had to [*628] punctuation, since no estate ought to depend upon the insertion or omission of a comma or semicolon; and although stops are sometimes used, they are not regarded in the construction or meaning of the instrument.²

36. In a large proportion of conveyances, the difficulties above considered are obviated by a minute and particular description of the thing intended to be granted. But, in attempting to give such description, it is often found that its parts are so inconsistent, and its terms so vague, that rules of construction have to be resorted to in order to give a determinate form to what the parties have themselves failed to make clear and intelligible. In applying the principles of construction where the terms of the description are uncertain, it is a familiar rule, that inasmuch as the fault is assumed to be in the grantor, if he has left the point doubtful, it shall be construed most favorably for the grantee. The grantor shall not take advantage of a difficulty which he has himself created. But this rule, however, is the last which courts apply, and is never resorted to so long as a satisfactory result can be reached by other rules of analysis and construction.³

¹ *Termes de la Ley*, "Mease;" *Shep. Touch.* 94; *Smith v. Martin*, 2 *Wms. Saund.* 401 and note; *Woodman v. Smith*, 53 *Me.* 81.

² *Wms. Real Prop.* 161; *Ewing v. Burnett*, 11 *Pet.* 54; *Doe v. Martin*, 4 *T. R.* 65; 3 *Dane, Abr.* 558.

³ *Worthington v. Hylyer*, 4 *Mass.* 205; *Marshall v. Niles*, 8 *Conn.* 469; *Carroll v. Norwood*, 5 *Harr. & J.* 155, 163; *Clough v. Bowman*, 15 *N. H.* 504; *Sanborn v. Clough*, 40 *N. H.* 330; *Vance v. Fore*, 24 *Cal.* 446; *Dodge v. Walley*, 22 *Cal.* 228.

37. When, as above suggested, the parts of a description in a deed are found inconsistent with each other, the courts always give effect to every part of the deed, if it is possible, consistently with the rules of law. The rule of law is, that a deed must be so construed, if possible, that no part shall be rejected.¹ If this cannot be done, they then examine and see if there is enough of the consistent and intelligible portions of the same to give effect to the intention of the parties; and if so, they reject what is repugnant to the general intention of the deed, or to any obvious particular intention of the party.² Upon the principle above stated, if there are two descriptions in a deed of the land conveyed, and they do not coincide, the grantee is at liberty to elect that which is most favorable to him.³ But if there are two clauses in a deed, which are so repugnant as not to stand together, the first is held to prevail over the last. But, between an introductory clause and the granting clause, the latter determines what interest is intended to be granted.⁴ And where an instrument is partly written and partly printed, and the written clause is repugnant to the printed one, the former governs;⁵ but if the repugnancy of the parts be such as to render the intention of the parties unintelligible, it defeats the grant itself. It has accordingly been held, that when the [*629] description of the estate intended to be conveyed * includes several particulars, *all* of which are necessary to ascertain it, no estate will pass except such as agrees with *every* particular of the description. But if the description is sufficient to ascertain the estate, although the estate cannot agree with all the particulars of the description, yet it will pass.⁶ If the estate cannot be ascertained by the description in the grant, the deed fails altogether. Thus, where the

¹ *Watters v. Breden*, 70 Penn. St. 238.

² *Presbrey v. Presbrey*, 13 Allen, 283.

³ *Esty v. Baker*, 50 Me. 331; *Melvin v. Proprs. Locks, &c.*, 8 Met. 27.

⁴ *Webb v. Webb*, 29 Ala. 606.

⁵ *McNear v. McComber*, 18 Iowa, 17.

⁶ 23 Am. Jur. 279-281, by Judge *Metcalf*; *Broom*, Max. 497, 498; *Law v. Hempstead*, 10 Conn. 23; *Corbin v. Healy*, 20 Pick. 514; *Bass v. Mitchell*, 22 Tex. 285, 294; *Peck v. Mallams*, 10 N. Y. 532; *Bond v. Fay*, 8 Allen, 212; *Abbott v. Abbott*, 53 Me. 360, 361; *Doane v. Wilcutt*, 16 Gray, 371; *Scofield v. Lockwood*, 35 Conn. 428; *Wilkinson v. Davis, Freeman*, Ch. 58.

terms of the grant recited that it was part of a certain patent bounded by other lands named, "and supposed to contain four hundred acres, whereof about one hundred acres were struck off to J. W.," — Now know ye, &c., "do grant, bargain, and sell the before-mentioned premises to the said J. W.," — it was held to be void for want of a sufficient description to show what premises were granted.¹ Thus where one granted a certain number of acres of land, and described it as now staked out, when, in fact, it never was staked out, it was held to be a void deed; for it was not competent to identify by parol what the grantor intended to convey, if there is nothing in the deed by which this can be done.²

38. Numerous illustrations might be given of the application of the foregoing rule, to some of which reference will be made; though, before this is done, the reader should be apprised of a maxim of pretty general application, *Falsa demonstratio non nocet*, under which, if the instrument defines with convenient certainty what is intended to pass by it, a subsequent erroneous addition will not vitiate it.³ Thus an officer's deed was of "all the right and title" of A to certain lands, "being a leasehold unexpired," when, in fact, he owned a fee, it was held to pass the fee.⁴ And a deed of all the interest of A in lot No. 7 which came to him from S. J., when, in fact, his title was from J. J., and not from S. J., it was held to pass all his interest in that lot.⁵ Thus, if one grant all his lands in D. which he had of J. S., none other will pass, though he have other lands in D. So "my house and land in S. occupied by me" will not contain an adjoining one then in the occupancy of a tenant.⁶ Nor would a grant of "my homestead, containing 200 acres of land, being

¹ Peck v. Mallams, 10 N. Y. 630. See Hill v. Mowry, 6 Gray, 551; McGuire v. Stevens, 18 Am. Law Reg. 484, 486; Boardman v. Reed, 6 Pet. 345; Fenwick v. Floyd, 1 Har. & G. 172; Thomas v. Turvey, Ib. 437; Deery v. Cray, 10 Wall. 270.

² Andrews v. Todd, 50 N. H. 565.

³ Broom, Max. 490; Crosby v. Bradbury, 20 Me. 61, 67; Jackson v. Clark, 7 Johns. 223; Parker v. Kane, 22 How. 1; Parks v. Loomis, 6 Gray, 487; Morrow v. Willard, 30 Vt. 118; Spiller v. Scribner, 36 Vt. 246; Hibbard v. Hurlburt, 10 Vt. 173; Presbrey v. Presbrey, 13 Allen, 283.

⁴ Dodge v. Walley, 22 Cal. 224.

⁵ Hathaway v. Juneau, 15 Wis. 264.

⁶ Brown v. Saltonstall, 3 Me. 423; Warren v. Cogswell, 10 Gray, 76.

the same now occupied by me," pass lots then in the occupation of tenants at will, though included in the two hundred acres. Nor will parol evidence be admitted in these cases to show that the grantor intended to convey these lots.¹ But if he describes the estate which he intends to convey as all his lands in D., called "The Grange," which he had of J. S., and he has an estate of that name in D., but did not have it of J. S., the estate will nevertheless pass, and the false part of the description will be rejected.² A case requiring a compliance with all the particulars in a description is that where a grant was made of all the lands of the grantor in B. and elsewhere in the county of S., in the tenure of J. D. Nothing would pass except lands in the county of S. and in the tenure of J. D.;³ whereas, by a grant of all the grantor's lands in D., containing ten acres, when, in fact, the parcel that he owns there contains twenty, the whole parcel passes.⁴ One other rule may be stated in this connection; which is, that, where the premises of a grant are special and express, they cannot be restrained or frustrated by a distinct clause in the deed; though it is otherwise where the premises are general and implied. Thus, if the description in the deed be general, and is followed by a reference to one that is particular, the latter limits and defines the terms of the grant.⁵ This may be illustrated by the case of *Smith v. Strong*, where the deed professed to grant several tracts of land de- [*630] scribed by numbers "in the Boston Purchase," among which were mentioned lots 15 and 43; and to this description was added, "The foregoing being the same and all the lands lying in the county of B. which were devised to me by the will of A." The lots named as above, in fact, were situated north of the "Boston Purchase," but adjoining it. It was held that they passed by the deed; for the words of general description of the granted premises are controlled and rendered certain by the particular description of the two lots.⁶ As the principle intended to be illustrated

¹ *Shep. Touch.* 90.

² *Shep. Touch.* 99.

³ *Shep. Touch.* 99.

⁴ *Shep. Touch.* 100.

⁵ *Barney v. Miller*, 18 Iowa, 466.

⁶ *Smith v. Strong*, 14 Pick. 128. See *Whiting v. Dewey*, 15 Pick. 428; *Winn v. Cabot*, 18 Pick. 553; *Cutler v. Tufts*, 3 Pick. 272. See *Dana v. Middlesex Bank*, 10 Met. 250; *Howell v. Saule*, 5 Mason, 410.

can be explained better by example than in any other form, the following cases have been selected from numerous others. In one or two this rule is stated.¹ If there is some land wherein *all* the demonstrations are true, and wherein part are false, they shall be "intended to pass only those lands wherein the circumstances are true." In this case, "all my leasehold, homestead, lands, and tenements at H., containing about 170 acres, held under M., and now in the occupation of F. B., as tenant to me," were devised; and the question was, if it carried a certain piece of six acres, which answered the foregoing description, except in not being in the occupation of F. B. It was held, that the last-mentioned piece did not pass. But if the devise had been, in express terms, of the six-acre parcel, though it stated it to be in the occupation of F. B., it would have carried the parcel, and the descriptive clause would have been rejected as *falsa demonstratio*. So where the deed conveyed all that messuage with the lands, &c., now or late in the occupation of B., which messuage, lands, &c., are called and known and described by the several names, and contain the several quantities by admeasurement following; then followed a particular description of sundry parcels, but it omitted three parcels which had always formed a part of the farm, and had been occupied by B.; it was held that these did not pass, not coming within the parcels particularly described.² A deed is not to be held void for uncertainty, if, by any reasonable construction, it can be made available. Parol evidence cannot be admitted to contradict or control the language of a deed; but latent ambiguities may be explained by such evidence. Facts existing at the time of the conveyance and prior thereto may be proved by parol evidence, with a view of establishing a particular line as being the one contemplated by the parties, when, by the terms of the deed, such line is left uncertain.³ Few cases, however, more fully illustrate these principles of construction

¹ Morrell *v.* Fisher, 4 Exch. 591, where numerous cases are cited and examined.

² Griffiths *v.* Penson, 1 H. & Colt. 862. See also Barton *v.* Dawes, 10 C. B. 261; Llewellyn *v.* Jersey, 11 M. & W. 183.

³ Crafts *v.* Hibbard, 4 Met. 452; Abbott *v.* Abbott, 51 Me. 582; Bond *v.* Fay, 12 Allen, 88.

than that of *Worthington v. Hylyer*, where the grant was of the "farm" in W., on which the grantor lived, "being lot No. 17 in the first division of lands, containing one hundred acres, with my dwelling-house standing thereon, bounding west on land of J. C., northerly by a pond, east of lot No. 18, south of lot No. 19, having a highway through it." Now, in fact, No. 17 had no house upon it, nor any road through it, and only a little part of it was clear or susceptible of cultivation, and was nearly worthless, and only answered to the description in that it was bounded by a pond. In fact, the grantor's house stood upon another lot, separated from No. 17 by No. 18 and a highway, and occupied by him as a farm; and the court held, that, as it was obviously the intent of the parties to convey the farm and dwelling-house, this specific reference to No. 17, as a description of it, was false, and must be rejected, and that the farm did pass.¹

39. Sometimes the quantity of land conveyed is mentioned in the deed; but, independently of an express averment or covenant as to quantity, this is always regarded as a part of the description merely, and will be rejected if it be inconsistent with the actual area of the premises, if the same is indicated and ascertained by known monuments and boundaries. It aids, but ordinarily does not control, the description of the granted premises,² and is regarded as the least reliable, and the last to be resorted to, in determining the boundaries of the premises conveyed.³ This was applied in the sale of lands by public commissioners; as, where the parcel sold was described by bounds as containing 174 acres, the whole passed, although ascertained to contain 214 acres.⁴

[*631] * 40. So the admeasurement of distances, and the

¹ *Worthington v. Hylyer*, 4 Mass. 196. See *Bosworth v. Surtevant*, 2 Cush. 392, 399; *Fancher v. DeMontegre*, 1 Head, 40; *Lush v. Druse*, 4 Wend. 313; *Johnson v. Simpson*, 36 N. H. 91; *Parks v. Loomis*, 6 Gray, 467, where a specific monument was excluded as being a *falsa demonstratio*. *Melvin v. Proprs. Locks, &c.*, 5 Met. 28.

² *Mann v. Pearson*, 2 Johns. 37, 41; *Snow v. Chapman*, 1 Root, 528; *Powell v. Clark*, 5 Mass. 355, 357; 1 United States Dig. "Boundaries," § 41; *Commissioners v. Thompson*, 4 M'Cord, 434; *Jackson v. Defendorf*, 1 Caines' Rep. 493; *Miller v. Bentley*, 5 Sneed, 671; *Hall v. Mayhew*, 15 Md. 551; *Wright v. Wright*, 34 Ala. 194; *Riddell v. Jackson*, 14 La. An. 135; *Stanley v. Green*, 12 Cal. 148; *Dutton v. Rust*, 22 Texas, 133; *Llewellyn v. Jersey*, 11 M. & W. 183.

³ *Ufford v. Wilkins*, 33 Iowa, 113.

⁴ *Ward v. Crotty*, 4 Met. (Ky.) 103.

direction of lines in reference to the points of compass mentioned in the deed, are often made a part of the description of the premises intended to be granted; and in some cases, where the lines are so short as to be evidently susceptible of entire accuracy in their admeasurement, and are defined in such a manner as to indicate an exercise of this accuracy in describing the premises, such description is regarded with great confidence as a means of ascertaining what is intended to be conveyed. But, ordinarily, surveys are so loosely made, instruments so liable to be out of order, and admeasurements, especially in rough or uneven land or forests, so liable to be inaccurate, that the courses and distances given in a deed are regarded as more or less uncertain, and always give place, in questions of doubt or discrepancy, to known monuments and boundaries that are referred to in the deed as indicating and identifying the land.¹ But if courses and distances are given, but no monuments are given or called for in the deed, parol evidence is not competent to control these.² What constitutes a boundary in a deed is a fact for the jury, and may be proved by any kind of evidence which is competent to prove any fact.³ Nor is it competent for a court of equity to fix boundaries to legal estates, unless some equity is superinduced by the act of the parties.⁴ The course called for in the deed was "westerly;" but the monuments referred to carried it in a north-westerly course, and the latter was held to be the true line.⁵ This doctrine was applied where the monument was the line of a third person's land: the true line of his land will control the courses named in the deed.⁶ And bounding by another's land means along the line of such land.⁷ There are, moreover, certain general rules which courts apply in con-

¹ *Davis v. Rainsford*, 17 Mass. 207, 210, where the distance given was but a few feet, and was given in feet and inches. *Howe v. Bass*, 2 Mass. 380; *Frost v. Spaulding*, 19 Pick. 445; *M'Pherson v. Foster*, 4 Wash. C. C. 45; 1 *United States Dig. "Boundaries,"* § 15, where cases are collected; *Lodge v. Barnett*, 46 Penn. St. 484; *Evansville v. Page*, 23 Ind. 527.

² *Drew v. Swift*, 46 N. Y. 209; *Bagley v. Morrill*, 46 Vt. 94, 100.

³ *Opdyke v. Stephens*, 4 Dutch. 89; *Brown v. Willey*, 42 Penn. St. 309.

⁴ *Norris' Appeal*, 64 Penn. St. 279, 280.

⁵ *Colton v. Seavey*, 22 Cal. 496.

⁶ *Park v. Pratt*, 38 Vt. 552.

⁷ *Bailey v. White*, 41 N. H. 343; *Peaslee v. Gee*, 19 N. H. 273.

struing the descriptions given in deeds, a few of which may be noticed here. But the purpose of these rules, after all, is to ascertain the *intention* of the parties by the law terms made use of in their deeds. To do this, it is often necessary to resort to parol evidence; but this is allowed to a very limited extent only, and rarely, if ever, beyond showing the circumstances under which the deed was made,¹ to show the meaning of technical terms of art,² or to show and explain what are called latent ambiguities.³ Thus where the land is bounded by a town-line, and it appeared there were two reputed town-lines, though only one of them is the true one, evidence was admitted to show which of these two lines the parties intended in the reference in the deed.⁴ It is competent to refer to parol evidence to show the definition of descriptive terms used in a deed, if in their nature ambiguous. This principle was applied to determine what the parties meant by the word "zinc" in their deed.⁵ But where the parties define in their deed what they mean by the terms they make use of, such definition will control the construction of the deed, though varying from that in common use.⁶ Thus, in *Stanley v. Green*, the court say: "That the evidence of the circumstances under which the deed was executed is admissible does not admit of a question. These circumstances place the court in the position of the parties, and enable it to interpret intelligently the language used by them. For this purpose, extrinsic evidence must be admissible in the interpretation of every instrument; and the law will not declare the instrument void for uncertainty until it has been examined with all the light which contemporaneous facts may furnish." "It is, however, a settled rule, that a deed must be construed *ex visceribus suis*. When the intent is clearly expressed, no evidence of extraneous facts or circumstances can be received to alter it." "The nature and *quantity* of the *interest* granted

¹ *Stanley v. Green*, 12 Cal. 162; *Shore v. Wilson*, 9 Cl. & Fin. 556; *Hildebrand v. Fogle*, 20 Ohio, 147, 157; 1 Greenl. Ev. §§ 295, 298.

² *Eaton v. Smith*, 20 Pick. 150.

³ 1 Greenl. Ev. § 297; *Hall v. Davis*, 36 N. H. 569.

⁴ *Pntnam v. Bond*, 100 Mass. 58.

⁵ *N. J. Zinc Co. v. Boston Franklinite Co.*, 15 N. J. Ch. 418, 448.

⁶ *Morrison v. Wilson*, 30 Cal. 347.

are always to be ascertained from the instrument itself.”¹ Another rule is, that “where more than one description is given, and there is a discrepancy, that description will be adhered to as to which there is the least likelihood that a mistake could be committed, and that be rejected in regard to which mistakes are more apt to be made.”² It is, accordingly, a rule of universal application, that natural, permanent objects called for in a deed control courses and distances given.³ So where, from the grant of a large tract of land, a meadow was excepted bounded “by the highlands,” the grantor and a third person named were to run out and fix the line by monuments. They ran out the line straight, without regarding the angles and indentations made by the highlands. The grantor then sold the meadow, and bounded it by “the highlands.” It was held to carry the entire meadow-land to the highlands, irrespective of the straight line.⁴ Among the things mentioned by the court in *Opdyke v. Stephens* (*sup.*), which may be referred to in determining questions of boundaries, are “actual occupation, ancient reputation, the admissions of the party in possession against his interest, ancient maps and draughts, marked trees, the lines of adjoining surveys, and monuments erected at or soon after the date of the grant of adjoining surveys.” These are all admissible for this purpose, though it conflicts with the courses and distances called for in the deed. The order of applying descriptions of boundaries is, *first*, to natural objects; *second*, to artificial marks; and *third*, to courses and distances given in the deed.⁵ The following is an example of the application of this rule; viz.: A agreed to convey a lot of land in the city of New York,

¹ *Caldwell v. Fulton*, 31 Penn. St. 489. See *Bond v. Fay*, 12 Allen, 88; *Lippett v. Kelly*, 46 Vt. 516, and is settled by the court as a question of law.

² *Miller v. Cherry*, 3 Jones, Eq. 29. See *Ferris v. Coover*, 10 Cal. 628; *Melvin v. Proprs. Locks, &c.*, 5 Met. 28; *Esty v. Baker*, 50 Me. 331.

³ *Brown v. Huger*, 21 How. 305; *Hall v. Davis*, 36 N. H. 569; *Murphy v. Campbell*, 4 Penn. St. 485; *Mackentile v. Savoy*, 17 S. & R. 104; *Miller v. Cherry*, 3 Jones, Eq. 29; *Colton v. Seavey*, 22 Cal. 496; *Drew v. Swift*, 46 N. Y. 207, 208.

⁴ *Haynes v. Jackson*, 59 Me. 386.

⁵ *Bolton v. Lann*, 16 Texas, 96; *Fulwood v. Graham*, 1 Rich. 497; *Ferris v. Coover*, 10 Cal. 629. See *Ogden v. Porterfield*, 34 Penn. St. 196; *Beahan v. Stapleton*, 13 Gray, 427.

120 feet deep from a street, "including the stable." The parties were mistaken as to the requisite admeasurement to include the stable, which was 131 feet. It was held that the deed must convey a sufficient depth to include the stable.¹ And courses and distances given in a deed can be controlled only by monuments.² The court had occasion to lay down a rule, in *Commonwealth v. Roxbury*, to meet the case of a public grant, where three sides only of the grant could be ascertained; and the question was, if the remaining side could be ascertained. Shaw, C. J., said: "A deed is not to be held void for uncertainty because the boundaries are not fully expressed, when by reasonable intendment it can be ascertained what was considered and understood by both parties to be embraced, and intended to be embraced, in the description. The obvious and legal course, we think, is to lay down a plan on the land according to ascertained boundaries, abutments, and monuments, on these three sides, and thus see where the fourth would come. If it terminate on the sea or salt water, on a highway or public common, or on a well-established line of private property, such deficient line will be supplied by necessary intendment, and the instrument be read as if it were so expressed."³ So where a certain quantity of land is mentioned with a given side upon the river, without the courses being given, it was held that the tract should be laid out as nearly as might be in a rectangular form, in the direction indicated from the stream, the stream forming its base line, the two sides being parallel and drawn at right angles with the general course of the stream at that point, and to extend back far enough to include the requisite quantity. If the description does not require the side opposite to the stream to be parallel with the stream, that side is to be drawn at right angles with the sides of the tract, and parallel with the general direction of the stream.⁴ So, where a line was to run from a certain point to a point on the side of a street *opposite* a certain monument upon the opposite side of the street, it was held

¹ *White v. Williams*, 48 N.Y. 344.

² *Chadbourne v. Mason*, 48 Me. 391.

³ *Commonwealth v. Roxbury*, 9 Gray, 490.

⁴ *Hicks v. Coleman*, 25 Cal. 142, 143; *Craig v. Hawkins*, 1 Bibb, 54; *Calk v. Stribling*, 1 Bibb, 122; *Van Gorden v. Jackson*, 5 Johns. 474.

that this point must be where a line drawn from the monument at right angles with the street at that point would strike the opposite side of the street.¹

41. If, however, the boundary-line is described by admeasurement, it will govern, if there are no known monuments by which to test its accuracy, although the distance be described as so many feet "more or less."²

42. In respect to courses, if the deed calls for a line running "northerly," it is said that it is to be taken as meaning a line due north.³ But where the grant was of the "west half" of a lot, it was held to be open to explanation by the situation of the lot when conveyed, and the manner in which the parties then occupied it, although a north and south line would materially vary from the line as thus established.⁴ All lines laid down in deeds as run by points of compass have reference to the magnetic meridian, even though "due" is used as "due north," &c. And this is the common law of New Hampshire.⁵ So granting land, reserving all the wood on the premises "south of the meadow," includes all that lies to the south of a line extending along the meadow through the premises, and is not limited to the wood lying directly south of the meadow itself.⁶

43. But the most reliable means of establishing what is intended to be conveyed in a deed are the monuments therein described and referred to as forming the boundaries of the estate. "Monuments must control courses and distances, even if it cause a wide departure from them."⁷ It is a universal

¹ *Bradley v. Wilson*, 58 Me. 360.

² *Blaney v. Rice*, 20 Pick. 62; *Cherry v. Slade*, 3 Murph. 82; 1 United States Dig. "Boundaries," § 47; *Welch v. Phillips*, 1 McCord, 215; 4 Greenl. Cruise, Dig. 265, note; *Flagg v. Thurston*, 13 Pick. 145. This was applied where one holding land bounded by a street on one side, and lands of another on the other side, sold one lot of thirty feet in width, and then a second of thirty feet in width, and then a lot of thirty-six feet to the street, and it turned out the whole line was thirty-six feet eighteen inches; and it was held that this extra eighteen inches belonged to the third parcel, to the exclusion of the other two parcels. *Block v. Pfaff*, 101 Mass. 538.

³ *Brandt v. Ogden*, 1 Johns. 158. See *Jackson v. Reeves*, 3 Caines, 293; *Van Gorden v. Jackson*, 5 Johns. 473; *Bosworth v. Danzien*, 25 Cal. 296.

⁴ *Schmitz v. Schmitz*, 19 Wis. 210. ⁵ *Wells v. Company*, 47 N. H. 235, 261.

⁶ *Cronin v. Richardson*, 8 Allen, 423. ⁷ *Coburn v. Coxeter*, 51 N. H. 158.

rule, that, where a line is given in a deed as running [*632] from one monument to another, it is always * to be taken as straight, if not otherwise described.¹ If the line run from one point to another over another point, the same is to be run straight from the first to the intermediate point, and straight from that to the other point.² So that, by ascertaining the monuments at the angles of a parcel of land, the boundary-lines can at once be determined. So if, in the description of land, a line is called for, running from an ascertained point to some natural boundary, like a stream of water, without giving the point of compass or some known object by the stream, it is held to be a line running in the most direct and shortest course between the given point and the stream.³

44. Some of these monuments are natural objects, others are artificial, and one parcel of land itself may be a monument to determine the boundary and limit of another.⁴ But in such case, the boundary is to be construed to be the true line of ownership, and not that of occupancy or enclosure, if the latter be other than by the true dividing-line.⁵ And such description excludes whatever has been already granted away, although the deed may not have been recorded.⁶ If a parcel is bounded "by a house," the line is at the *eaves* of the house.⁷

45. Among the natural objects which are often referred to as monuments in deeds, and which have been the subject of

¹ *Allen v. Kingsbury*, 16 Pick. 235, 238; *Baker v. Talbott*, 6 Mon. 179; *McCoy v. Galloway*, 3 Ohio, 382; *Nelson v. Hall*, 1 McLean, 519, in which blocks from trees marked as corners, and others marked as line trees, were produced to the jury, showing the annular growth of the trees. *Burnett v. Thompson*, 6 Jones (Law), 210; *Caraway v. Chancy*, 6 Jones (Law), 364; *Jenks v. Morgan*, 6 Gray, 448.

² *Hovey v. Sawyer*, 5 Allen, 585.

³ *Caraway v. Chancy*, 6 Jones (Law), 364.

⁴ *Flagg v. Thurston*, 13 Pick. 150; *Carroll v. Norwood*, 5 Harr. & J. 163; *Smith v. Murphy*, 1 Tayl. 303; *Bates v. Tymanson*, 13 Wend. 300; *Bloch v. Pfaff*, 101 Mass. 538.

⁵ *Northrop v. Sumney*, 27 Barb. 196; *Cornell v. Jackson*, 9 Met. 154; *ante*, pl. 40; *Wiswall v. Marston*, 54 Me. 270; *Sparhawk v. Bagg*, 16 Gray, 585; *Cleveland v. Flagg*, 4 Cush. 76.

⁶ *Adams v. Cuddy*, 13 Pick. 460; *Chaffin v. Chaffin*, 4 Gray, 280; *Jamaica Pond v. Chandler*, 9 Allen, 167.

⁷ *Carbrey v. Willis*, 7 Allen, 370; *Millett v. Fowle*, 8 Cush. 150.

somewhat arbitrary rules, are streams and rivers, ponds, shores, beaches, highways, streets, and the like. These, of course, must exist, in the nature of things, at the time of making the deed, in order to serve as monuments. But artificial monuments may be referred to in a deed, which do not then exist, but which, if afterwards fixed and established by the parties to correspond with and answer to those described, become as effectual and conclusive upon the parties as if they had been in existence when the deed was executed.¹ The same principle has been applied where the line has been described as running a particular course from an established point; and if the parties have then run it out, located and marked it, and occupied to the line so marked, it is taken to be the true line, though varying from the course given in the deed, or other less certain boundaries than the line so marked.² Thus, to sell ten acres of land without describing any boundaries to the same would be void; but if the parties then go on and stake out that quantity of land, and the grantee takes possession of it, it ascertains the grant, and gives effect to the deed.³ So where the grant was of a parcel of land running back from a street so many feet, more or less, and the grantor afterwards had a plan drawn, which he put on record, making the back line of the lot a larger number of feet from the street than that mentioned in the deed, it was held to be equivalent to fixing the bounds of the lot, and to govern in ascertaining what was intended to be granted.⁴

46. In respect to streams and rivers which are not navigable, — that is, in which the tide does not ebb and flow, — the rule seems to be universal, that describing land as running to the stream or the bank, and by it or along the stream or the bank, extends to the middle or thread of the stream, the *filum aque*, unless there is something in the description clearly excluding the intermediate space between the edge or bank of

¹ *Waterman v. Johnson*, 13 Pick. 261, 267; *Makepeace v. Bancroft*, 12 Mass. 469, 478; *Blaney v. Rice*, 20 Pick. 62; *Lerned v. Morrill*, 2 N. H. 197; *Kennebec Purchase v. Tiffany*, 1 Me. 219; *Knowles v. Toothacker*, 58 Me. 175.

² *Kellogg v. Smith*, 7 Cush. 382; *Frost v. Spalding*, 19 Pick. 445; *Corning v. Troy Iron Co.*, 40 N. Y. 208; *Rockwell v. Baldwin*, 53 Ill. 22.

³ *Purinton v. No. Ill. R. R.*, 46 Ill. 300; *Cleveland v. Flagg*, 4 Cush. 81.

⁴ *Blaney v. Rice*, 20 Pick. 64. See also *Hathaway v. Evans*, 108 Mass. 270

the stream and its thread.¹ And if the bed of the stream changes imperceptibly by the gradual washing of the banks, the line of the land bordering upon it changes with it; but if this change is by reason of a freshet, and suddenly done, the line remains as it was originally.² Where the line ran "to the bank" of a stream, in which there was an ebb and flow of tide of fresh water, then by the bank, &c., it was held to be a boundary by the line of high-water mark.³ In Michigan, lands bounding upon her rivers extend to the *filum aquæ*, subject to the right in the public to use them as highways.⁴ If one owning lands upon one or both sides of a river within which there are islands, and the same is not navigable, and he sells the land upon the side or sides of the river, excepting or reserving these islands, the line of division between the islands and the mainland is the *filum aquæ* of the river between the two;⁵ and if islands form in such rivers, there are thereby two *fila aquæ* in the stream, one on each side of the island and the bank opposite to it.⁶ This doctrine was applied to land bordering upon a lake and its outlet, which lake was five miles in length, but less than a mile in width: the *filum aquæ* was held to be the boundary-line.⁷ When a boundary-line of land runs up or down a stream, it follows its meanderings; and when the length of it is given, it is ascertained by reducing these meandering lines to a straight one.^{8*} The rule as adopted in California as to

* NOTE. — The rulings of the court, in applying the general doctrine of the text, can best be illustrated by referring to the terms of the deeds which

¹ The State v. Gilmanton, 9 N. H. 461; Hatch v. Dwight, 17 Mass. 289, 293, 299; Commissioners v. Kempshall, 26 Wend. 404; The People v. Platt, 17 Johns. 195, 210; Hargr. Law Tracts, 5, 6; Morgan v. Reading, 3 S. & M. 366, 399, 404; The People v. Canal Appraisers, 13 Wend. 355, 370; Morrison v. Keen, 3 Me. 474; Harramond v. M'Glaughon, 1 Tayl. 136, though the courses and distances given do not agree with the actual course of the stream; Browne v. Kennedy, 5 Harr. & J. 195, 205, 207. See Hammond v. Ridgely, 5 Harr. & J. 245, 274, 275; Arnold v. Elmore, 16 Wis. 514; Yates v. Judd, 18 Wis. 128; Gove v. White, 20 Wis. 432; Hayes v. Bowman, 1 Rand. 417.

² Lynch v. Allen, 4 Dev. & B. 62.

³ Stone v. Augusta, 46 Me. 127.

⁴ Lormon v. Benson, 8 Mich. 18.

⁵ Stolp v. Hoyt, 44 Ill. 220.

⁶ Trustees, &c. v. Dickinson, 9 Cush. 549.

⁷ Ledyard v. Ten Eyck, 36 Barb. 125; Mill River Co. v. Smith, 34 Conn. 462, though the mill pond had existed 200 years; Paine v. Woods, 108 Mass. 168-172; Manson v. Blake, 62 Me. 38.

⁸ Hicks v. Coleman, 25 Cal. 142; Calk v. Stribling, 1 Bibb, 122.

measuring a boundary-line of land bordering upon a river is this: If a certain distance is called for from a given point on

were the subjects of consideration. These may appear to be conflicting; but the question seems to turn upon the whole language as to the stream, which is the boundary, and not upon the fact that an object, mentioned as a corner bound, stands upon the bank. If the bank or shore be the intended line, the stream is excluded. If it be the stream, the *filum aquæ*, which is the line, any object mentioned upon the shore merely indicates the point at which the line strikes the bank in extending it to the thread of the stream. Thus, in one case, the line ran "to a stake standing on the east bank, &c., thence down the river, &c.," and was held to extend to the thread. *Luce v. Carley*, 24 Wend. 451. The case of *Lunt v. Holland* is, in most respects, like the last-mentioned case: the corners given were trees standing on the side of the river, the intermediate line "bounding by said river." 14 Mass. 150. In *Newton v. Eddy*, 23 Vt. 319, the boundary was described as "easterly on a creek, and down said creek to a small butternut-tree, which is the north-east corner of said lot." It was held that the true corner was at the centre of the stream, opposite this tree. *Robinson v. White*, 42 Me. 218. The case of *Cold Spring Iron Works v. Tolland*, 9 Cush. 492, is the same in principle as the above, the corner being a tree on the river, but the land "bounding on said" river. The centre of the river was held to be the boundary-line. The following cases may be added upon the general point stated in the text: *Newhall v. Ireson*, 13 Gray, 262; *Commonwealth v. Alger*, 7 Cush. 97; *Brown v. Chadbourne*, 31 Me. 9. Among the cases illustrating the other part of the above proposition is *Dunlap v. Stetson*, 4 Mason, 349, where one corner was a stake, &c., on the west bank of the river, and then around to another stake on the same bank, "thence running on the western bank of said river to high water to the first bound." It excluded the river. *Babcock v. Utter*, 1 Abb. N. Y. Rep. 27; *Watson v. Peters*, 26 Mich. 516, 517. So a line running to G. River, thence "along the shore of said river to," &c., was held to exclude the river. *Child v. Starr*, 4 Hill, 369. *Bradford v. Cressey*, 45 Me. 9, is the same in principle as the last-mentioned case: the line ran to strike the creek, then "on the west bank of said creek." The court in the latter case consider, at considerable length, the conflicting cases on this point, many of which are collected in the opinion there given, and sustain the distinction above stated, that where the party uses the term "bank, side, margin, or shore," they become themselves monuments, and are to be so treated. The case of *Child v. Starr*, as reported in 4 Hill, 369, overruled the decision in the same case in 20 Wend. 149. The doctrine as to the "bank," when a monument, excluding the stream itself, was fully held in *Daniels v. Cheshire R. R. Co.*, 20 N. H. 85, and in *Halsey v. McCormick*, 3 Kernan, 296, where it was held, that such a boundary carried the line to the low-water mark of the stream, if not otherwise limited. See also *Child v. Starr*, *sup.* For further authorities upon the general subject, see *Ang. Wat. Cour.* §§ 24, 29; *Varick v. Smith*, 9 Paige, 547; *Hathorn v. Stinson*, 10 Me. 224. But the case of *McCulloch v. Aten*, 2 Ohio, 425, seems to vary somewhat from either of the general propositions above made. There the boundary began "at a white oak on the south-east bank of G. Creek, thence down said creek with the several meanderings thereof," and was held to be the line of the water in the creek, and not the top of the bank. See *Cox v. Freedley*, 33 Penn. St. 129; *Ex parte Jennings*, 6 Cowen, 536.

a navigable stream to another point on the stream, to be ascertained by such admeasurement, it is made by its meanders, and not in a straight line; and the same rule prevails when distance is called for upon a travelled highway. When a tract of land is bounded upon a navigable stream, the distance upon the stream will be ascertained, in the absence of other controlling facts, by measuring in a straight line from the opposite boundaries.¹ The operation of the same rule includes the [*633] parts of * islands divided by the thread of the stream, extended as a line across them.² But though it is well settled, that, if an island forms in a river opposite to lands whose owner's property extends to the thread of the stream, it will belong to both, or to the one or the other, as its parts are divided by the thread of the stream extended across it, or otherwise; its existence leads, of course, to two separate and distinct threads, one to each branch of the stream; and these are, after such change, to be regarded each as a *filum aquæ* as to that part of the stream in relation to any new acquisition of titles bordering upon the same.³ And the doctrine that the riparian owner of land is thereby the owner of the soil of the stream to its centre applies to the great rivers in this country, like the Mississippi, subject to the public easement of passing over the same in boats or river

But in Tennessee, where her large rivers are deemed to be *navigable* streams by her courts, a line running to a tree on the bank of the C. River, thence down said river according to its several courses, so many rods, to "a sweet gum-tree," was held to run along the line of low-water mark of the river. *Martin v. Nance*, 3 Head, 650. "It may be considered a canon in American jurisprudence that where the calls in a conveyance of land are for two corners, at, in, or on a stream or its bank, and there is an intermediate line extending from one such corner to the other, the stream is the boundary, unless there is something which excludes the operation of this rule by showing that the intention of the parties was otherwise." *County St. Clair v. Lovington*, Wall.; *Woodman v. Spencer*, 23 Am. L. Reg. 411. The river, and not the meander line, in such cases, is the boundary of the lot. *Railroad v. Schurmeir*, 7 Wall. 286.

¹ *People v. Henderson*, 40 Cal. 32.

² *Ingraham v. Wilkinson*, 4 Pick. 268; *The People v. Canal Appraisers*, 13 Wend. 355, 370; *Canal Commrs. v. The People*, 5 Wend. 423, 443; *Ang. Wat. Cour.* §§ 44-47; 3 Kent, Com. 428; *Schurmeier v. St. P. & P. Railroad*, 10 Minn. 102, 103. For what is an island, see *ante*, *451.

³ *Hopkins Academy v. Dickinson*, 9 Cush. 544, 548. See also *ante*, p. *452.

craft, and doing whatever is necessary to use it as a highway.¹

46 *a.* Though it would be impossible to reconcile the rulings of the various courts in this country upon the question, What is a navigable stream? it may be useful to give the result of some of these, in order to see in what respect they differ. It seems to be conceded by all, that streams in which the tide ebbs and flows are what are known to the common law as *navigable*; and further, as will be stated hereafter, land bounding upon such streams extends only to the line of the high-water mark. But some of the courts regard the large rivers in this country above tide-water as navigable, and carry the line of land bounding upon them to *low-water* mark. The subject is very ably and learnedly discussed by the court of Mississippi, who make what seems to be the true and proper distinction between *public* and *navigable* streams. They show that it does not depend upon the capacity for navigation by boats or other craft, but is borrowed from the law of nations. By this, tidal waters are public highways for all nations, and therefore the State only can own or exercise control over them; whereas intra-territorial streams are subject to State jurisdiction as to being navigated; and it is competent for the State to grant the soil under these rivers, subject to a public use of the waters for purposes of travelling, and carrying on trade. In that way the ownership of the soil may be in the riparian proprietors, subject to the easement on the

¹ *Ingraham v. Wilkinson*, 4 Pick. 268, 271; *Adams v. Pease*, 2 Conn. 481; *The People v. Platt*, 17 Johns. 195, 211; *Hooker v. Cummings*, 20 Johns. 90, 99; *Middleton v. Pritchard*, 3 Scamm. 510, 521; *Gavit v. Chambers*, 3 Ohio, 495; *Commonwealth v. Chapin*, 5 Pick. 199; *Morgan v. Reaog*, 3 S. & M. 366, 403; *The People v. Canal Appraisers*, 13 Wend. 355, 371. In *Palmer v. Mulligan*, 3 Caines, 315, *Thompson, J.*, held the Hudson a public river, subject to private ownership of its banks to its thread. In *Brown v. Chadbourne*, 31 Me. 9, the same doctrine is applied to smaller boatable rivers in Maine. See also *Commissioners, &c. v. Withers*, 29 Miss. 29; *Home v. Richards*, 4 Call, 441. In Massachusetts, the doctrine is applied to the Connecticut and Merrimac above tide-water; *Commonwealth v. Alger*, 7 Cush. 53, 97, 101. *Contra*, *Carson v. Blazer*, 2 Binn. 475; *Shrunk v. Schuylkill Co.*, 14 S. & R. 71; *Bullock v. Wilson*, 2 Port. 436; *Haight v. Keokuk*, 4 Clarke (Iowa), 199, 212; *McManus v. Carmichael*, 3 Iowa, 1. See also *O'Fallon v. Daggett*, 4 Mo. 343; *Canal Commissioners v. The People*, 5 Wend. 423, 443; *Cates v. Wadlington*, 1 McCord, 580; *Blanchard v. Porter*, 11 Ohio, 138. See 3 Kent, Com. 431, note; *Clsremont v. Carlton*, 2 N. H. 369.

part of the public of passing in boats, rafts, &c., upon its waters. The court examine critically the decisions of the various courts, and come to the conclusion, that whoever owns lands bounding upon such streams owns the soil to the *flum aquæ*, subject to the right of navigating its waters by the public.¹ The large rivers in Pennsylvania are held to be navigable, and the bed of the stream belongs to the State. If land is bounded by such rivers, the line is that of low-water mark; but it is subject to the right in the public to pass over the space between high and low water marks in boats and for fishing. Islands in such rivers belong to the State. "Low water" means *ordinary* low water; so that if, at very low water, there is no flow between the bank and the supposed island, it would not make it a part of the mainland, if, at the ordinary state of the stream, the water flows between it and the bank.² The same rule applies in Indiana in respect to the Ohio River.³ In Illinois, the Ohio is a navigable river and a public highway; but persons using it as such have no right to land on or make use of the shore above the line of low water. The owner of the land between high and low water may erect and maintain a wharf thereon, and charge any one for using it. The ownership of the bed of the stream to the *flum aquæ* seems to be conceded to the riparian owner, but subject to the use of the river as a highway by the public.⁴ In Kentucky, the riparian owner of lands bounding by the Ohio owns to the thread of the stream, subject to its being used as a highway.⁵ In Michigan, if the bed of the stream belongs, as in case of navigable rivers, to the State, riparian owners may not extend wharves in front of their lands: otherwise, though the stream be a public way, they may erect such wharves, if they do not thereby unreasonably impede the passage of water-borne craft.⁶

¹ *Steamboat Magnolia v. Marshall*, 39 Miss. 109-135. See *Canal Appraisers v. The People*, 17 Wend. 595. See *Rhodes v. Otis*, 33 Ala. 578, 596, 597.

² *Stover v. Jack*, 60 Penn. St. 339; *Wood v. Appal*, 63 Penn. St. 221, 224; *Tinicum Fishing Co. v. Carter*, 61 Penn. St. 21; *Wainwright v. McCullough*, 63 Penn. St. 66, which relates to the Alleghany River.

³ *Martin v. Evansville*, 32 Ind. 85.

⁴ *Ensminger v. People*, 47 Ill. 384-391.

⁵ *Berry v. Snyder*, 3 Bush, 266.

⁶ *Ryan v. Brown*, 18 Mich. 196.

The court in New Brunswick recognize the above distinction between navigable and public streams, and the ownership of the soil under them by the riparian proprietors.¹ In Wisconsin, the court hold Rock River a navigable stream, and excepted, as such, from the mill laws; but they evidently do not give it the incidents of a navigable as distinguished from a public stream, inasmuch as they hold that the ownership of the soil under any of her rivers is not affected by its being declared navigable.²

In this distinction, as to the rights of riparian owners, between a *public* and a *navigable* stream, the courts of Alabama, Ohio, and Maine coincide; while those of Maine hold that one is liable to indictment who stops the navigation of one of these public streams.³ Whereas Davies, J., in a very elaborate opinion, maintained that the Mohawk is a *navigable* stream, like all the large rivers in New York; that the State owns the beds of these; that land bounding upon them extends only to the line of low water; and that islands formed in the stream belong to the State.⁴ The courts of Pennsylvania adopt the same rule in respect to the Monongahela River and other large rivers in the State, the bed of the river to the low-water mark belonging to the State. They trace this doctrine to the Roman law which gives the bed of all perennial streams to the public, ignoring the English common law on the subject.⁵ The law of Pennsylvania, in making the low-water mark of such streams the boundary of the riparian owners, is adopted in North Carolina and Tennessee.⁶

¹ *Esson v. McMasters*, 1 Kerr, 501.

² *Wood v. Hustis*, 17 Wis. 418; *Cobb v. Smith*, 16 Wis. 664. See Wis. Rev. Stat. Ch. 41, § 3, that boundaries of lands adjoining rivers conform to the common law.

³ *Walker v. Public Works*, 16 Ohio, 540, 544; *Veazie v. Dwinel*, 50 Me. 479, 485. See also *Ellis v. Carey*, 30 Ala. 727, 728; *Rhodes v. Otis*, 33 Ala. 598.

⁴ *People v. Canal Commissioners*, 33 N. Y. 461.

⁵ *Monongahela Bridge v. Kirk*, 46 Penn. St. 120; *Flanagan v. Philadelphia*, 42 Penn. St. 229, 230; Inst. L. 2, T. 1, § 2. But the chancellor, in *Canal Appraisers v. The People*, 17 Wend. 595, reiterates his position, that the common and not the civil law governs in such cases.

⁶ *Wilson v. Forbes*, 2 Dev. 30, 38; *Elder v. Burrus*, 6 Humph. 367; *Martin v. Nance*, 3 Head, 650.

47. Where the boundary given is a natural pond or lake of fresh water, the boundary-line will, it seems, run along the low-water mark of the pond,¹ though other cases speak only of the "water's edge."² But if the pond be an artificial one made by a dam across a running stream, and land is bounded upon it, the line will be the thread of the [*634] stream.³ If the * natural pond be raised above its natural margin by an artificial dam at the time of making the deed, or be at that time drawn down by an artificial trench or channel, the line of the water in the then existing pond is the boundary; and unless there is something in the deed to negative the presumption, such boundary is the low-water mark, or line of the pond in its artificial extent, and is not confined to what happened to be the line of the water at the precise time when the deed was made.⁴ In *Hathorn v. Stinson*, the court held that a grant exhibited upon a plan as being bounded by a natural pond which was then raised by a dam should be construed to include two acres subsequently left bare and susceptible of cultivation by removing the obstructions in the stream, so as still to bring the boundary to the pond as it was after such removal.⁵ If the bound be by a great pond * or lake which is public property, it carries the land to the low-water mark; and this would be true if the pond be a natural one, though raised at times artificially by a dam at its outlet. The boundary in such cases would extend to the low-water mark of the pond in its natural state.⁶ The above doctrine is sustained in New York,

¹ *Waterman v. Johnson*, 13 Pick. 261, 265. See *Nelson v. Butterfield*, 21 Me. 229; *West Roxbury v. Stoddard*, 7 Allen, 167; *Canal Commrs. v. The People*, 5 Wend. 446, 447; *Fletcher v. Phelps*, 28 Vt. 257; *Jakeway v. Barrett*, 38 Vt. 323, in relation to Lake Champlain; *Primm v. Walker*, 38 Mo. 99.

² *The State v. Gilmanton*, 9 N. H. 461; *Hathorn v. Stinson*, 10 Me. 224, 238; *Manson v. Blake*, 62 Me. 38.

³ *Bradley v. Rice*, 13 Me. 198, 201; *Waterman v. Johnson*, 13 Pick. 261; *Lowell v. Robinson*, 16 Me. 357; *Phinney v. Watts*, 9 Gray, 269; *Manson v. Blake, sup.*, unless the land is bounded by "the bank," which excludes the water.

⁴ *Wood v. Kelley*, 30 Me. 47, 54.

⁵ *Hathorn v. Stinson*, 12 Me. 133.

* Great ponds contain ten or more acres. *Colony Laws*, 148.

⁶ *Paine v. Woods*, 108 Mass. 170-172, in which *Waterman v. Johnson* and *Bradley v. Rice, sup.*, are qualified and explained, and *Wood v. Kelley, sup.*, approved; *Boston v. Richardson*, 13 Allen, 154.

where it was held, 1st, converting a fresh-water pond into a salt one by an artificial channel between it and the sea does not change its character as a boundary; 2d, land-owners bounding on natural ponds hold to low-water mark. If it be an artificial pond, they hold to the centre line of the pond; but if the boundary be by tide-water, though a stream, it extends only to high-water mark.¹ In New Brunswick it was held, that land bounding by a stake upon the edge of a lake, and running by the bank or edge of the land to another stake, extended to the margin of the land, and was not restricted to the stake; so that, if the waters of the lake receded, the land that was thus formed adjacent to that of the riparian owner became his.² In Vermont it is held, that owners of land bounding on Lake Champlain have no title beyond low-water mark, and cannot, therefore, build out wharves into the lake beyond this line without a grant from the legislature.³ In a peculiar case, however, in Massachusetts, where a large natural pond had been raised by an artificial dam above its natural height, a party to a deed, referring to it as a boundary, was allowed to show by parol that the former bank was the line intended.⁴

48. If the boundary be a navigable stream, — that is, one in which the tide ebbs and flows, — the land extends only to the water's edge, or to high-water mark.⁵ But he would have a right of access to the navigable part of the stream in front of his land, and to construct a wharf or pier projecting into the stream for his own use, subject to such general rules and regulations as the legislature may prescribe for the protection of the public.⁶ And the owner of land bounding on such a stream would have no cause of action against one,

¹ *Wheeler v. Spinola*, 54 N. Y. 377. It seems doubtful in England whether the soil of lakes belongs to the owners of the land on their sides or to the crown. *Marshall v. Steam Navigation Co.*, 3 B. & S. 741.

² *Burke v. Niles*, 19 Am. L. Reg. 118.

³ *Austin v. Rutland R. R.*, 45 Vt. 215.

⁴ *Bradley v. Rice*, 13 Me. 200, 201; *Waterman v. Johnson*, 13 Pick. 261.

⁵ *Canal Commissioners v. The People*, 5 Wend. 423, 442; *Middleton v. Pritchard*, 3 Scamm. 520; *East Haven v. Hemingway*, 7 Conn. 186; *Wheeler v. Spinola*, 54 N. Y. 377.

⁶ *Yates v. Milwaukee*, 10 Wall. 497; *Weber v. Harb. Commrs.*, 18 Wall. 64

who, in navigating it, should lay his boat or vessel or raft upon the shore fronting his land, if he has not made improvements upon the same, since the title to the shore is in the State.¹ So a conveyance bounding "westerly by the beach" excludes the shore, or land between high and low water mark.²

49. The same is the rule where land is bounded by the sea, or an arm of the sea. The space between high and low water mark of the border of the sea is called the "shore," and belongs by common law to the sovereign, precluding, of course, the claim of any other person, unless acquired by grant from the sovereign.³ In Connecticut, the riparian owner can claim title only to the high-water mark, but has access to deep water, and may extend his wharf into the same, if he do not thereby interfere with public navigation. He is also entitled to the alluvion, and to such seaweed as is thrown upon his soil and left there by the tide. Seaweed which is afloat is *publici juris*, and is not private property.⁴ The State, in such cases, holds the fee in trust for the public; except in New York, where, by an early declaration to that effect, she holds it in trust for the owner of the adjacent lands.⁵ The civil and common law substantially concur in this respect, with the exception, that, by the former, the "shore" extended to the highest winter tide; whereas, by the latter, it is limited to the ordinary high-water line of the flow of the tide, which has been construed to be, on the land side, the medium line of the high water of all tides occurring in the ordinary course of nature throughout the year.⁶ In the case of the lands

¹ Stewart v. Fitch, 30 N. J. Law, 20.

² Niles v. Patch, 13 Gray, 254.

³ Hargr. Law Tracts, 12; Storer v. Freeman, 6 Mass. 435, 438, 439; 3 Kent, Com. 431; Cortelyou v. Van Brundt, 2 Johns. 362. "Beach," "strand," and "flats," are often used as identical with "shore." Doane v. Willcutt, 5 Gray, 328, 335; Niles v. Patch, 13 Gray, 254; Hodge v. Boothby, 48 Me. 71; Dana v. Jackson St. Wharf, 31 Cal. 120; Pollard v. Hagan, 3 How. 230; Goodtitle v. Kibbe, 9 How. 477.

⁴ Mather v. Chapman, 40 Conn. 382, 385; *ante*, p. *451.

⁵ Ledyard v. Ten Eyck, 36 Barb. 125.

⁶ City of Galveston v. Menard, 23 Texas, 349, 392, 398; Commonwealth v. Roxbury, 9 Gray, 451, 483, 491, and note, p. *520; Attorney-General v. Chambers, 4 De G., M. & G. 206, 214, 216; s. c. 4 De G. & J. 56, 58; Martin v. O'Brien, 34 Miss. 21, 36; Commonwealth v. Alger, 7 Cush. 63, 65; Inst. Lib. 2, T. 1, § 3; Teschemacher v. Thompson, 18 Cal. 21.

originally held by the Colonial government of Massachusetts, the government stood in two relations to its subjects, — one as owner of the land to be granted to purchasers and settlers, to be held in severalty in fee; the other a prerogative right to the sea and sea-shores, in a fiduciary relation for the public use.¹

50. By an ordinance in 1647, the common law of Massachusetts was changed, so as to give to the owner of lands bounding on the sea, &c., the shore or *flats* adjoining it between high and low water, provided the tide does not ebb more than one hundred rods, and to that extent if the tide ebbs to a greater distance; and such is now the common law of the State. This gave the owners of the uplands the flats adjoining at the time of its passage.² By “flats,” when used in speaking of an arm of the sea, is meant a level place over which the water stands or flows; and “shore” means the border of land alternately covered and left bare by the changing tide between high and low water.³ An owner, however, may sell his upland and flats together or separately, the one to one man, and the other to another.⁴ If he conveys land bounding on the sea, it will include the flats to low-water mark, if not exceeding the hundred rods. If he bounds the land granted by the *shore*, or running to the shore, and the like, the limits of his grant are the high-water line along the margin of the land, unless the word “shore” is coupled * with the sea, so as to show that the line is intended [*635] to be that side of the shore or beach next to the sea.⁵ If the boundary is “along” the shore, it means “by,” “on,” or “over,” according to the subject-matter and the context.⁶

¹ Commonwealth v. Roxbury, 9 Gray, 492.

² Boston v. Richardson, 105 Mass. 353.

³ Church v. Meeker, 34 Conn. 429.

⁴ Hill v. Lord, 48 Me. 95; Valentine v. Piper, 22 Pick. 94.

⁵ Storer v. Freeman, 6 Mass. 435, 439; 3 Kent, Com. 434; Doane v. Willcutt, 5 Gray, 335; Green v. Chelsea, 24 Pick. 71, 77. The grant of a wharf may carry the flats in front of it. Ashby v. Eastern R. R., 5 Met. 368; Doane v. Broad St. Association, 6 Mass. 332; Commonwealth v. Alger, 7 Cush. 66. See note, 9 Gray, 524, 525, and cases cited; Palmer v. Hicks, 6 Johns. 133; Middletown v. Sage, 8 Conn. 221; Hodge v. Boothby, 48 Me. 71. Whether this ordinance extended to New Hampshire, *quære*. Nudd v. Hobbs, 17 N. H. 527.

⁶ Church v. Meeker, *sup*.

If the boundary be tide-water, it carries the flats in front of the upland; but if it be by the shore or beach or flats, it excludes the thing named.¹ This extends to flats adjacent to islands as well as the mainland.² And a disseisin of the mainland may extend to the flats.³ As an incident to this ownership of the flats, seaweed thrown upon them or upon the shore belongs as an appurtenant to the owner of the soil;⁴ and the right to take it may be the subject of sale and conveyance, separate from the soil itself.⁵

51. Notwithstanding it was once supposed to be otherwise, in Massachusetts at least,⁶ it seems to be now a well-settled rule of law, that where land sold is bounded by a *highway*, or upon or along a highway, the thread or centre line of the same is presumed to be the limit and boundary of such land, in strict analogy with the case of a stream of water not navigable.⁷ * Where the grant was of a quantity of "sedge flat"

* NOTE. — But while the doctrine as stated in the text is now the settled rule of law, the cases present so many limitations and qualifications of the rule in order to carry out the intention of the parties to the grant, that it becomes necessary to refer to some of these otherwise than by their names. The reader will find the subject discussed, and numerous cases collected, in 2 Smith's Lead. Cas. 5th Am. ed. 216. In *Berridge v. Ward*, 10 C. B. n. s. 400, the grant was bounded by a highway, and held to extend to the *flum viæ*, although the colored plan of the lot sold, and admeasurement, extended only to the line of the road. The case of *Salisbury v. G. N. Railway Co.*, 5 C. B. n. s. 174, was one where the highway adjoining the granted premises was held to be excluded by the description taken in connection with the circumstances existing at the time. In *Smith v. Slocomb*, 9 Gray, 36, the description of the premises began at an angle in the wall on the side of the road, and ran around the parcel "to a stake

¹ *Boston v. Richardson*, 13 Allen, 153; *Paine v. Woods*, 108 Mass. 168-172.

² *Hill v. Lord*, 48 Me. 95.

³ *Valentine v. Piper*, 22 Pick. 94.

⁴ *Emory v. Turnbull*, 2 Johns. 322.

⁵ *Hill v. Lord*, *sup.*

⁶ *Tyler v. Hammond*, 11 Pick. 192.

⁷ *Newhall v. Ireson*, 8 Cnsh. 595, 598; *Hammond v. McLachlan*, 1 Sandf. 323; *Herring v. Fisher*, Id. 344; *Child v. Starr*, 4 Hill, 369, 373, unless the description, which may be the case, excludes the soil of the highway. *Jackson v. Hathaway*, 15 Johns. 454; 3 Kent, Com. 433, 434; *Chatham v. Brainerd*, 11 Conn. 60; *Codman v. Evans*, 1 Allen, 443; *Hollenbeck v. Rowley*, 8 Allen, 473; *Milhau v. Sharp*, 27 N. Y. 624; *Dubuque v. Maloney*, 9 Iowa, 458; *Rice v. Worcester*, 11 Gray, 283, n.; *Bissell v. N. Y. Cent. Railroad*, 26 Barb. 633; *Gove v. White*, 20 Wis. 432; *Richardson v. Vermt. Cent. R. R.*, 25 Vt. 472; *Sutherland v. Jackson*, 32 Me. 82; *Lord v. Commrs. of Sidney*, 12 Moore, P. C. 497; *Regina v. Board of Works*, 4 B. & S. 526; *Read v. Leeds*, 19 Conn. 187; *White v. Godfrey*, 97 Mass. 474; *Maynard v. Weeks*, 41 Vt. 619.

bounded by a highway running along the shore, it was held to exclude the highway, and limit it to the sedge flat, the

and stones at the aforesaid road, and thence on the line of said road to the first-mentioned bound," and was held to exclude the road. See also *Sibley v. Holden*, 10 Pick. 240; *Phillips v. Bowers*, 7 Gray, 25. While, in New Jersey, the doctrine of land bounding on a highway extending to the thread of the street prevails. *Winter v. Peterson*, 4 Zab. 527. If the terms of the deed show an intention to make the side-line, rather than the centre of the road, the boundary, it will be so construed. As where the line began at a corner on the side of the road, and ran by courses and distances, but without reference to the road, which, if accurately followed, would exclude it, it was held not to extend beyond the line thus indicated. *Hoboken Land Co. v. Kerrigan*, 30 N. J. (Law), 16. So in a more recent case in Massachusetts, where land was bounded by a thirty-foot street by a line running so many feet from a certain bound, which admeasurement brought the line to the edge of the street, it was held to exclude the street; and inasmuch as the street was a private one, in which the grantor had no interest, it was further held not to pass any right of way in the street, nor to amount to a covenant of any such right belonging to the granted premises. *Brainard v. Boston & N. Y. Central Railroad*, 12 Gray, 410. Sometimes granting land bounding upon a way or street is held to grant an easement in the way mentioned, though it may not convey any part of the soil. But that seems to be limited to cases where the grantor owns the way or street, if a private one not opened or dedicated. If he do not, neither grant nor covenant as to such easement will be implied from merely bounding upon it, unless the street be a public one, or it be laid down upon a plan referred to by the deed as an existing street. If it operates at all, it is usually by estoppel. *Howe v. Alger*, 4 Allen, 200; *Roberts v. Karr*, 1 Taunt. 495; *White v. Flannigain*, 1 Md. 540, 542; *Moale v. Mayor, &c.*, 5 Md. 314; *Hanson v. Campbell*, 20 Md. 232; *Washb. Ease.* *172, *173; *post*, *671. In *Morrow v. Willard*, 30 Vt. 118, where the court held that bounding "south on a highway" passes the soil to its centre-line, it would, if it had said "by the north line of the highway," have excluded it altogether. And in *Kimball v. City of Kenosha*, 4 Wis. 331, the court say, "Unless the street or road is expressly excluded, the grantee takes to the centre." But in *Cox v. Freedley*, 33 Penn. St. 124, a grant bounding "along the south-east side of Race Street, &c.," was held to carry the land to the centre of the street, although the admeasurements, as given, carried the line only to the side of the street. *Cottle v. Young*, 59 Me. 105, 109; *Woodman v. Spencer*, 23 Am. Law Reg. 411; *Johnson v. Anderson*, 18 Me. 76. The court rely much upon the identity of the rule as to roads, and streams of water, when referred to as boundaries; and if land is bounded "by the river," or "along the river," it includes the stream to its thread. The case of *Paul v. Carver*, 24 Penn. St. 207, and 26 Penn. St. 224, is to the same effect as the case above stated. See also *Phillips v. Bowers*, 7 Gray, 24, 25. From the want of any precise technical rule upon the subject, each case must be tested, in no small degree, by its own circumstances, where there has been a departure from a general reference to such way; and the following cases are added, as confirming the general doctrine stated in the text: *Witter v. Harvey*, 1 McCord, 67; *Canal Trustees v. Havens*, 11 Ill. 557; *Parker v. Framingham*, 8 Met. 267; *O'Linda v. Lothrop*, 21 Pick. 296; *Harris v. Elliott*, 10 Pet.

grantor not owning the soil of the highway. But if one disseise another of land bordering upon a highway, he will be understood as extending his disseisin to the centre of the highway, if it belonged to the owner of the land adjacent to it.¹ And where a *road, street, &c.*, are referred to as boundaries, it is understood to be the road as it is actually opened and in use, rather than as it was originally located, if there has been any change in this respect.² So if a fence has stood over twenty years along a street, and its bounds cannot be defined by record, the fence is taken as its true line.³ And the same rule applies to a private street, as well in the city as in the country, opened by the grantor, upon which he sells house-lots, bounding them upon it.⁴ If the boundary is a street, the line is along the centre of it.⁵ If it is by a way of such a width, or a passage-way, and the soil and freehold of the way are in the grantor, it will be the centre of such way, whether it is a private way and open, or not yet laid out or open. It would, moreover, convey an easement of way over the other half of the defined way, while it reserved an easement over the part granted.⁶ And if the way is laid down on a plan referred to in the deed, it carries the right of having it kept

53; *Fisher v. Smith*, 9 Gray, 441; *Grose v. West*, 7 Taunt. 39; *Headlam v. Hedley*, Holt, 463; *Steel v. Prickett*, 2 Stark. 463; *Smith v. Slocomb*, 11 Gray, 285.

But where the grantor laid out a plan of several lots, having thereon an open space marked as "a park," and bounded the lots, in his conveyance of them, by the *park*, it was held, that the grantees were limited in their grants by the exterior line of the park, and could not claim to the centre of the space. *Perrin v. N. Y. Central Railroad*, 40 Barb. 65; *Hanson v. Campbell*, 20 Md. 223.

¹ *Church v. Meeker*, 34 Conn. 426, 429.

² *Tibbetts v. Estes*, 52 Me. 566, 568; *Falls Village, &c. Co. v. Tibbetts*, 31 Conn. 165; *Sproule v. Foye*, 55 Me. 164.

³ *Hollenbeck v. Rowley*, 8 Allen, 475.

⁴ *Hammond v. McLachlan*, 1 Sandf. 323; *Holmes v. Bellingham*, 7 Com. B. n. s. 329; *Fisher v. Smith*, 9 Gray, 441; *Phillips v. Bowers*, 7 Gray, 26; 17th Street, 1 Wend. 262; *Lozier v. N. Y. Cent. Railroad*, 42 Barb. 468; *Bissell v. N. Y. Cent. Railroad*, 23 N. Y. 61; *Adams v. Saratoga & W. Railroad*, 11 Barb. 484.

⁵ *Trustees v. Londer*, 8 Bush, 680.

⁶ *Stark v. Coffin*, 105 Mass. 330; *Falls v. Reis*, 74 Penn. St. 439; *Lewis v. Beattie*, 105 Mass. 410; *Boston v. Richardson*, 13 Allen, 154; *Fisher v. Smith*, 9 Gray, 444; *White v. Godfrey*, 97 Mass. 472; *Winslow v. King*, 14 Gray, 323; *Smith v. Howdon*, 14 C. B. n. s. 398.

open for the use of the granted land.¹ But bounding on a street or way does not imply any obligation on the part of the obligor to make it passable by grading it or otherwise.² Nor does it carry the line to the centre of the street, unless the grantor owns the soil and freehold thereof; and if he do not, the terms of the deed would be satisfied by extending to the side of the street.³ But the street would not be excluded by reason of the dimensions of the lot as given in the deed.⁴ Where the adjacent owner's land extends to the centre line of the street, and it is discontinued so far as it lay over his land, he holds it thereafter free from the incumbrance.⁵ It extends to lands bounding upon dedicated streets as well as to such as are regularly laid out and accepted, if they are open and in use.⁶ It extends also to streets in the city of New York.⁷ And in all cases of boundary, where the object referred to in the description is of considerable width, like an artificial ditch, a stone wall, and the like, the grant extends to the centre of it.⁸ The rule, as given in Massachusetts, is as follows: "Whenever land is described as bounded by other land, or by a building, the name of which, according to its legal and ordinary meaning, includes the title to the land of which it has been made part, as a house, a mill, a wharf, or the like, the side of the land or structure referred to as a boundary is the limit of the grant; but when the boundary-line is simply by an object, whether natural or artificial, the name of which is used in ordinary speech as defining a boundary, and not as describing a title in fee, and which does not, in its description or nature, include the earth as far down as the grantor owns, and yet which has width, as in the case of a way, a river, a ditch, a wall, a fence, a tree, or a stake and

¹ *Cox v. James*, 59 Barb. 144.

² *Hennesy v. Old Colony R. R.*, 101 Mass. 540; *post*, *671.

³ *Dunham v. Williams*, 37 N. Y. 251.

⁴ *Sherman v. McKeon*, 38 N. Y. 271.

⁵ *Wallace v. Fee*, 50 N. Y. 694.

⁶ *Weisbrod v. C. & N. W. Railroad*, 18 Wis. 43; *Banks v. Ogden*, 2 Wall. U. S. 57, 69.

⁷ *People v. Law*, 22 How. Prac. C. 115; *Wetmore v. Law*, *ib.* 130.

⁸ *Child v. Starr*, 4 Hill, 369, 373; *Warner v. Southworth*, 6 Conn. 471, 474; *Bradford v. Cressey*, 45 Me. 9; *Woodman v. Spencer*, 23 Am. L. Reg. 411.

stones, then the centre of the thing so running over or standing on the land is the boundary of the lot granted.”¹

52. While it has become an elementary principle, in construing a deed, that known and visible monuments, rather than admeasurements, shall govern, parol evidence is often admissible and necessary to identify and ascertain the locality of such monuments, and which of two or more objects answering the description of the monument named was intended, as where the monument is a pine-tree, and there are two, to either of which the description in the deed might refer.² So where the description in the deed leaves the boundaries intended doubtful, it is competent to show the practical construction given by the parties to the language used.³ If parties agree by parol as to what shall be a boundary between their lands, and acquiesce in it, it may be binding upon them, although sufficient time to establish adverse possession may not have passed.⁴ In all these cases, the question, *what* the boundaries of a given piece of land which has been conveyed by deed are, is for the court; *where* these boundaries are is a question for the jury.⁵ What is the true location of a survey is not one of construction, nor a question of law, but of fact;⁶ and whether a particular piece of land is included within the boundaries mentioned, if these are in dispute, is a question for the jury.⁷

[*636] * 53. But it is not competent to control the boundaries given in a deed by parol evidence that the parties supposed other land, in addition to what is embraced within such bounds, was included in the grant, or that the monument expressly described is different from the one in-

¹ *Boston v. Richardson*, 13 Allen, 154, 155; *Woodman v. Spencer*, 23 Am. L. Reg. 411.

² *Waterman v. Johnson*, 13 Pick. 267; *Frost v. Spaulding*, 19 Pick. 445, 447; *Ferris v. Coover*, 10 Cal. 624; *Middleton v. Perry*, 2 Bay, 539; *Claremont v. Carlton*, 2 N. H. 369, 373; *Cotton v. Seavey*, 22 Cal. 496.

³ *Stone v. Clark*, 1 Met. 378; *Choate v. Burnham*, 6 Pick. 274, 278; 3 Dane, Abr. 363; *Steele v. Taylor*, 1 A. K. Marsh. 315; *Gratz v. Beates*, 45 Penn. St. 504.

⁴ *Smith v. Hamilton*, 20 Mich. 433.

⁵ *Abbott v. Abbott*, 51 Me. 581.

⁶ *Opdyke v. Stephens*, 4 Dutch. 90

⁷ *Pettingill v. Porter*, 3 Allen, 349.

tended.¹ And although coming rather within the rules of evidence than of the construction and interpretation of deeds, it may be remarked, that what is called *reputation* is never evidence of title, nor is it admissible in support of private rights.² But it is sometimes admitted to establish what are the boundaries of particular parcels intended to be conveyed by deed, though it is believed that the monuments which may be thus identified must be both ancient and of a public or *quasi* public nature. Thus traditional evidence is admissible to show boundaries of ancient parishes.³ So, in one case, it was admitted to establish the line of a public grant of great notoriety made many years before, and which was referred to as a monument in a deed of adjacent land.⁴ So a map was admitted to establish a line which was proved to have been in existence many years, and referred to by the proprietors of the lands designated thereon as the original map of their location.⁵ But there is a singular looseness as well as discrepancy in the ruling of different courts upon the competency of reputation and hearsay evidence in establishing particular monuments and boundaries of private lands. Thus, in one case, McLean, J., instructed the jury that "reputation is admissible evidence to prove boundaries;" that what an individual had said of certain lines and corners did not constitute *reputation*; "the reputation must be general in the neighborhood."⁶ A similar doctrine is maintained by the *court of Kentucky.⁷ In North Carolina, [*637]

¹ Frost v. Spaulding, 19 Pick. 445, 448; Child v. Wells, 13 Pick. 121, where a deed which described and granted half of A, also B, also half of G, was held to convey the entire parcel B. Pride v. Lunt, 19 Me. 115. If a deed declares that a certain stake is a corner, parol evidence is not admissible to show that the stake is not the corner. McCoy v. Galloway, 3 Ohio, 283; Emerick v. Kohler, 29 Barb. 169; Parker v. Kane, 22 How. 1; Clark v. Baird, 5 Seld. 183; Dodge v. Nichols, 5 Allen, 548; Spiller v. Scribner, 36 Vt. 247; Gilman v. Smith, 12 Vt. 150; Peaslee v. Gee, 19 N. H. 278; Terry v. Chandler, 16 N. Y. 358; Dear v. Erskine, 18 N. H. 83, parol evidence excluded tending to show the grant of an entire lot, though described as half of it. Drew v. Swift, 46 N. Y. 209.

² Green v. Chelsea, 24 Pick. 71, 80.

³ 1 Greenl. Ev. § 145.

⁴ Taylor v. Strafford, 1 Hawks, 116, 132.

⁵ Harmer v. Morris, 1 McLean, 44; Whitney v. Smith, 10 N. H. 43; Gratz v. Beates, 45 Penn. St. 505.

⁶ Nelson v. Hall, 1 McLean, 518.

⁷ Smith v. Prewitt, 2 A. K. Marsh. 158; Beatty v. Hudson, 9 Dana, 322; Smith v. Shackelford, 9 Dana, 455; Cherry v. Steele, 6 Lit. 9.

“hearsay is evidence upon the question of boundary.” So one may show “common reputation and understanding in the neighborhood.”¹ And language about as strong is used by McLean, J., in the court of the United States.² In Pennsylvania, the court limited the testimony of what another person had said to the declarations of one then deceased.³ In New Hampshire, Richardson, C. J., refers to numerous cases, where, “in questions of boundary, declarations as to common opinion of the place, made by deceased persons, who from their situation had the means of knowledge, and no interest to misrepresent, have been generally considered admissible.”⁴ In Virginia, this doctrine is fully sustained in a very elaborate opinion by Tucker, Pres. J.⁵ In Ohio, such reputation cannot be admitted to control record evidence; though, “where corners are lost, they may be proved by reputation.”⁶ The rule on this subject, as adopted in Florida, is thus stated: “Such evidence, taken in connection with other evidence, is entitled to respect in cases of boundary, where the lapse of time is so great as to render it difficult, if not impossible, to prove the boundary by the existence of the primitive landmarks, or other evidence than that of hearsay.”⁷ And in New Jersey, in the case of *Opdyke v. Stephens*, cited above, the court say that “ancient reputation” is one of the things held competent to be shown to establish boundaries. The subject is ably examined by Mr. Greenleaf, in his treatise on Evidence, where many of these cases are considered; and the conclusion to which he comes is undoubtedly the sound one, that the general rule of law of this country excludes such evidence, when offered for the purpose of proving the boundary of a private estate.⁸ But this does not exclude evidence of

¹ *Den v. Herring*, 3 Dev. 340; *Tate v. Southard*, 3 Hawks, 119. But, by a more recent case, report or reputation in the neighborhood is not evidence of a paper title. *Den v. Cassells*, 3 Dev. & B. 49.

² *Boardman v. Reed*, 6 Pet. 341; *Conn v. Penn*, 1 Pet. (C. C.) 511, per Washington; *Opdyke v. Stephens*, 4 Dutch. 89, approving of *Conn v. Penn*.

³ *Buchanan v. Moore*, 10 S. & R. 281. See *Abington v. N. Bridgewater*, 23 Pick. 175, per Putnam, J.; *Pettibone v. Rose*, Brayt. 77.

⁴ *Shepherd v. Thompson*, 4 N. H. 214; *Great Falls v. Worster*, 15 N. H. 412, 437.

⁵ *Harriman v. Brown*, 8 Leigh, 697, 707, *et seq.*

⁶ *McCoy v. Galloway*, 3 Ohio, 282. ⁷ *Daggett v. Willey*, 6 Florida, 511.

⁸ 1 Greenl. Ev. § 145 and note; *Bartlett v. Emerson*, 7 Gray, 174; *Gratz v. Beates*, 45 Penn. St. 505.

admissions and declarations as to boundaries of land made by an owner while in occupation thereof.¹ The question was considered in *Bartlett v. Emerson*, where former cases decided by the court are commented upon by Thomas, J. In that * casè, a wood-cutter, then deceased, who had [*638] worked for more than fifty years upon the lot whose boundary was in question, and lived near it, but never owned or occupied either of the lots, had, at the request of the plaintiff, gone upon the plaintiff's lot in presence of witnesses, and pointed out an ancient stake which he declared was the corner-bound. The court held the evidence incompetent. They overrule the case of *Van Deusen v. Turner*, so far as it conflicts with this ruling, and restrict the admissibility of such declarations to those of persons not living at the time of the trial, made while in possession of land owned by them, and when in the act of pointing out their boundaries, with respect to such boundaries, where nothing appears to show an interest to deceive or misrepresent. The fact of the witness going upon the land, and the finding of the stake, do not seem to have been objected to, but merely the declarations made to what it indicated. It has, moreover, been determined in England, that no declarations of a tenant while in possession of the land, in derogation of the title of the reversioner, are admissible in evidence.² Nor can the declaration of one tenant in common be received as evidence against another.³ The rule as to declarations, as laid down in more recent cases, seems to be this: A claim made by one in possession of lands, and while upon the land, as to a boundary thereof, which he then pointed out, may be shown after his death as evidence in favor of one claiming under him.⁴ The declaration as to ownership by one in possession, though it will be evidence against another who claims in privity under him, yet, in order to have that effect, it must be made by him while in occupation, and while he is the owner of the estate. It will not bind the estate,

¹ *Jackson v. M'Call*, 10 Johns. 377; *Daggett v. Shaw*, 5 Met. 223; *Van Deusen v. Turner*, 12 Pick. 532; *Orr v. Hadley*, 36 N. H. 575. See *Ware v. Brookhouse*, 7 Gray, 454.

² *Papendick v. Bridgwater*, 5 Ellis & B. 166, 477.

³ *Pier v. Duff*, 63 Penn. St. 59.

⁴ *Wood v. Foster*, 8 Allen, 24.

although he afterwards becomes the owner of it.¹ The same rule prevails in New Hampshire, except that the court allowed in evidence the declaration of a former owner while he owned the land, but not made upon the land, that he and the person under whom the adverse party claimed had established a certain stake as the corner, such stake then standing, and being now claimed at the trial, as the true corner.² But the declaration of an owner of an adjacent lot to that in controversy, made upon such adjacent lot, as to its boundary, is not evidence after his death as to the boundary of such lot, as neither of the parties claimed under him. It is confined to declarations made by one under whom some of the parties claim, made upon the lot in controversy as to bounds.³ If made anywhere else than on the land, it is not competent evidence. So if the person making it is not dead.⁴ But in Vermont, the declaration of one who had owned the land, but did not then own it, made upon the land in respect to an ancient monument, was admitted as evidence after his death.⁵

54. Where one deed refers to another for a description of the granted premises, it is regarded as of the same effect as if the latter was copied into the deed itself, and what is therein described will pass.⁶ Thus where the same grantor conveys two parcels of land to two different owners at the same time, one of which contains the grant of one easement over the other, and this is referred to in the other's deed, they are to be construed together in ascertaining what such easement is, and what are its limitations.⁷ So in the grant of a mill and buildings by metes and bounds, "together with all the water-privilege that was conveyed by A to B by deed: it was held that the deed referred to fixed the extent of the privilege, instead of the extent of flowing at the date of the grant."⁸

¹ *Noyes v. Morrill*, 108 Mass. 399.

² *Smith v. Forrest*, 49 N. H. 230.

³ *Sullivan Co. v. Gordon*, 57 Me. 522.

⁴ *Morrill v. Titcomb*, 8 Allen, 100; *Currier v. Gale*, 14 Gray, 504. But see *Smith v. Forrest*, 49 N. H. 230.

⁵ *Wood v. Willard*, 37 Vt. 377; *Smith v. Powers*, 15 N. H. 546, note.

⁶ *Allen v. Bates*, 6 Pick. 460; *Foss v. Crisp*, 20 Pick. 121; *Vance v. Fore*, 24 Cal. 444; *Boylston v. Carver*, 11 Mass. 515, 517; *Jenks v. Ward*, 4 Mich. 404; *Allen v. Taft*, 6 Gray, 552; *Lippitt v. Kelley*, 46 Vt. 523.

⁷ *Knight v. Dyer*, 57 Me. 176.

⁸ *Perry v. Binney* 103 Mass. 158.

But a reference to a deed will not exclude a parcel actually granted in the deed in which the reference is made, though not included in the deed referred to.¹ Nor does it make any difference that the deed referred to has not been duly acknowledged or recorded. But if a deed or plan is referred to as one on record, no other than a recorded deed or plan is competent to be used in evidence.² In applying boundaries and monuments referred to in a description of granted premises, "between" two objects, excludes these objects and all not lying within them.³ So "from" an object, or "to" an object, or "by" it, excludes the terminus referred to.⁴ "Beginning at the south-west corner of the granted premises, at A B's north-east corner," means that the corner of these lots should be coincident and identical.⁵

55. Where lines are laid down upon a plan, and are referred to accordingly in a deed, they are to be regarded as giving the true description of the parcel, as much as if expressly recited in the deed itself.⁶* In this way, a line may be

* NOTE.— Rules of construction, somewhat arbitrary and artificial in their nature, have been applied in determining the rights of riparian owners of lands bordering upon inlets and arms of the sea, and in some cases upon rivers where the shore-line is curved or crooked, so far as relates to the flats adjacent to this line, or in the case of rivers lying between it and the thread of the stream. As the side-lines of the respective parcels belonging to different owners of the upland, if extended in a direct course to low water or to the centre of the stream, might often cross each other, some special and peculiar mode or principle of determining such admeasurement and boundary became necessary for settling these conflicting rights. The reader will find these explained in Angell

¹ Needham v. Judson, 101 Mass. 161; Whitney v. Dewey, 15 Pick. 434.

² Simmons v. Johnson, 14 Wis. 526; Caldwell v. Center, 30 Cal. 543.

³ Revere v. Leonard, 1 Mass. 91.

⁴ Hatch v. Dwight, 17 Mass. 289; 298; 4 Greenl. Cruise, Dig. 265, note. Bonney v. Morrill, 52 Me. 256; Millett v. Fowle, 8 Cush. *150; Carbrey v. Willis, 7 Allen, 370, whether bounding by "a house" is the body or eaves of the building. Wells v. Jackson Iron Co., 48 N. H. 491.

⁵ Bailey v. White, 41 N. H. 343.

⁶ Davis v. Rainsford, 17 Mass. 207, 211; Kennebec Purchase v. Tiffany, 1 Mo. 219; Thomas v. Patten, 13 Me. 329; Lunt v. Holland, 14 Mass. 149; Shirras v. Caig, 7 Cranch, 48; McDonald v. Lindall, 3 Rawle, 496; Ferris v. Coover, 10 Cal. 622; Morgan v. Moore, 8 Gray, 319; Farnsworth v. Taylor, 9 Gray, 162, as to passing streets exhibited upon a plan. See also Rogers v. Parker, Id. 445; Murdock v. Chapman, 9 Gray, 158; Spiller v. Scribner, 36 Vt. 247; Birmingham v. Anderson, 48 Penn. St. 253; Parker v. Bennett, 11 Allen, 393.

supplied which was omitted in the description contained in the deed.¹ So a plan referred to in a deed, describing land as bounded by a way laid down upon a plan, may be used as evidence in fixing the locality of such way.² Ancient maps and surveys are evidence to elucidate and ascertain boundaries and fix monuments.³ If a plan is referred to in a deed for description, and on it are laid down courses, distances, and other particulars, it is the same as if they were recited in the deed itself. So if a point in the description of a parcel granted bound by a way, there is an implied grant of a right of way to connect between the street or public way and the way by which the parcel is bounded; and this connecting way may be ascertained by a reference to the plan on which the way is laid, provided these passage-ways are over the grantor's land. And such would be the effect if the lot granted adjoined the passage-way as laid down upon the plan of lots referred to, although the parcel were not expressly bounded in the deed by the way.⁴ But though a deed refers to a plat or plan of land, or a line, it may be read in evidence without producing the plat or plan; and the line may be established

on Watercourses, §§ 55, 56, and in the following cases: *Emerson v. Taylor*, 9 Me. 42; *Rust v. Boston Mill Corp.*, 6 Pick. 158; *Deerfield v. Arms*, 17 Pick. 41, 44, 45; *Commonwealth v. Alger*, 7 Cush. 67; 9 Gray, 521, 522, notes and cases cited; *Atty.-Gen. v. Boston Wharf Co.*, 12 Gray, 553. It may, however, be stated as a general rule in such cases, that where land is bounded by a river on one side, and the side-lines of the lot are oblique to the course of the river from the points where the side-lines strike the edge of the stream, the side-lines are to be extended at right angles with the course of the river, if it is not navigable, to the thread of the stream; and where, as in Pennsylvania, it bounds by a navigable river in which the tide does not ebb and flow, these lines are to be extended to low-water mark, on the ground that the shore-lines of riparian owners fix the shares belonging to them of the river-bottom in front of their lots. *Clark v. Campau*, 19 Mich. 325; *Bay City Gaslight v. Industrial Works*, 28 Mich. 182; *Gray v. Deluce*, 5 Cush. 12; *Stockham v. Browning*, 3 C. E. Green, 396; *O'Donnel v. Kelsey*, 10 N. Y. 412; *Wood v. Appal*, 63 Penn. St. 210, 224. For a rule by which to divide alluvion, formed upon the bank of a navigable stream, among riparian proprietors, see *Batchelder v. Keniston*, 51 N. H. 496; and for dividing flats which are granted with the adjoining upland, see *Stone v. Boston, &c. Co.*, 14 Allen, 230, and *Wonson v. Wonson*, 14 Allen, 85.

¹ *Chamberlain v. Bradley*, 101 Mass. 191. ² *Stetson v. Daw*, 16 Gray, 374

³ *McCausland v. Fleming*, 63 Penn. St. 36.

⁴ *Fox v. Union Sugar Co.*, 109 Mass. 292.

by other competent evidence, as, for example, by long possession up to a fence standing upon the line.¹

*56. It is often customary to insert in a deed, by [*639] way of explanation or for some similar purpose, recitals of certain things, which, though not necessarily a part of the deed, are often useful in aiding to understand the intention of the parties to the same. In the celebrated case of *Cholmondeley v. Clinton*, the judgment of the court was materially affected by the clew to the intention of the parties supplied by the recitals in the deed. The language of Wilde, J., upon this subject, is: "Every deed is to be construed according to the intention of the parties, as manifested by the entire instrument, although it may not comport with the language of a particular part of it. Thus a recital or a preamble in a deed may qualify the generality of the words of a covenant or other parts of a deed."² And he illustrates his proposition by a case where the lands intended to be conveyed were particularly named in the preamble, and were afterwards minutely described in the premises; to which was added a sweeping clause, purporting to convey "all other the donor's lands, tenements, and hereditaments in Ireland." But it was held, that this general clause was limited and restricted by the recitals and preamble, and nothing passed beyond what was there described.³ These recitals are usually a part also of the premises of the deed.⁴ In a recent case it was held, that a recital in a deed might constitute a covenant, and render the party liable accordingly.⁵

57. If the grantor wish to except any thing out of what he may, in general terms, have granted, it is proper that such exception should follow the description of the thing granted; and it comes, therefore, under the head of the premises in the deed. As an exception is the taking of something out of the thing granted which would otherwise pass by the deed, it may be said, in general terms, that it ought to be stated and

¹ *Deery v. Cray*, 10 Wall. 263.

² *Allen v. Holton*, 20 Pick. 463, 464.

³ *Moore v. Magrath*, Cowp. 9. See *Peck v. Handey*, 2 Texas, 673, 677.

⁴ *Cholmondeley v. Clinton*, 2 Jac. & W. 124; *Shep. Touch. Prest. ed. 76*, and cases cited in the note; 4 *Cruise*, Dig. 264.

⁵ *Farrall v. Hilditch*, 5 C. B. n. s. 840.

described as fully and accurately as if the grantee were the grantor of the thing excepted, and the grantor, in the deed, were made the grantee by the exception. It must, in the first place, be a part of the thing included in the grant, and be to be taken, in substance, out of that; in which respects [*640] it differs from a reservation, which, * as will be explained, is always of some new right not *in esse*, in substance at the making of the grant. Exceptions are often made in the form of a reservation, where the thing intended not to pass by the deed is then existing. Thus the grant of a farm, "reserving to the public the use of the road through said farm," "also reserving for W. R. R. the roadway for said road as laid out," &c., was held to except the easement of the public and of the railroad out of the granted premises, and that the soil and freehold of these passed by the deed, the effect being to create an *exception*, and not a *reservation*.¹ The uncertainty arising from this cause renders it necessary to refer to rules laid down by the courts for discriminating between exceptions and reservations. "A title or right acquired by the grantor by reservation in a deed-poll stands, in this respect, upon the same footing as that which is acquired by direct grant or conveyance; but whatever is excluded from the grant by exception *remains* in the grantor as of his former title or right."² If, by the deed, the grantor reserves a license to enter upon the granted premises and extract from mines therein a limited quantity of ore, and to become thereby revested in the property of what is thus separated, it is a *reservation* proper; if it is a reservation of an exclusive right to extract ore, retaining in the grantor the property in the mines, it is an *exception* from the grant.³ So where A granted land to B, reserving one acre to C. As a reservation it would be void, in being made to a stranger; and it was therefore held to be an *exception* of the acre, and that C took nothing.⁴ And where B had a right of way across A's land, and, in conveying it, A reserved the right of way to B,

¹ Richardson v. Palmer, 38 N. H. 212, 223; Hurd v. Curtis, 7 Met. 110; Pettee v. Hawes, 13 Pick. 323.

² Stockbridge Iron Co. v. Hudson Iron Co., 107 Mass. 321.

³ *Ib.* 322.

⁴ Corning v. Troy Iron Co., 40 N. Y. 209.

it was held to be an *exception* of the right of way out of the granted premises, because, as a reservation to a stranger, it would be invalid.¹ That the thing intended to be saved to the grantor is an easement is not a reliable test of its being a reservation. It may be an exception, as was held in case of a partition by two tenants in common, by mutual deeds of grant, in one of which the grantor reserved to himself a right of way of a certain width to his own lot over the lot of the other. It was held to be a part of the right previously enjoyed *excepted* out of the grant.² So where one sold a well which supplied several houses, stables, &c., with water, excepting the branches of the aqueduct conducting to the "take-outs" of the grantor, at his store, &c., it was held to be an *exception* from the grant.³ But whether it be a reservation or an exception of a right to use and enjoy land, it will extend to the *assigns* of the one in whose favor it is created.⁴ So in *Fancy v. Scott*, where, in the lease, the lessor *reserved* the peat and a right to dig it, and so pleaded it as a reservation, it was held to be an *exception*, and not a reservation. "A landlord cannot *reserve* a component part of the lands demised or granted."⁵ Accordingly, when A sold his land, *reserving* the coal, it was held to be an *exception*, thereby making the grantor the separate and absolute owner of the coal.⁶ So where one granted, "except as hereinafter excepted," it being in the granting part of the deed, it was held not to be an exception out of the thing granted, but an excluding of such part from the grant altogether: *si quis rem dat et partem retinet, illa pars quem retinet semper cum eo est et semper fuit.*⁷ The effect, in such a case, in respect to the thing excepted, is as if it never had been included in the deed.⁸ So there may be

¹ *Bridger v. Pierson*, 45 N. Y. 601, 603; *Westpoint Co. v. Reymert*, 45 N. Y. 707.

² *Bowen v. Conner*, 6 Cush. 132, 137; *Dennis v. Wilson*, 107 Mass. 591. See *Munn v. Warrall*, 53 N. Y. 44.

³ *Emerson v. Mooney*, 50 N. H. 316.

⁴ *Metcalf v. Westaway*, 17 C. B. N. s. 658, 667; *Dennis v. Wilson*, *sup.*

⁵ *Fancy v. Scott*, 2 M. & R. 335. See also *Doe v. Lock*, 2 A. & E. 724; *Dyer*, 19 a, pl. 110, 143 a; *post*, *645.

⁶ *Whitaker v. Brown*, 46 Penn. St. 197.

⁷ *Greenleaf v. Birth*, 6 Peters, 302, 310; 60 Lit. 47 a.

⁸ 1 Wood, Conv. 207, and Powell's note; *Shep. Touch* 77.

an exception out of an exception, limiting the general effect of the exception, and withdrawing something from its operation, which will therefore pass by the general grant.¹ The writers last cited give ten rules in relation to what may be excepted, and how an exception may be properly made. But it will be sufficient to refer to some general principles which are applicable to cases of this kind. In the first place, the exception must not be repugnant to the grant: if it is, it is void. Consequently, while it is competent to make an exception of a particular thing out of a general grant, it is not so if the grant itself is special and particular. Thus, if the grant were of a lot of land, describing it, and making general mention of its quantity,—as twenty acres, for instance,—it would be competent to except out of it one acre; but, if the grant had been of twenty acres specifically, it would be obviously repugnant to such a grant to except one acre. In the one case, the twenty acres are mentioned as a part of the description of the entire lot or parcel; in the other, the grant is of each and every acre of the twenty, and to except one is to take back what had been once specifically granted.² So one may grant a farm, excepting the meadow; but to grant a pasture and meadow, excepting the meadow, would be repugnant and void.³ The rule, as given in one of the cases, is, that exceptions must be of something that can be severed from what is granted. Reservations are always of something issuing or coming out of the thing or property granted, and not a part of the thing itself. They must be to the grantor, and not to a stranger: if to a stranger, they are void.⁴ In one case, an administrator sold the estate of his intestate after his wife had had her dower set out, and in it described the premises by metes and bounds, excepting the widow's thirds of so many acres, set off on the west side of the tract. It was held to be an exception of her life-estate in that part of the tract, and not so much of the tract itself in fee.⁵

¹ 1 Wood, Conv. 208; Shep. Touch. Prest. ed. 78, and note.

² Shep. Touch. 79; Sprague v. Snow, 4 Pick. 54; Cutler v. Tufts, 3 Pick. 272; 4 Greenl. Cruise, Dig. 271, note.

³ Shep. Touch. 79.

⁴ Borst v. Empie, 1 Seld. 38; Barber v. Barber, 33 Conn. 335; *post*, pl. 67.

⁵ Crosby v. Montgomery, 38 Vt. 238.

58. It may be added, that whatever may pass by words of grant may be excepted by like words, and the same consequences attach to such an exception as would have attached had it been a grant; such as, for instance, that it carries with it constructively to the grantor making the exception all the necessary means of enjoying or availing himself of it.

Thus *if one grant land, excepting the trees, he has a [*641] right to enter and cut them and carry them away.¹

So, if he excepts the mines, he retains the powers incident to working them.² So, if the exception from an estate be a mill standing upon it, it includes therewith the land under it, and so much as is necessary to use it, with the necessary privileges of water for working it, unless this water-privilege and land be the estate particularly granted, in which case the exception would only cover the building.³ The *reservation* of "a cider-house and cider-mill" standing upon land which is granted, "so long as the cider-house shall stand," was held to be a reservation of a freehold estate in the land on which the buildings were, as long as they should stand irrespective of the use made of them.⁴

59. And the same rule applies to an exception as to a grant, in respect to the limitation of the estate thereby created. If the exception be to himself without words of inheritance, the grantor takes only a life-estate; and if he means to retain a fee in what he excepts, he must limit it accordingly.⁵ It will be perceived that the terms "exception" and "excepted" are used here, as in many of the reported cases, without discriminating between a technical *exception*, where the thing which is not to go to the grantee in the deed remains in the grantor as it was originally, and a *reservation*, where the thing which is to be the grantor's comes back to him from the grantee in the nature of a grant. In the first, the grantor

¹ Shep Touch. 100; Broom, Max. 365; Dand v. Kingscote, 6 M. & W. 174; Pettee v. Hawes, 13 Pick. 322, 327.

² Wms. Real Prop. 174.

³ Allen v. Scott, 21 Pick. 25; Howard v. Wadsworth, 3 Me. 471. See, as to the exception of a house in granting a farm, Sanborn v. Hoyt, 24 Me. 118.

⁴ Esty v. Currier, 98 Mass. 500.

⁵ Shep. Touch. 100; Jamaica Pond v. Chandler, 9 Allen, 170; Curtis v. Gardner, 13 Met 461; *post*, pl. 66-68.

continues to hold as he held before the deed was made, and needs no words of limitation to define the grantor's estate ; in the other, the estate intended to be *created* in the grantor for the first time, must be defined by proper words of limitation, as in the case of any grant.¹

The term "premises," it will be perceived, has thus far been used as embracing all that part of a deed which precedes the *habendum* ; and this is the proper technical sense of the term as used in conveyancing. In its etymological sense, the term applies to that which has been before mentioned, and includes facts recited in the instrument in which it is used ; but, in popular phrase, it is used for the lands and tenements themselves which are the subject of grant.²

60. The next orderly part of a deed is the *habendum*, which begins at the words "to have and to hold," &c., the office and purpose of which is to limit and define the estate which the grantee is to have in the property granted, such as whether for life, in fee, and the like. After what has been said in the early part of this work as to the different kinds of estate, and the proper words by which these various estates may be limited, it will not be necessary to repeat in what [*642] form of phraseology an *habendum* must be framed to accomplish the purpose for which it is designed. As has already been observed, it is not an essential part of a deed ; and Chancellor Kent declares that it has degenerated into a mere useless form. If the granting part of the deed contain proper words of limitation, the *habendum* may be dispensed with altogether ; and of so little importance is it deemed, compared with the words of the grant, that, if the *habendum* is clearly repugnant to the grant, it is treated as of no validity or effect.³ But where the grant is indefinite from its generality in respect to the estate in the lands conveyed which it is intended to create in the grantee, the

¹ Emerson v. Mooney, 50 N. H. 318 ; Wheeler v. Brown, 46 Penn. St. 197 ; Keeler v. Wood, 30 Vt. 242 ; Smith v. Ladd, 41 Me. 314 ; Winthrop v. Fairbanks, 41 Me. 307 ; Dennis v. Wilson, 107 Mass. 593 ; Stockbridge Iron Co. v. Hudson Iron Co., 107 Mass. 321 ; Randall v. Randall, 59 Me. 338, 340.

² Sumner v. Williams, 8 Mass. 162, 174 ; Wms. Real Prop. 14 ; Doo v. Meakin, 1 East, 456, 459 ; Bouvier, Dict. "Premises."

³ Flagg v. Eames, 40 Vt. 23.

habendum serves to define, qualify, or control it.¹ Thus a lease of land to one, *habendum* to him and his heirs, conveys a fee.²

61. An *habendum* may, therefore, be regarded as the clause following the granting part of the premises in a deed which defines the extent of ownership in the thing granted, to be held and enjoyed by the grantee, and can, therefore, be applied to use only when the granting words leave the subject of such ownership open to explanation. Thus a grant to A of certain lands, without any other words of limitation, leaves it doubtful what is to be the extent of ownership, as to time, which he is to have therein; though, to supply the omission, the common law would construe it to mean that he should enjoy it for life. But if a clause follows the grant, declaring that he is to hold the estate for years, or to himself and his heirs, it simply defines what had been before left indeterminate. So if the grant be to "A and his heirs," the term "heirs" is indefinite; though, if no explanation is given, the law construes it to mean heirs generally. But a clause following the grant, declaring that he is to hold to him and the "heirs of his body," simply defines what heirs were meant by the general term used in the grant. But because the broadness of the grant, if to one and his heirs, embraces all minor estates, it has been held, as it is said, that though the limitation in the *habendum* be to a certain class of heirs, namely, to heirs of the body, and would be good, *yet, [*643] if this class of heirs were to fail, the general heirs of the grantee would take; there being at first, by the terms of the grant, a fee-simple which is expectant upon the estate-tail which is first to take effect.³ The rule, as stated by Mr. Powell in the note above cited, is this: "Where a deed first speaks in general words, and afterwards in special words, and the latter accord with the former, this deed shall operate

¹ Co. Lit. 6 a; Termes de la Ley, "Habendum;" Sumner v. Williams, 8 Mass. 162, 174; 1 Wood, Conv. 224, and Powell's note; Shep. Touch. 475. 4 Kent, Com. 468; Berry v. Billings, 44 Me. 423.

² Jamaica Pond v. Chandler, 9 Allen, 168.

³ 1 Wood, Conv. 224, Powell's note. See also Shep. Touch. 102. Mr. Preston, in his edition of the latter work, in a note to the same, denies the proposition. But see Thurman v. Cooper Poph. 138.

according to the special words, whether they enlarge or restrain the general words that precede.”¹ Thus where A made a deed of an estate to J. S. for life, and to her eldest son who should be living at her death, and to his eldest son living at his death, and so on, with an *habendum* “to A and her heirs as aforesaid,” it was held to be a grant to A for life; and that the *habendum* to her heirs aforesaid was to be taken as meaning her son, who took a remainder as purchaser.² The *habendum* may enlarge, expound, qualify, or vary the estate granted in the premises;³ but it can never extend the subject-matter of the grant.⁴ So the terms of the grant may be qualified and limited by those of the *habendum*, when express reference is made in the premises to the *habendum*. Thus where one granted to A three hundred acres of land, “subject to the limitations hereinafter expressed as to part thereof,” and in the *habendum* one hundred and fifty acres designated were to the use of the grantee during his life, and at his decease to go to his children, it was held to give a fee in one half, and a life-estate in the other.⁵ The words of the *habendum* are mere “words of limitation,” as they are called, in distinction from the words in the grant, which are those “of purchase;”⁶ and in those States where a fee may by statute be limited without the word “heirs,” a proper reference is to be had to the terms of these statutes in determining how far the grant and *habendum* are compatible and consistent with each other.

62. If, therefore, any thing is embraced in the *habendum* which is not granted, it does not pass. Thus upon a grant of Blackacre, *habendum* Blackacre and Whiteacre, the first only passes. If, however, the person who is to take is not named in the grant, he may be ascertained if named in the *habendum*; since there is no repugnancy between the two, and the grant alone takes effect.⁷ A stranger to the deed

¹ 1 Wood, Conv. 199, 212, 223, 224, note; Perkins, § 167; 4 Cruise, Dig 274; Wrotesley v. Adams, Plowd. 187, 196.

² Ford v. Flint, 40 Vt. 382.

³ Moss v. Sheldon, 3 W. & Serg. 162.

⁴ Manning v. Smith, 6 Conn. 292

⁵ Tyler v. Moore, 42 Penn. St. 374, 388.

⁶ 4 Cruise, Dig. 265; 1 Wood, Conv. 212.

⁷ Spyye v. Topham, 3 East, 115; 1 Wood, Conv. 206, 212; 4 Cruise, Dig

may take by way of remainder, though not named in the premises ; but otherwise one shall not take a present interest jointly with another, unless named in the premises.¹ So if a feofment be to A and B of two acres, *habendum* one acre to A, and the other to B, it is incompatible with the grant, and will not stand against the grant to the two.²

63. If, however, there is a clear repugnance between the nature of the estate granted and that limited in the *habendum*, the latter yields to the former ; but if they can be construed so as *to stand together by limiting the [*644] estate without contradicting the grant, the court always gives that construction in order to give effect to both. If, therefore, a grant be to A and his heirs, *habendum* to him for years or for life, the restrictive clause is void, because it contradicts and defeats the grant.³ Where, by the premises, the estate is granted to one, it cannot by the *habendum* be limited to another ; nor can the *habendum* frustrate a grant complete before, or abridge or lessen the estate granted.⁴ A lease to A, *habendum* to him and his heirs for a hundred years, will be a good *habendum* for years ; the incompatible clause of “ his heirs,” as words of inheritance, being held void, the estate demised being one for years only.⁵ Instead of referring to the numerous cases where the principles above stated have been applied, it may be sufficient to say, that the test to be applied to an *habendum* in a deed is, whether it can be construed so as to stand with the premises, or is so repugnant in its operation as to be irreconcilable with the latter. In the one case, it limits and explains the grant ; in the other, it is rejected as of no effect.⁶

272 ; Shep. Touch. 75 ; 2 Prest. Conv. 380, 433 ; *contra*, *Bustard v. Coulter*, Cro. Eliz. 902, 903 ; *Berry v. Billings*, 44 Me. 424 ; *Sumner v. Williams*, 8 Mass. 174.

¹ Co. Lit. 26 b, note, 154 ; *Greenwood v. Tyler*, Cro. Jac. 564 ; *Brooks v. Brooks*, Ib. 434.

² 1 Wood, Conv. 199, 212 ; Shep. Touch. 76 ; *Hafner v. Irwin*, 3 & 4 Dev. & Bat. 434.

³ 1 Wood, Conv. 199, 212, 224 ; Shep. Touch. 102 ; 4 Cruise, Dig. 273 ; *Tyler v. Moore*, 42 Penn. St. 376.

⁴ *Nightingale v. Hidden*, 7 R. I. 118 ; 4 Cruise, 272 ; *Walters v. Breden*, 70 Penn. St. 237.

⁵ Shep. Touch. 76.

⁶ Shep. Touch. 74 ; 4 Cruise, Dig. 274 ; 1 Wood, Conv. 199, 212.

64. The *habendum* frequently serves to limit the uses, or to declare to what use the party to whom the deed is made shall have the thing granted, and generally to limit the uses to which the estate shall be held;¹ and this, it will be recollected, by recurring to the doctrine of uses, may be important, where no consideration is expressed or proved, in preventing the use from resulting to the grantor.² It may be added, that, though usually inserted immediately after the premises, the *habendum* may be embraced in any other part of the deed, and be equally valid.³

65. In the English deeds, there is usually inserted a clause in relation to the transfer of the title-deeds of the premises, where the estate granted is a fee; but there is no occasion for such a clause in this country, since the registry furnishes all that is requisite in the history of the title, and the title-deeds never pass with the estate from grantor to grantee successively, as in England.⁴

[*645] * 66. If any thing is to be reserved out of the property granted, it is usually done by the clause of *reddendum*, as it is called, which commonly follows that of the *habendum*. A reservation should be carefully distinguished from an exception, the difference between the two being this: By an exception, the grantor withdraws from the effect of the grant some part of the thing itself which is *in esse*, and included under the terms of the grant, as one acre from a certain field, a shop or a mill standing within the limits of the granted premises, and the like; whereas a reservation, though made to the grantor, lessor, or the one creating the estate, is something arising out of the thing granted not then *in esse*, or some new thing created or reserved, issuing or coming out of the thing granted, and not a part of the thing itself, nor of any thing issuing out of another thing.⁵ Thus a grant of land, reserving the right to cut and carry away the pine-timber upon the premises at any time within two

¹ Shep. Touch. 114; 1 Wood, Conv. 212; Nightingale v. Hidden, 7 R. I. 118.

² *Ante*, pp. *116, *132-134.

³ 1 Wood, Conv. 213.

⁴ 4 Greenl. Cruise, Dig. 271.

⁵ Co. Lit. 47 b; 4 Kent, Com. 468; Shep. Touch. 80; 1 Wood, Conv. 227; Doe v. Lock, 4 Nev. & M. 807; Dyer v. Sanford, 9 Met. 395, 404; Cutler v. Tufts, 3 Pick. 272, 278. See *ante*, pl. 57-59.

years, was held not to be an exception of an absolute property in the trees, but a mere reservation of a right to enter within two years and cut and remove them, but not after that time.¹ The terms "reserve" and "reservation," however, are often used as synonymous with "except" and "exception," when the thing to be thereby secured to the grantor is a part of the granted premises; and, when thus used, they are to be construed accordingly.² Thus the grant of land reserving the use of a well is a reservation, and not an exception; giving the grantee a right to use it also, if he could do so without interfering with the use of it by the grantor.³ But a parol exception or reservation of a part of the granted premises which are conveyed by deed would be void.⁴ Where one of several co-tenants, by quitclaim-deed, granted a farm, reserving the aliquot part of the portion of the farm which had been set to the grantee's mother as dower, it was held to be an exception of the land itself, and not merely of the widow's right of dower therein.⁵ Where one granted a farm, and in his deed reserved the buildings with a right to remove them in so many days, it was held to be a mere license to remove them within that time, but giving him no right in respect to them after that time.⁶ So where one granted his farm, reserving the highways across it, it was construed to be an exception as to easements in the covenants contained in his deed, and not the soil of these.⁷ So it is said that a reservation may be of money, corn, a horse, or the like, and be good as such; but the reservation of the grass or vesture, or other profits of the land granted, would be void as a technical reservation.⁸ The term in the English books

¹ *Rich v. Zeilsdorff*, 22 Wis. 544.

² *Doe v. Lock*, 4 Nev. & M. 807, where the distinction between exception and reservation is examined at length, and a reservation of "the wood and underground produce" of the estate was held to be an exception. See *Pettee v. Hawes*, 13 Pick. 323, 326; *Hurd v. Curtis*, 7 Met. 110. See *ante*, 640.

³ *Barnes v. Burt*, 38 Conn. 541.

⁴ *Wickersham v. Orr*, 9 Iowa, 253, 259; *Bond v. Coke*, 71 N. C. 97.

⁵ *Clark v. Cotrel*, 42 N. Y. 527.

⁶ *Holton v. Goodrich*, 35 Vt. 21.

⁷ *Richardson v. Palmer*, 38 N. H. 212; *Leavitt v. Towle*, 8 N. H. 96; *Winthrop v. Fairbanks*, 41 Me. 311; *Bridger v. Pierson*, 45 N. Y. 601, 603.

⁸ 1 Wood, Conv. 228. It is held in Pennsylvania, that growing crops may be reserved by parol upon conveying an estate, although no mention of them

applies chiefly to rents, or something in the nature of rent; the words on the part of the grantee or lessee being "yielding or paying therefor," &c.¹ But in this country the cases are numerous where the thing reserved is some easement, privilege, or benefit, out of the granted premises, other than and different from the thing granted, and yet nothing like [*646] a rent or return by the grantee, to be by him paid * or delivered to the grantor. In the case of *Sprague v. Snow*, the thing reserved was a right to use the surplus water of a stream, and the court describe it as "an exception or reservation."² Probably, in applying the foregoing rules of construction, it would be held to be an exception, as the thing granted was a water-privilege with a shop. But in *Choate v. Burnham*,³ the reservation was of a privilege of a way through the granted premises. In *Dyer v. Sanford*,⁴ the reservation was of an easement of light and air to the grantor for the benefit of his house, over a parcel of land adjoining it then granted, in the same way as it had been used before. It was held, that where one granted land, reserving a right to a tail-race across it for the benefit of a mill, but no line for it was fixed, if there was one then in use, it would be the one reserved; if there was none in use, and grantor had gone on and excavated one with the grantee's assent, it would have fixed the place for it, and the same could not afterwards be changed by him.⁵ In *Cutler v. Tufts*,⁶ the court say that a reservation "must be of some new right not *in esse* before the grant, as of rent, &c., or of some *pre-existing* easement." In *O'Neal v. Matson*,⁷ the grant was of a fishery, with a reservation to the grantor to take fish for his own table. And the matter treated as a reservation in *Hornbeck v. Westbrook* was a limited right to cut and carry away wood from the granted premises.⁸ But a reservation in the sale

is made in the deed. *Backenstoss v. Stahler*, 33 Penn St. 251; *ante*, *625; *Adams v. Morse*, 51 Me. 499.

¹ 1 Wood, Conv. 225.

² *Sprague v. Snow*, 4 Pick. 54; *Karmuller v. Krotz*, 18 Iowa, 357.

³ *Choate v. Burnham*, 7 Pick. 274.

⁴ *Dyer v. Sanford*, 9 Met. 395.

⁵ *Galloway v. Wilder*, 26 Mich. 98, 99.

⁶ *Cutler v. Tufts*, 3 Pick. 272, 278

⁷ *Seymour v. Courtenay*, 5 Burr. 2814.

⁸ *Hornbeck v. Westbrook*, 9 Johns. 73.

and conveyance of a saw-mill of all slabs made at the mill would be void.¹

67. Among the rules regulating reservations, one is, that it must be to him who made the deed, and not to a stranger. Thus a reservation in a grant to A of B's right of way, or his right to take seaweed and the like, gives no right to B, unless he had it before. It merely saves the grantor from liability arising from his covenant against incumbrances in case B had such a right.² A second is, that, a reservation being equal to a grant, there must be proper words of limitation and inheritance, if the grantor intends to secure it to himself and his heirs, or extend the enjoyment beyond his own life.³ A reservation of the trees on the land conveyed to the grantor and his heirs is a reservation of the fee in the trees then standing, with a right of soil to have them stand and grow until cut, and a right to enter and cut them. A reservation of the wood and trees for ever growing on the land is of a right in the soil itself, for the growth and nourishment of trees, so long and so far as it may be used for that purpose.⁴ But a reservation of the trees to the grantor and his heirs on land granted is limited to the trees then growing, without any limit as to the time of their removal.⁵ A reservation of certain parts of the granted premises, "for the use of our mother," is that of a life-estate only.⁶

68. Another rule of general application is, that the reservation must be out of the estate granted, and not out of another; though, in some peculiar cases, such a reservation may operate in the nature of a grant from the grantee, to charge upon other premises the burden of contributing the means of enjoying what is thus reserved. An illustration of both these propositions * may be found in the case of Dyer [*647]

¹ *Adams v. Morse*, 51 Me. 497.

² *Hill v. Lord*, 48 Me. 95; *Bridger v. Pierson*, 45 N. Y. 601, 603; *Westpoint Iron Co. v. Reymert*, 45 N. Y. 707.

³ *Hornbeck v. Westbrook*, 9 Johns. 73; 1 Wood, Conv. 228, 230; *Seymour v. Courtenay*, 5 Burr. 2814, 2817; *Bean v. Coleman*, 44 N. H. 542.

⁴ *Putnam v. Tuttle*, 10 Gray, 48; *Clap v. Draper*, 4 Mass. 266; *White v. Foster*, 102 Mass. 378.

⁵ *Putnam v. Tuttle*, 10 Gray, 49.

⁶ *Keeler v. Wood*, 30 Vt. 242.

v. Sanford.¹ There the grantor, owning a house with a window opening out of the same, and a strip of land adjoining it twenty-five inches wide, conveyed the strip of land to the adjacent owner, reserving the right for ever of keeping open the window aforesaid. It was contended, that, by so doing, he reserved also the light and air that came over the grantee's land to said window from beyond this space of twenty-five inches. But it was held that he had not this right; for a grantor could not, by a reservation in his own deed, acquire an easement in his grantee's land, unless the carrying out of the grant, according to the stipulations in the deed, of itself provided the means of giving operation and effect to the reservation therein, and created an obligation on the part of the grantee to suffer him to use it. And the case, put by way of illustration, was as follows: "Suppose A has close No. 2, lying between closes Nos. 1 and 3 of B, and A grants to B the right to lay and maintain a drain from No. 1 across No. 2, thence to be continued through No. 3 to its outlet, and reserves in his deed the right to enter his drain for the benefit of his intermediate close, together with the right and privilege of having the waste water therefrom pass off through the grantee's close, No. 3, for ever. In effect, this, if accepted, would secure to the grantor a right in the grantee's land; but we think it would enure by way of implied grant or covenant, and not *strictly* as a reservation."

69. For the reservation of freehold rents, as well as rents under demises, the reader is referred to former parts of this work for a fuller consideration of the subject, under the heads of Estates for Years, and Rents.

70. Conditions inserted in deeds, restraining or limiting the effect thereof, have been already noticed under the heads of Estates upon Condition, and Conditional Limitations; and all that is necessary to add upon the subject here is, that such a clause, if it is to be inserted, properly comes next in order after the *habendum* or *reddendum*. And to show how liberal courts are in construing conditions so as to give effect to deeds,

¹ *Dyer v. Sanford*, 9 Met. 395.

the case of *Pierson v. Armstrong* may be mentioned, where the limitation was to A and his heirs, and if A died without *children* living at his death, then over, and he left one child at his death, it was held to save the condition, and this child took a fee absolute.¹

¹ 1 Iowa, 295.

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* SECTION V.

COVENANTS IN DEEDS.

1. Of the different kinds of covenants in deeds.
2. Covenants usually found in deeds.
3. Covenants *in presenti* and *in futuro*.
- 4, 5. In what cases the covenant of seisin runs with land.
6. Slater *v.* Rawson : what sustains a covenant of seisin.
7. What seisin and possession give effect to covenant of warranty
8. Cases impugning possession as a sufficient seisin to pass estate.
9. What is embraced and implied in the covenant of seisin.
10. Of covenant of seisin, &c., of an indefeasible estate, &c.
11. Covenant of seisin broken at once, if grantor has no possession.
12. What things constitute a breach of the covenant of seisin.
13. Of covenants against incumbrances.
14. What constitutes an incumbrance.
- 14 a. How far this covenant may be *in futuro*.
15. Of covenant of warranty.
16. Covenant of warranty same as that for quiet enjoyment.
17. Feudal origin and nature of warranty.
18. Covenant of warranty a personal one.
19. Such covenant runs with the estate.
20. Actions for breach of warranty must be by the party evicted.
- 21, 22. Where subsequent warrantor can recover of previous one.
23. Who can release covenant of warranty.
24. Covenant of warranty broken only by eviction.
- 25, 26. Of limited covenants of warranty.
27. Of eviction in case of warranty and covenant for quiet enjoyment
28. What may be treated as an eviction.
29. When a party is liable for an eviction by a junior title.
30. Of covenant for further assurance.
31. Effect of warranty in the way of estoppel.
32. When warranty operates a rebutter.
33. Of lineal and collateral warranty.
34. Of implied covenants of warranty.
35. Effect of covenants, express and implied in the same deed.
- 35 a. How far purchaser is liable for a charge on the estate granted
36. Statutes of States as to implied covenants in deeds.
- 36 a. When mention of quantity of land is a covenant.
37. Of the rule of damages for breach of covenants.
38. Damages for breach of covenant of seisin.
39. Damages in case of incumbrances.
40. Effect of the payment of damages upon right to recover from others
41. Of damages under a covenant of warranty.
42. Rules in different States as to damages.

1. IN ordinary deeds, next to the parts which have thus been considered in detail, are inserted the clauses of covenant in respect to the title to the granted premises. But it must be a deed in effect as well as in form, in order to have the covenants contained in it available; for if the effect of the instrument be that of a will, though in form a deed, as may be the case, no action can be maintained upon a covenant of warranty contained in it.¹ For a full examination of the subject, the reader is referred to the able and exhaustive work of Mr. Rawle upon Covenants for Title. It, however, should be borne in mind, that in the conveyance of real estate, if no covenants are expressed in the deed, there is not, as in the sale and transfer of chattels, a warranty of the title. If the deed contains no covenant, the purchaser is wholly without remedy. The right of the grantee to relief, either in law or in equity, on account of defects or incumbrances in the title, in the absence of fraud, depends solely upon the covenants for title which he has received. But if he have been induced by fraud to accept a title, he may have his remedy.² But a vendor will be liable for fraudulent representations as to title, if accompanied with damage, although his deed contains covenants of title.³

Covenants in deeds are either *express*, or are *implied* from certain words and forms of expression made use of in them, to which the law has attached an obligation, although not, by their ordinary import, expressing any contract or agreement, which are used in connection with these words of implied covenant. Of this character are the words "give," "grant," "demise," and some other,⁴ which will be hereafter considered.

2. The three covenants ordinarily found in deeds of conveyance in the Eastern States are those contained in the form of a deed heretofore given; namely, of seisin, and right to convey, against incumbrances and of warranty. In the English deeds there is a covenant for further assurance, which is

¹ Scott v. Scott, 70 Penn. St. 248; Co. Lit. 386 a.

² Brandt v. Foster, 5 Iowa, 292.

³ Whitney v. Allaire, 1 Comst. 308; Wardell v. Fosdick, 13 Johns 325.

⁴ Wms. Real Prop. 365-369; Walk. Am. Law, 381; 1 Wood, Conv. 232; Co. Lit. 334 a, n. 332

also found in deeds in use in some of the Middle States, and a covenant of quiet enjoyment. It is said that the covenant of seisin is not in use now in England, being embraced in that of a right to convey; while in the Western States, Pennsylvania, and the Southern States, the covenant of warranty is not unfrequently the only covenant inserted.¹ In Iowa, a covenant of warranty is held to embrace the whole three above mentioned.² It is said that covenants for further assurance are not in general use in this country.³ In Ohio, the usual covenants are of seisin and warranty.⁴ Covenants of seisin, and right to convey, amount to the same thing.⁵ In construing and applying covenants, they are intended not to enlarge but to defend the quantity of estate granted in the deed; so that, if the grant be of less than a fee, a covenant to warrant it to the grantee and his heirs does not enlarge the estate to a fee.⁶ But covenants are sometimes resorted to to aid in construing doubtful grants.⁷ Sometimes a general covenant of warranty to a grantee and his heirs may estop the grantor and his heirs, though the granting words do not, in terms, carry an inheritance without actually enlarging the estate granted; but such covenant does not estop, when the deed shows what estate was intended to be granted, if that is less than a fee.⁸

[*649] * 3. A marked difference between covenants of seisin, and right to convey, and against incumbrances, and of those of warranty, quiet enjoyment, and further assurance, is, that the former are all in the present tense, relating to something being or existing at the time when the covenant

¹ Wms. Real Prop. 69, and Rawle's note; *Caldwell v. Kirkpatrick*, 6 Ala. 60.

² *Van Wagner v. Van Nostrand*, 19 Iowa, 426.

³ *Foote v. Burnet*, 10 Ohio, 317, 329; *Armstrong v. Darby*, 26 Mo. 517, case of such a covenant. See *Funk v. Creswell*, 5 Iowa, 62; *Colby v. Osgood*, 29 Barb. 339, held to be a covenant that runs with the land.

⁴ *Walk. Am. Law*, 382.

⁵ *Griffin v. Fairbrother*, 10 Me. 91, 95; *Prescott v. Trueman*, 4 Mass. 627, 631; *Raymond v. Raymond*, 10 Cush. 134, 140; *Brandt v. Foster*, 5 Iowa, 294; *contra*, *Richardson v. Dorr*, 5 Vt. 21.

⁶ *Ross v. Adams*, 4 Dutch. 168; *Adams v. Ross*, 1 Vroom, 509, 510.

⁷ *Mills v. Catlin*, 22 Vt. 104.

⁸ *Shaw v. Galbraith*, 7 Penn. St. 111; *Férrett v. Taylor*, 9 Cranch, 53; *Adams v. Ross*, 1 Vroom, 509; *Blanchard v. Brooks*, 12 Pick. 67; *Co. Lit.* 385 b.

is made; while the others relate to something future, and are to guard against the consequences of some future act, or for the performance of some future act which the condition of the title to the estate may require. Two important consequences grow out of this form of the first-named covenants; namely, that, if they are ever broken, the breach is simultaneous with the making of the covenant. If the grantor was then seised, he had made good his covenant, and he had a right to convey; if he was not seised, he had violated his covenant as soon as made, and had no right, at common law, to convey the estate, and nothing passed by the deed. So with incumbrances: these did or did not exist when the deed was made; and if they did, the covenant that they did not was then broken. A further consequence was, that a cause of action was at once created in favor of the covenantee to recover his damages; and this being what in law is called a *chose in action*, the law, as a general proposition, does not allow of its being transferred to another to be taken advantage of by him in his own name. So that a covenant of seisin is not one which can be transferred from one grantee to another grantee of the land in relation to which it is made: in other words, it is not a covenant that runs with the estate. This may be stated as the American doctrine, though differing in some respects from that of the modern English decisions, and, to a certain extent, those of several of the States.¹

4. In the leading English case of *Kingdon v. Nottle*, the covenant of seisin is regarded as one that will run with the *land, and may be sued upon by an as- [*650] signee.² And the courts of Indiana have adopted the

¹ *M'Carty v. Leggett*, 3 Hill, 135; *Thayer v. Clemence*, 22 Pick. 490, 493; *Slater v. Rawson*, 1 Met. 450; *Fitzlugh v. Croghan*, 2 J. J. Marsh. 429, 438; *Mitchell v. Warner*, 5 Conn. 497; *Clark v. Swift*, 3 Met. 390, 392; *Bartholomew v. Candee*, 14 Pick. 167; *Rawle, Cov.* 3d ed. 342, n. for American cases; 4 Kent, Com. 471, 472; 1 Smith, Lead. Cas. 5th Am. ed. 174; *Catlin v. Hurlburt*, 3 Vt. 403, 407; *Morrison v. Underwood*, 20 N. H. 369; *Kincaid v. Brittain*, 5 Sneed. 119, 123; *Swasey v. Brooks*, 30 Vt. 692; *Mott v. Palmer*, 1 Comst. 573; *Wilson v. Cochran*, 46 Penn. St. 229, 231; *Hall v. Plaine*, 14 Ohio St. 422; *King v. Gilson*, 32 Ill. 354; *Hamilton v. Wilson*, 4 Johns. 72; *Donnell v. Thompson*, 10 Me. 170; *Baker v. Hunt*, 40 Ill. 266.

² *Kingdon v. Nottle*, 1 Maule & S. 355, s. c. 4 Id. 53. The statute of Maine

same doctrine.¹ The same is true of Iowa, where the covenant of seisin is regarded as running with the land. It is, moreover, divisible, so that, if a part of the granted premises be conveyed to a third person, he may recover *pro rata* for a breach. The courts get over the difficulty, that, after the covenant is broken, it becomes a mere chose in action, by assuming that choses in action are assignable by the laws of that State; although they hold, in the same case, that such covenants are divisible, and run with the estate.² The court of Ohio make a distinction between the case of a covenant of seisin, where the covenantor is in possession at the time of making the grant, and where he is not in possession: in the first the covenant runs with the land to a second grantee; in the other it does not.³ In Illinois, the covenant of seisin runs with the land.⁴ The case of *Kingdon v. Nottle* has been subjected to able criticism by two, at least, of the American courts;⁵ and the doctrine seems to confound all distinction between covenants of seisin and warranty.

5. In respect to the extent and construction given to covenants of seisin in American deeds, there is an irreconcilable discrepancy in the decisions of the courts. This remark, as will hereafter appear, does not apply to cases where the grantor, when making his deed, is actually out of possession of the granted premises, but to those where he has a possession under a claim of title adverse to him who has the rightful seisin. In some of the States, the covenant of seisin is regarded as having been made good by such a possession; and that, for any subsequent eviction by one having a better title, the grantee or his assignee has no remedy upon his covenant of seisin, but must rely upon that of warranty, if such cove-

gives the assignee of a grantee a right to maintain an action upon a covenant of seisin against the covenantor. Rev. Stat. 1857, c. 82, § 16.

¹ *Martin v. Baker*, 5 Blackf. 232; *Coleman v. Lyman*, 42 Ind. 289.

² *Kneedler v. Sharp*, 36 Iowa, 236; *Schofield v. Homestead Co.*, 32 Iowa, 317. The court cite *Keene v. Sanger*, 14 Johns. 89, where the covenant was for quiet enjoyment; and the court in that case say that "a covenant of seisin, broken the instant it was made, could not be assigned," p. 93.

³ *Backus v. McCoy*, 3 Ohio, 218, 221.

⁴ *Richard v. Bent*, 59 Ill. 45.

⁵ *Mitchell v. Warner*, 5 Conn. 497, 504; *Clark v. Swift*, 3 Met. 390, 392. See also *Moore v. Merrill*, 17 N. H. 79; *Shep. Touch.* 170.

nant be contained in his deed. In other words, in some of the States a covenant of seisin is one *in præsentia*, which can be broken, if at all, only when the deed is delivered, and consequently cannot run with the land to a future grantee; while in other States it is held to be a covenant annexed to the land, running with the same, and to be availed of, upon any future breach, by an heir or assignee of the covenantee.

Thus, in Ohio, the courts hold that "it is a real covenant annexed to the land, and passes with it to the heir or assignee, until he who has the paramount title may assert it, and evict the person in possession, when it becomes a mere claim to damages to be enforced by him who has been evicted."¹ The covenant, as thus construed, becomes one of indemnity, not an undertaking *merely, [*651] that the grantor's title is absolutely good, but that the grantee shall be saved harmless if it prove defective, and he is deprived of his estate.² And to that extent it has the same operation as a covenant of warranty; which is now the English doctrine.³ In Massachusetts, on the other hand, the court held, in *Marston v. Hobbs*, that to sustain a covenant of *lawful seisin*, and *right to convey*, which are regarded as synonymous, it was not necessary that the covenantor should be seised of an indefeasible title, but that a seisin in fact was sufficient, whether he gained it by his own act of disseisin, or was in under a prior disseisor. If, at the time he executed the deed, he had the exclusive possession of the premises, claiming the same in fee-simple by a title adverse to that of the owner, he was seised in fee, and had a right to convey. Nor is it necessary that the grantor in possession should have a legal title.⁴ If a covenantee sue the covenantor for a breach of the covenant of seisin, the burden is on him to show that the covenantor was not seised.⁵ In *Twambly v. Henley*, this was followed by a ruling, that the covenant of good right to convey amounted to a covenant

¹ *Backus v. McCoy*, 3 Ohio, 211, 221; *Foote v. Burnet*, 10 Ohio, 312, 332; *Devore v. Sunderland*, 17 Ohio, 52, 60.

² 1 Smith, Lead. Cas. 5th Am. ed. 174.

³ Walk. Am. Law, 382, 383.

⁴ *Beddoe v. Wadsworth*, 21 Wend. 124; *Wilson v. Widenham*, 51 Me. 567; *Griffin v. Fairbrother*, 10 Me. 95.

⁵ *Ingalls v. Eaton*, 25 Mich. 35.

that the lands should pass by the conveyance, and was not broken if the covenantor was, in fact, seised either by wrong or by a defeasible title.¹

6. The more recent case of *Slater v. Rawson* not only sustained the doctrine above stated, but established the further doctrine, that if one in actual possession, under a claim of right, conveys land with covenants of seisin and warranty, a seisin thereby passes by the deed, and with it enough of estate to attach to it the covenant of warranty, and that the latter would run with the land to the grantee of such covenantee. The facts of this case were, in brief, these: Jacobs was the owner of a parcel of unenclosed woodland. Rawson, under a claim of title to the land, went upon it from time to time, cutting wood and timber thereon, without being disturbed by Jacobs in these acts of possession. He then conveyed it, with covenants of seisin and warranty, to the plaintiff's [*652] grantor. Jacobs having *claimed the land, the plaintiff yielded to his title, and brought an action upon the defendant's covenant of warranty. It was objected, that as Jacobs' seisin was not defeated by these acts of Rawson, and as there could be but one seisin of land, when Rawson conveyed, he had no seisin, and no estate passed by his deed which would carry the covenant of warranty, so as to entitle the present plaintiff to sue upon it as assignee by virtue of his deed from Rawson's grantee. But it was held, that, though the seisin of Jacobs was not affected by the acts of possession of Rawson, he acquired thereby, as to all the world besides, such a seisin as enabled him to convey an estate in the premises which carried with it the covenant of warranty which ran with the land.²

¹ *Marston v. Hobbs*, 2 Mass. 433; *Twambly v. Henley*, 4 Mass. 439; *Bearce v. Jackson*, 4 Mass. 408; *Prescott v. Trueman*, 4 Mass. 627, 631; *Raymond v. Raymond*, 10 Cush. 134, 140; 4 Dane, Abr. 339.

² *Slater v. Rawson*, 1 Met. 450, 6 Id. 439; *Beddoe v. Wadsworth*, 21 Wend. 120; *Fitzbugh v. Croghan*, 2 J. J. Marsh. 429; *Cushman v. Blanchard*, 2 Me. 266, 268; *Dickinson v. Hoopes*, 8 Grat. 353, 397, expressly affirming *Slater v. Rawson*; *Fowler v. Poling*, 2 Barb. 300, 304, s. c. 6 Barb. 165; *Griffin v. Fairbrother*, 10 Me. 91, 95; 1 Smith, Lead. Cas. 5th Am. ed. 157; *Backus v. McCoy*, 3 Ohio, 218; *Devore v. Sunderland*, 17 Ohio, 218. Chancellor Kent does not favor the doctrine. 4 Kent, Com. 471, n.; *Bartbolomew v. Candee*, 14 Pick. 167; *Willard v. Twichell*, 1 N. H. 177, overruled *arguendo* in *Barker v. Brown*. 15 N. H. 176, 187; *Overfield v. Christie*, 7 S. & R. 177.

7. From the apparent inconsistency of regarding the covenant of seisin broken as soon as made, and yet holding the deed in which it is contained to convey so much estate in the land as to carry with it the covenant of warranty, it would seem, that, in such a case as *Slater v. Rawson*, the covenant of seisin would be saved. And such seems to be the doctrine maintained, more or less directly, in several of the cases above cited; ¹ although Mr. Rawle remarks that "it does not necessarily follow that such a seisin will support a covenant for seisin." ²

8. There is a class of cases which impugn the doctrine maintained in *Marston v. Hobbs*, and some other of the cases above cited, that actual seisin and possession of granted premises by the grantor, when he makes his deed, supports his *covenant that he is lawfully seised; [*653] and Mr. Rawle says that the doctrine is confined to the States in which the cases arose, and has not passed without contradiction in others. ³ In New Hampshire, the doctrine is severely criticised in the opinion of Parker, Ch. J., in *Parker v. Brown*; and it is maintained that a covenant that one is lawfully seised is not supported by a seisin which may be good against all but the true owner, since it is not a seisin in the party's own right in fee. "Parties," says the chief justice, "not conversant with the law, ordinarily understand this covenant as an assurance of a title; and we are of opinion that they have the right so to understand it:" "that the deed may transmit a seisin, in virtue of which, and a possession under it, the grantee may obtain evidence of an indefeasible fee-simple, does not show that the terms of the covenant are fulfilled." ⁴ If the court mean by the covenant of seisin one of assurance of title, what that term ordinarily implies, it seems to go the whole length of affirming that such

¹ *Fowler v. Poling*, 2 Barb. 304, 305; *Dickinson v. Hoopes*, 8 Gratt. 396, *Cushman v. Blanchard*, 11 Me. 269; *Willard v. Twichell*, 1 N. H. 175; *Marston v. Hobbs*, 2 Mass. 433.

² Rawle, *Cov.* 3d ed. 53, n. See also 4 Kent, *Com.* 471 and note.

³ Rawle, *Cov.* 3d ed. 26; 4 Kent, *Com.* 471, note; *Kincaid v. Brittain*, 5 Sneed, 120.

⁴ *Parker v. Brown*, 15 N. H. 176, 187; reaffirmed in *Partridge v. Hatch*, 18 N. H. 498. See also *Mills v. Catlin*, 22 Vt. 106; *Brandt v. Foster*, 5 Iowa, 294.

covenants run with the land, as it is laid down in broad terms that "all covenants concerning title run with the land, with the exception of those that are broken before the land passes."¹ So that, instead of being a covenant *in presenti*, it is both present and future in its operation, and, in its future operations, is like that of warranty. In *Lockwood v. Sturdevant*, the court of Connecticut, after remarking in regard to *Marston v. Hobbs*, and *Twambly v. Henley*, that, "if these determinations are considered as law, they will not aid the party citing them," take occasion to comment upon and dissent from the law of these cases. The case under consideration was one where the covenant declared on was that the grantor was seised "as of a good *indefeasible* estate in fee-simple," when, in fact, he had only a life-estate. In the opinion of the court, it is said: "A seisin, in fact, as it has been called, is not an indefeasible estate, and a seisin for life is not an estate in fee."² A covenant of this [*654] * special character, as will be shown hereafter, is regarded as essentially different from the ordinary covenant of seisin; and, therefore, did not seem to call for this criticism. Questions analogous to these have arisen, and been considered by the court of Vermont, in one of which reference is made to the case of *Marston v. Hobbs*, and a distinction is recognized between a covenant that the grantor "is lawfully seised in fee" and that he is "seised of an indefeasible estate in fee-simple." The case was a peculiar one, and was between the original parties, where the land, when conveyed, was in a state of nature, and the covenantor had no title to it beyond mere possession when he made his deed, and the grantee was never disturbed in his possession, until, by lapse of time, he had acquired an undisputed title to the land by the statute of limitations. The plaintiff, in an action upon the covenant of seisin, recovered nominal damages. The court refer to *Abbot v. Allen*, sustaining the distinction between a covenant of seisin and one of seisin of an indefeasible

¹ 4 Kent, Com. 473; Rawle, Cov. 3d ed. 333; that covenants of seisin do not run with the land, 2 Sugd. Vend. Ham. ed. 458, and note. *Griffin v. Fairbrother*, 10 Me. 95. See *Backus v. McCoy*, 3 Ham. 219, following *Kingdon v. Nottle*.

² *Lockwood v. Sturdevant*, 6 Conn. 374, 386.

estate, in which case *Marston v. Hobbs* is referred to upon the same point.¹ In *Catlin v. Hurlburt*, the court examine the original doctrine of covenants of seisin, and suggest that they were introduced into deeds to guard against such an adverse possession as would render the deed void, as would have been the case at common law, and, as is stated by the court, "is now the case by virtue of our statute, if there be an adverse possession." "While we had no such statute," they add, "in this State, and there was no special reason for inserting that covenant, except to follow existing forms, the phraseology of that covenant has been varied, and it has generally been considered synonymous with covenant of title, and frequently has been so worded as necessarily to be a covenant of title." So that the character of the covenant in that State seems to depend chiefly upon local law.²

9. Much, therefore, must depend, in determining the effect to be given to covenants of seisin, upon the meaning which * courts attach to the term. If it is limited to [*655] the mere fact of being in possession under a claim of right, then such possession will support it, and the absence of it will be a breach; and the language of a large number of cases is thereby sustained, that the covenant of seisin is broken, if at all, as soon as made. And Mr. Rawle, in reference to the effect of possession in supporting the covenant of seisin, remarks: "There is one point of view from which the construction thus given to this covenant might readily appear to be correct. Since possession, enduring for a sufficient length of time, will, under the limitation acts, ripen into a good title, there would seem reason for holding that such possession should be regarded as an actual estate from the moment of its commencement; and, therefore, that the seisin which this covenant purports to assure might properly be used in its old signification, and not, as has been more recently the case, as synonymous with title."³ Whatever is asserted by the deed to be true, or covenanted therein to be true, as that the covenantor is seised, or lawfully seised, must be true or false at

¹ *Garfield v. Williams*, 2 Vt. 327; *Abbot v. Allen*, 14 Johns. 248, 252.

² *Catlin v. Hurlburt*, 3 Vt. 403-407. See *Brandt v. Foster*, 5 Iowa, 295.

³ *Rawle, Cov.* 3d ed. 23, 24.

that time, and will not become otherwise by any subsequent event. If, for instance, he is in possession, and covenants that he has a right to convey the estate to another, it is just as true after having been in such possession a month or a year as it would be if this possession had been continued nineteen years and three hundred and sixty days; and if the covenant is broken as soon as made, it is difficult to understand how it can afterwards run with the land through subsequent conveyances to after-purchasers as assignees.

10. It seems from the statement of Mr. Rawle, that while, in this country, "seised" and "lawfully seised" are but different forms of the same covenant, and identical in effect,¹ in the early English cases these terms were held to mean the same as "seised of an *indefeasible* estate."² The effect of the latter covenant in this country, when expressly [*656] made, is uniformly *held to extend farther than that of the ordinary covenant of seisin, and to cover an existing outstanding title adverse to that of the grantor. It is intended to meet the case where one is in possession, and his grantee wishes for a remedy, if he shall discover that a third person has a better title, which, for any reason, he does not see fit to enforce by eviction, so as to lay a foundation for an action by the grantee upon his covenant of warranty. The damages in an action upon such a covenant may be merely nominal, as in the case above cited of *Garfield v. Williams*, where the plaintiff had been suffered to enjoy undisturbed possession under his conveyance till his title had become consummated by the statute of limitations.³ This latter form of the covenant of seisin, though not in general use in this country, is fully recognized, in the distinction between its terms and those in which such covenant is usually framed, by many of the cases, among which the following may be referred to.⁴ It may be remarked, in passing, that if the covenant of seisin is deemed to be broken by a mere want of title in the grantor,

¹ Rawle, Cov. 3d ed. 20; 4 Dane, Abr. 339.

² Rawle, Cov. 20.

³ *Garfield v. Williams*, 2 Vt. 328. See *Wilson v. Forbes*, 2 Dev. 30; *Bender v. Fromberger*, 4 Dall. 439; *Kincaid v. Brittain*, 5 Sneed, 123.

⁴ *Preston v. Trueman*, 4 Mass. 627, 631; *Abbot v. Allen*, 14 Johns. 248, 252; *Smith v. Strong*, 14 Pick. 128; *Collier v. Gamble*, 10 Mo. 467, 472; *Raymond v. Raymond*, 10 Cush. 134, 140; *Bender v. Fromberger*, 4 Dall. 436, 439.

who is in possession under a claim of right, and conveys the land with the usual covenant of warranty as well as of seisin, and if the grantor's deed conveys the possession so that the grantee may avail himself of it in giving him an estate in the land, it is difficult to see why the covenantor may not be subjected to two actions, if the title fails in the grantee of his vendee, by an entry and eviction by him who has the paramount title, — one in favor of his immediate covenantee upon the covenant of seisin, and the other in favor of the assignee of the covenantee upon the covenant of warranty.

11. In one respect the authorities seem to be uniform, and the rule of law the same in all the States, except where the subject is controlled by local statute; and that is, if the grantor has no possession of land, either by himself or by another, where he undertakes to convey it by deed, and enters into a * covenant of seisin therein, nothing passes by [*657] his deed, and this covenant is broken at once; nor can he be made liable thereon to any assignee to whom his grantee may undertake to convey the estate.¹ And the cases cited below, as well as some others already referred to, state the doctrine as one of general application, that a proper covenant of seisin is broken, if at all, as soon as made.²

12. In respect to what constitutes a breach of the covenant of seisin, it has been held that the existence of an easement or incumbrance upon the land, like a highway, or a mortgage, or an equitable lien, is not such a breach, if possession has not been taken under such mortgage.³ So the existence of a railroad across land which is conveyed with a covenant

¹ 1 Smith, Lead. Cas. 5th Am. ed. 159; Slater v. Rawson, 1 Met. 450; Devore v. Sunderland, 17 Ohio, 60; Greenby v. Wilcocks, 2 Johns. 1; Dickinson v. Hoopes, 8 Gratt. 397; 4 Kent, Com. 471; Pollard v. Dwight, 4 Cranch, 430; Walk. Am. Law, 382; Garfield v. Williams, 2 Vt. 327; Bartholomew v. Candee, 14 Pick. 170; Mitchell v. Warner, 5 Conn. 497; Backus v. McCoy, 3 Ohio, 218, 221.

² Rawle, Cov. 3d ed. 110; Walk. Am. Law, 382; Fowler v. Poling, 2 Barb. 303; Cushman v. Blanchard, 2 Me. 269; Wilson v. Forbes, 2 Dev. 30, 35; Griffin v. Fairbrother, 10 Me. 95; Bickford v. Page, 2 Mass. 455; Wilson v. Cochran, 46 Penn. St. 231.

³ Rawle, Cov. 3d ed. 51; Fitzhugh v. Croghan, 2 J. J. Marsh. 429, 437, 439; Whitbeck v. Cook, 15 Johns. 483; Reasoner v. Edmondson, 5 Ind. 393; Mills v. Catlin, 22 Vt. 98, 106.

of seisin is not a breach of such covenant, though it would be of a covenant against incumbrances.¹ But the existence of an outstanding life-estate would constitute a breach; and Mr. Rawle suggests that an outstanding term of years might also have this effect.² But it has been held, that if premises, when granted, are in the possession of another as tenant of the grantor, which was known to the grantee at the time the deed was made, such possession is not a breach of the covenants in the grantor's deed. The tenant becomes the tenant of the grantee, and the possession of the tenant becomes his possession.³ Such would be the case if the quantity of land expressly granted and described is materially less than would answer to such description; at least, such seems to be the rule in South Carolina.⁴ And the covenant of seisin would be broken if there were no such land in existence as that described and purported to be conveyed in the covenantor's deed.⁵ And, generally, where a part of the thing granted is not owned by the covenantor, but is owned by another;⁶ as if one of two tenants in common convey the entire estate with covenants of seisin, the covenant as to one-half the estate would be broken at once, and the purchaser might recover back one-half the purchase-money.⁷ Where one owning land on which was a spring of water granted to another the right to take the water by pipes and carry it on to other land, and then sold his estate with covenants, it was held that there was thereby a breach of the covenant of seisin in respect to the spring.⁸ So if there are buildings, or fences, or other fixtures, standing upon and attached to premises conveyed with covenants of seisin, and these buildings, &c., belong to other persons who have a right to remove them, the covenant of seisin will, if no exception of these is made in the

¹ *Kellogg v. Malin*, 50 Mo. 496.

² *Rawle, Cov.* 52.

³ *Lindley v. Dakin*, 13 Ind. 388.

⁴ *Pringle v. Witten*, 1 Bay, 256. See *Kincaid v. Brittain*, 5 Sneed, 123.

⁵ *Wheelock v. Thayer*, 16 Pick. 68, 70; *Bacon v. Lincoln*, 4 Cush. 210; *Basford v. Pearson*, 9 Allen, 389.

⁶ *Mott v. Palmer*, 1 Comst. 564; *Brandt v. Foster*, 5 Clarke (Iowa), 295; *Wilson v. Forbes*, 2 Dev. (Law) 35.

⁷ *Downer v. Smith*, 38 Vt. 468.

⁸ *Clark v. Conroe*, 38 Vt. 469; *Lamb v. Danforth*, 59 Me. 324.

grant, be broken ; and * the purchaser of the estate [*658] may, in an action thereon, recover the value of such buildings and fixtures.¹ But one in possession under a patent, who conveys with covenants of seisin, would not be liable thereon, because such patent was voidable, and with it the title to the premises ;² and if one purchase of another, with covenants of seisin, lands of which he is himself in possession, and to which he has a good title, and these facts were known to him at the time of taking his deed, he could not recover of his covenantor in an action for a breach of such covenant.³

13. Much that has been said of the covenant of seisin, and right to convey, may be applied to the covenant against incumbrances. If there be an incumbrance, the covenant, being *in præsentî*, is broken as soon as made.⁴ Accordingly, if the covenant be broken in the lifetime of the covenantee or one holding the covenant, his executor or administrator must sue upon it, and not his heir.⁵ In Iowa, though the covenant against incumbrances be *in præsentî*, if a second or third grantor from the covenantee be called upon to discharge it, in order to protect his title, he may sue and recover upon the covenant what he has been required to pay.⁶ The same is the law in Illinois.⁷ But incumbrances are so various in their description and character, that the same rule cannot well be applied to all. Some of them, like an existing right of way over the premises, or a permanent easement, are as much incumbrances when the deed is made as they ever can be, and, of course, actually diminish and detract from the value of the estate at that time. Other incumbrances, like an existing right of dower or an outstanding mortgage, may or may not impair the value of the premises conveyed, according as these claims are or are not enforced. The person entitled to dower may die before

¹ *Mott v. Palmer*, 1 Comst. 564, 572, case of a fence ; *West v. Stewart*, 7 Penn. St. 122, case of a building ; *Powers v. Dennison*, 30 Vt. 752 ; *Van Wagner v. Van Nostrand*, 19 Iowa, 427.

² *Pollard v. Dwight*, 4 Cranch, 430, 432.

³ *Fitch v. Baldwin*, 17 Johns. 161.

⁴ *Cathcart v. Bowman*, 5 Penn. St. 317 ; *Clark v. Swift*, 3 Met. 392.

⁵ *Frank v. Bellis*, 33 Ind. 135.

⁶ *Kradler v. Sharp*, 36 Iowa, 236

⁷ *Richard v. Bent*, 59 Ill. 45.

having it set out, or the mortgagor may pay the mortgage-debt and relieve the estate. If, in the cases first supposed, the covenantee sues upon his covenant, he recovers the damage which the estate sustains by the existence of such a permanent incumbrance; in the other, he can only recover nominal damages until it shall have been ascertained that the widow or mortgagee will enforce their claim, and he has paid or satisfied the same.¹ Suppose that such a grantee con-

veys the estate to a third person by a deed of quit-
[*659] claim or other * deed not of warranty, and the dower right or mortgage is then enforced for the first time against the last-named purchaser, and regarding the first grantor's covenant, as to these incumbrances, as one *in præ-senti*: the second purchaser would be without remedy against him; being a mere assignee of a covenant broken before assignment made. But if he shall be evicted by the enforcement of the widow's or mortgagee's claim, these being paramount titles to his, he may avail himself of the covenant of warranty if there were one contained in the first deed, disregarding altogether that against incumbrances.² But this is obviated now by statute in Massachusetts, giving a right of action for a breach of this covenant, in some cases, "to the grantee, his heirs, executor, administrator, successors, or assigns."³

14. An incumbrance, within the terms of the covenant against them, is said to be "every right to, or interest in, the land, to the diminution of the value of the land, but consistent with the passage of the fee by the conveyance."⁴ An

¹ Prescott v. Trueman, 4 Mass. 627, 629; Thayer v. Clemence, 22 Pick. 490, 493; Clark v. Swift, 3 Met. 390, 392; Wyman v. Ballard, 12 Mass. 304; Tufts v. Adams, 8 Pick. 547; Rawle, Cov. 3d ed. 111-114; Id. 347; Whitney v. Dinsmore, 6 Cush. 127; Funk v. Creswell, 5 Clarke (Iowa), 62; Andrews v. Davison, 17 N. H. 416; Runnels v. Webster, 59 Me. 488; Russ v. Perry, 49 N. H. 547.

² Sprague v. Baker, 17 Mass. 586, where Wilde, J., intimates, that, in such a case as is supposed in the text, the purchaser might recover upon the covenant against incumbrances, and clearly might upon covenant of warranty. Tufts v. Adams, 8 Pick. 547; Thayer v. Clemence, 22 Pick. 490, 494; Whitney v. Dinsmore, 6 Cush. 124, 128. In Foote v. Burnet, 10 Ohio, 317, 333, the court held that a covenant against incumbrances ran with the land, as, in a former case, they had held was the case with covenants of seisin. Backus v. McCoy, 3 Ohio, 211. See also M'Crady v. Brisbane, 1 Nott & McC. 104.

³ Gen. Stat. c. 89, § 17.

⁴ Prescott v. Trueman, 4 Mass. 627, 630; Cary v. Daniels, 8 Met. 482.

inchoate right of dower is an incumbrance within the meaning of the covenant against these.¹ So a condition, the non-performance of which by the grantee may work a forfeiture of the estate, is also an incumbrance.² But the fact that the land conveyed is covered with water is not an incumbrance, whether it be by a natural pond or artificial flowing, if done without right by the grantor or a stranger. The remedy of the grantee in such a case is in a different form from an action upon his covenant.³ In Wisconsin, where one conveyed land with covenant against incumbrances, a part of which was then flowed for the purpose of a mill-pond, which the mill-owner had a prescriptive right to maintain, it was held not to be a breach of the covenant, on the ground "that purchasers of property, obviously and notoriously subjected at the time to some right of easement or servitude affecting its physical conditions, take it subject to that right, without any express exceptions in the conveyance."⁴ So is a paramount title; and the existence of such an outstanding title is a breach of this covenant,⁵ or an existing lien for taxes.⁶ But in Louisiana a vendor is not bound by his warranty in respect to servitudes which are apparent, but would be if they were non-apparent.⁷ The court of Maryland adopt the same distinction in case of a grant of an estate, over which another had an easement of light and air by windows opening upon the land granted. But an annotator upon the case impugns the doctrine, because windows might be thus situate without having such easement connected with them.⁸ In Pennsylvania the court held a highway across the granted premises, which had existed thirty years, not to constitute an incumbrance within the meaning of the covenants in a deed. But a private way would be an incumbrance.⁹ A right of way

¹ *Shearer v. Ranger*, 22 Pick. 447; *Jenks v. Ward*, 4 Met. 412; *Fletcher v. State Bank*, 37 N. H. 397. But see *Bostwick v. Williams*, 36 Ill. 69; *Powell v. Monson Co.*, 3 Mason, 355; *Bigelow v. Hubbard*, 97 Mass. 198.

² *Jenks v. Ward*, *sup.*

³ *Kidder v. George*, 18 N. H. 572.

⁴ *Kutz v. McCnne*, 22 Wis. 628.

⁵ *Cornell v. Jackson*, 3 Cush. 309.

⁶ *Long v. Moler*, 5 Ohio, n. s. 271; *Mitchell v. Pillsbury*, 5 Wis. 407; *Cockrane v. Guild*, 106 Mass. 30; *Hill v. Bacon*, 110 Mass. 388; *Richard v. Bent*, 59 Ill. 38.

⁷ *Lallande v. Wentz*, 18 La. An. 290.

⁸ *Janes v. Jenkins*, 34 Md. 11.

⁹ *Wilson v. Cochran*, 46 Penn. St. 232; *Butler v. Gale*, 27 Vt. 739; *Rawle*,

for a railroad is an incumbrance for which a covenantee may recover, although cognizant of its existence when he took the deed. But whether this applies to public highways, the court of Iowa do not decide.¹ But, in Indiana, a public highway in use is not deemed an incumbrance in the conveyance of lands.² And the same is held in Wisconsin.³ And such is the tendency of the opinion of the court of New York.⁴ But in Massachusetts, Connecticut, New Hampshire, and Maine, a public highway is an incumbrance, and constitutes a breach of the covenants in a deed of the land over which it exists.⁵ A covenant which runs with the land, creating a charge thereon, is also deemed an incumbrance; such, for instance, as a covenant to maintain a division-fence along the entire line between the granted premises and lands adjoining them.⁶ But it seems that a clause in the grantor's deed, that the grantee, his heirs and assigns, shall maintain a fence along the line of the granted land, is a personal obligation alone, and not an incumbrance binding the estate.⁷ But where the grantor covenanted in his deed, that he, his heirs and assigns, would maintain a fence along the line of the granted lands, it was a covenant running with the land as a burden and incumbrance, and would be a breach of the grantor's covenant, if he granted the land with covenants.⁸ And it was held in Vermont and New Hampshire, that a similar clause inserted in a deed-poll, to be performed by the grantee, his heirs and assigns, would run with the land granted, and be an incumbrance in the hands of a purchaser from such grantee.⁹ Where the maintaining a fence between two

Cov. 3d ed. 116, 117; *contra*, *Kellogg v. Ingersoll*, 2 Mass. 101; *Rawle*, Cov. 3d ed. 119, note; *Patterson v. Arthur*, 9 Watts, 154; *Russ v. Steele*, 40 Vt. 310.

¹ *Van Wagner v. Van Nostrand*, 19 Iowa, 422; *Barlow v. McKinley*, 24 Iowa, 69; *Beach v. Miller*, 51 Ill. 266.

² *Scribner v. Holmes*, 16 Ind. 142.

³ *Kutz v. McCune*, *sup.*

⁴ *Whitbeck v. Cook*, 15 Johns. 483.

⁵ *Kellogg v. Ingersoll*, 2 Mass. 101; *Hubbard v. Norton*, 10 Conn. 422; *Haynes v. Young*, 36 Me. 561; *Lamb v. Danforth*, 59 Me. 324; *Prichard v. Atkinson*, 3 N. H. 335.

⁶ *Kellogg v. Robinson*, 6 Vt. 276. See *Duffy v. N. Y. & Harl. R. R.*, 2 Hilton, 496.

⁷ *Parish v. Whitney*, 3 Gray, 516; *Plymouth v. Carver*, 16 Pick. 183.

⁸ *Bronson v. Coffin*, 108 Mass. 175, 187.

⁹ *Kellogg v. Robinson*, *sup.*; *Burbank v. Pillsbury*, 48 N. H. 475.

parcels is imposed upon one of the owners, he is to construct it of a reasonable and suitable width, height, and materials, and is at liberty to place it in equal parts on each side of the dividing-line.¹ A right in the owner of a mill to enter upon the land of another, and clear the channel of the stream, is not an incumbrance upon the premises, but the exercise of a natural right.² In Iowa, one of two adjacent owners may set his house so that half the outer wall may stand upon the other's land, to serve as a party-wall; and if the latter uses it for that purpose, he shall pay one-half the cost thereof. But this liability, though extending to whoever may be the owner when the same shall be used, is not an incumbrance upon the land: it is an incident to the ownership of land.³ Nor does it affect the rights of the parties claiming under the covenant against incumbrances, that the existence of the incumbrances complained of was known to the covenantee when the conveyance was made.⁴ If, when a party grants his estate with covenants against incumbrances, there is a process like partition pending, which is afterwards consummated, and the purchaser is wholly divested of his title, it is a breach of this covenant, and under it he may recover back the purchase-money paid.⁵ But the definition is, of course, a general one, embracing a great variety of things which would be accounted incumbrances, many of which are collected by Mr. Rawle; to whose work the reader is again referred.⁶ An outstanding condition, which may defeat the title to the estate granted, is not deemed an incumbrance within the meaning of a covenant against incumbrances.⁷

14 *a.* The covenant against incumbrances, thus far considered, has related to something existing at the time of making the deed, which has been held to constitute an

¹ *Newell v. Hill*, 2 Met. 180.

² *Prescott v. Williams*, 5 Met. 429.

³ *Bertram v. Curtis*, 31 Iowa, 49. See *Hendricks v. Stark*, 37 N. Y. 110.

⁴ *Hovey v. Newton*, 7 Pick. 29; *Long v. Moler*, 5 Ohio, n. s. 271; *Medler v. Hiatt*, 8 Ind. 171; *Snyder v. Lane*, 10 Ind. 424; *Kincaid v. Brittain*, 5 Sneed, 119, 125; *Funk v. Voneida*, 11 S. & R. 112; *Harlow v. Thomas*, 15 Pick. 66; *contra*, *Kutz v. McCune*, 22 Wis. 628.

⁵ *Chapel v. Bull*, 17 Mass. 213; *Funk v. Creswell*, 5 Clarke (Iowa), 62.

⁶ *Rawle, Cov.* 3d ed. 113 *et seq.*

⁷ *Estabrook v. Smith*, 6 Gray, 572, 576.

incumbrance. Such covenants being *in præsentia*,* and being broken as soon as made, cannot, for obvious reasons, run with the estate to subsequent owners, so as to entitle them to sue for the breach thereof. Such a covenant must obviously be an inadequate remedy in those cases where the incumbrance exists at the time of making the deed, but is inchoate so far as occasioning loss or damage to the purchaser is concerned. Besides the cases above stated of a right of dower, or an outstanding mortgage, the value or amount of which it may not be possible to ascertain until after the covenantee shall have parted with his estate to a third party, may be the case of an attachment outstanding upon the land, or a judgment lien which the creditor may never enforce, or, if at all, not until the vendee shall have conveyed his estate. In such cases, the actual damages arising from the lien do not accrue until the estate shall have passed into a third person's hands, who, upon the well-settled doctrine upon the subject, cannot sue upon this covenant. Wilde, J., as stated in the note in *Sprague v. Baker*, was inclined to hold that this covenant did run with the land, so far as to allow the purchaser to recover for such new damages as should arise to him as the owner while he was such. But this doctrine was afterwards overruled; and the law in this country, as to existing incumbrances, may be considered as settled.¹ In England, there is a covenant usually inserted in deeds, as to title for indemnity against incumbrances. It is future in its character, and intended to be. In the words of Mr. Platt, "It is not a covenant that the estate is free, and shall remain free from incumbrances, but that the purchaser shall enjoy it free from such incumbrances."² And in all these cases, where the incumbrance is of a nature to work an eviction of the purchaser as the terre-tenant, he may always protect himself under a covenant of warranty which runs with the land, as was the case in *Tufts v. Adams*.³ But may there not be inchoate rights in respect to land existing at the time of a conveyance, which are not in themselves incumbrances, but may become such at a future time, and, before they

¹ Rawle, Cov. 346; *Whitney v. Dinsmore*, 6 Cush. 124.

² Platt, Cov. 330; Rawle, Cov. 109

³ *Tufts v. Adams*, 8 Pick. 547.

become such, the grantee, with a covenant against incumbrances, may have conveyed the estate to a third person by a deed of quitclaim, and where, if the covenant against incumbrances does not run with the land, such second purchaser would be wholly without indemnity or relief? Suppose A, while the owner of lands, conveys to B a right of way across them upon strictly a condition precedent, such, for instance, as that he shall erect a house, construct a bridge across a stream, or some such act, with which the way is to be used as an easement; and A should then convey this land to J. S., with a covenant of seisin; and that the premises are free of incumbrances, and also of warranty. Subsequently J. S. conveys this land, by deed of quitclaim, to J. N.; and while he is the owner, and in possession of it, B erects his house, or performs the condition whereby the right to this easement becomes consummated. If J. N. cannot sue upon this covenant, as running with the estate, is he not wholly without remedy? and has not the vendor, in that way, wholly escaped liability under his covenants? Such an incumbrance is not a breach of the covenant of seisin; nor does it seem to be of the covenant of warranty, since it does not work an eviction of the terre-tenant. Would it not be necessary to refer such a case to the general principles governing covenants of title, rather than to the rules which have been laid down as to covenants against incumbrances not running with the land? The rule upon the general subject is thus stated: "It is a settled rule on both sides of the Atlantic, that, until breach, the covenants for title, without distinction between them, run with the land to heirs and assignees."¹ And the language of Wilde, J., in the case of *Sprague v. Baker*, already cited, in respect to the right of an assignee to recover upon a covenant as to title, bears directly upon the same point: "He is principally interested in the covenant; and those covenants run with the land in which the owner is solely or principally interested, and which are necessary for the maintenance of his rights. Covenant lies by an assignee on every covenant which concerns land."² It would seem, therefore, that the

¹ 4 Kent, Com. 473; Rawle, Cov. 336.

² *Sprague v. Baker*, 17 Mass. 536. See *Kellogg v. Robinson*, 6 Vt. 276, 280.

covenant against incumbrances may run with the land, and may be sued by whoever is the owner of the land, if the same be not, in fact, broken, until such owner shall have acquired title to the premises, provided the incumbrance shall be of such a nature, that, when it takes effect to impair the value of the premises, it relates back to the time of making the deed and covenant.

15. The broadest and most effective of the covenants contained in American deeds is that of warranty, which, as has already been remarked, is, in some of the States, the only one in general use.¹ It is future in its terms and operation, and *runs with the estate, in respect to which it is made, into the hands of whoever becomes the owner of such estate. But, if once broken by an eviction, the covenant of warranty stands upon the same ground as the covenants which are broken as soon as made.² It is not only a means of obtaining recompense for the loss of the land so held, but it often operates to create a title to land by way of estoppel, even against the grantee of the warrantor, by preventing a party from setting up an otherwise good title to the same; ³ as where one, having no title to land conveys it, with a covenant of warranty, and afterwards acquires a title to the same, he is estopped to claim the land, and this extends to his second grantee in favor of the covenantee. And, in some cases, an heir is thereby rebutted from claiming, by another and better title, the land which his ancestor had conveyed with warranty, if such heir receives assets from his ancestor, the covenantor, sufficient to make good such warranty.⁴ One thing is to be observed in giving the effect

¹ Rawle, Cov. 3d ed. 203, note, mentions, generally, that such is the case in the Southern and Western States, as well as Pennsylvania; and quotes the language of Lumpkin, J., of Georgia, that, in twenty-five years' practice, he never saw a deed with the covenant of seisin against incumbrances or for further assurance. *Leary v. Durham*, 4 Ga. 593, 601; *Dickinson v. Hoomes*, 8 Gratt. 353, 399. But see *Kincaid v. Brittain*, 5 Sneed, 120.

² *Wilson v. Cochran*, 45 Penn. St. 229.

³ *Walk. Am. Law*, 388; *White v. Patten*, 24 Pick. 324; *Allen v. Sayward*, 5 Me. 231; *Somes v. Skinner*, 3 Pick. 52; *Jackson v. Stevens*, 13 Johns. 316; *Jackson v. Murray*, 12 Johns. 201; *Kimball v. Blaisdell*, 5 N. H. 533; *Terrett v. Taylor*, 9 Cranch, 53; *ante*, c. 2, § 6, pl. 35.

⁴ *Bates v. Norcross*, 17 Pick. 14, 21; *Cole v. Raymond*, 9 Gray, 217; *Torrey v. Minor*, 1 S. & M. Ch. 489.

above stated to the covenant of warranty, where no estate passes by the deed, that by means of the estoppel the covenant attaches to the estate as soon as the covenantor acquires it, although until then there was no estate with which it could be held to run.^{1*}

16. Though the covenant of warranty in a deed is now a personal one, binding the warrantor and his personal representatives, it is important to understand somewhat the nature and character of the remedy for which it has become a substitute. This is principally important when the measure of the recompense for a breach of such covenant is considered. The covenant answering to this in English deeds is that for quiet enjoyment; † and as synonymous with that for quiet

* NOTE. — By the law of Missouri, one who conveys land with covenant of warranty may attach the covenant to the seisin, so as to run to assignees, although, at the time of conveying the land, he had no seisin thereof. *Vancourt v. Moore*, 26 Mo. 92.

† NOTE. — The form of this covenant is as follows: "And that it shall be lawful for the said grantee, his heirs and assigns, from time to time, and at all times hereafter, peaceably and quietly to enter upon, and have, hold, occupy, possess, and enjoy, the said lands and premises hereby conveyed, or intended so to be, with their and every of their appurtenances, and to have, receive, and take the rents, issues, and profits thereof, to and for his and their use and benefit, without any let, suit, trouble, denial, eviction, interruption, claim, or demand whatsoever, of, from, or by him, the said grantor, or his heirs, or any other person or persons whomsoever." Rawle, *Cov.* 3d ed. 163. By recurring to page * 610 of this work, the reader may see the form of a covenant of warranty, substantially such as is in general use in this country, and can compare the redundancy of terms in the one with the terse brevity of the other. See *Funk v. Creswell*, 5 Iowa, 68.

¹ *McCusker v. McEvey*, 9 R. I. 528. In the case of *McCusker v. McEvey*, Mr. Justice Potter gave a dissenting opinion, which is published in 10 R. I. Rep. 606, in which he controverts with much force and research the doctrine stated in the text as derived from the cases therein cited. His doctrine is, that allowing a deed given by one who has no title, and recorded, to take precedence of a subsequent deed, made after the grantor has acquired a title, and defeat the same, is not sustained by the law of estoppel, and does violence to the spirit of the law of registry of deeds. "The second grantee, going to the records, would find that W. (the grantor), at a certain date, had acquired the title, and had not conveyed it away since that date. Is it reasonable to require him to examine farther, so far as it relates to his acquiring whatever title W. had at that date?" He states and cites several American cases as sustaining the doctrine he advocates: viz., *Bevins v. Vinsant*, 15 Ga. 521, and four other cases in Georgia; *Great Falls v. Worcester*, 15 N. H. 452; and "see *Gouchenour v. Mowry*, 33 Ill. 331."

enjoyment, it can be broken only by something equivalent to an eviction or disturbance of possession of grantee. It is not, therefore, broken by an outstanding incumbrance, like an inchoate right of dower. The covenant extends to lawful disturbances only, and not to tortious acts; and if the covenantor do the acts, he must, in order to make it a breach of the covenant, do them under the claim and assertion of a right.¹ To constitute a breach of this covenant, there must be something tantamount to an eviction. But this may be done by yielding to a better title; though no action can be maintained upon it until the real owner of the estate has done something answering to an eviction of the tenant.² So if the covenantee find another in possession under a paramount right, when he takes his deed, he may have an action upon this covenant, without being obliged to subject himself to the hazard of an action of trespass by first entering upon the premises and being ousted.³

[*661] *17. The doctrine of warranty is of feudal origin, and, as anciently understood and practised, involved the application of a system of rules of great subtlety and refinement. It grew out of the relation of lord and vassal, in respect to the land which the former gave to the latter, and for which he was to receive in return the services prescribed by the terms of the tenure by which the latter held it. Upon accepting homage, the lord became bound, among other things, to defend the title of the land for which the vassal had done the homage. If the tenant's title was disputed, he might vouch in the lord to defend it; and if he was evicted, the lord was bound to give him other land, by way of recompense, equal in value to that he had lost.⁴ Space will not admit of tracing the steps through which warranty, as a remedy, passed, from the time when, upon a *warrantia chartæ*,

¹ Beebe v. Swartwout, 3 Gilm. 179, 181; Bostwick v. Williams, 36 Ill. 69, 70.

² Claycomb v. Munger, 51 Ill. 376; McGary v. Hastings, 39 Cal. 360; Knepper v. Kurtz, 58 Penn. St. 484.

³ Clark v. Conroe, 38 Vt. 469; *contra*, Kortz v. Carpenter, 5 Johns. 120. But the text sustained Grist v. Hodges, 3 Dev. 200; Rawle, Cov. 8d ed. 253, 255. Whether a mere easement can be a breach of warranty, see Rawle, Cov. 293 3d ed.; Wilson v. Cochran, *sup.*, p. 233; Wead v. Larkin, 54 Ill. 497.

⁴ Stearns, Real Act. 121; 2 Bl. Com. 300.

the plaintiff recovered other lands equal in value to the lands lost, to the substitution of a personal action for the recovery of damages instead of land, which seems to have become established about the time of the settlement of this country. The ancient form of remedy is now become wholly obsolete.¹

18. This covenant of warranty, to repeat, is a personal one, and is, in effect, a covenant for quiet enjoyment.² As a personal covenant, it may be barred, like any other personal obligation, by the statute of limitations; but such bar would not affect it as an estoppel or rebutter, in its effect upon the title to land in favor of the covenantee.³ But if, before a breach, the grantor who makes the covenant takes a reconveyance of the estate, it extinguishes the covenant; nor can it be revived by a new conveyance without a new express covenant.⁴

* 19. In the next place, it is a covenant that runs [*662] with the estate in reference to which it is made, and may be availed of, by suit in his own name, by any one to whom the same shall come by deed, even after several successive conveyances, or a descent or devise.⁵ It is often difficult to distinguish between covenants in gross and such as run with land; but a covenant of warranty seems to be clearly among those that will always run with land. In the first place, there is the requisite privity of estate between the grantor who is the covenantor, and the purchaser or holder of the land in relation to which the covenant is entered into; in the next, the covenant for the title entered into, and formed

¹ *Gore v. Brazier*, 3 Mass. 523, 543; *Roll v. Osborn*, Hob. 20; *Rawle, Cov.* 3d ed. 210, 211; 4 *Kent, Com.* 472; *Caldwell v. Kirkpatrick*, 6 Ala. 60; *Townsend v. Morris*, 6 Cow. 123, 126; *Marston v. Hobbs*, 2 Mass. 432, 437; 1 *Smith, Lead. Cas.* 5th Am. ed. 158, 166-168; *Co. Lit.* 384 a, *Butler's note*, 332.

² 4 *Kent, Com.* 472; *Caldwell v. Kirkpatrick*, 6 Ala. 60, 62; *Townsend v. Morris*, 6 Cow. 126; *Fowler v. Poling*, 2 Barb. 300, 303.

³ *Cole v. Raymond*, 9 Gray, 217. See *Holden v. Fletcher*, 6 Cush. 235.

⁴ *Brown v. Metz*, 33 Ill. 339.

⁵ *Rawle, Cov.* 3d ed. 352; *Withy v. Mumford*, 5 Cow. 137; *Ford v. Walsworth*, 19 Wend. 334, 337; *White v. Whitney*, 3 Met. 81, 86; *Platt, Cov.* 471; *Dickinson v. Hoomes*, 8 Gratt. 353, 396; *Booth v. Starr*, 1 Conn. 244, 246; *De Chaumont v. Forsythe*, 2 Penn. 507, 514; *Chase v. Weston*, 12 N. H. 413; *Lawrence v. Senter*, 4 Sneed, 52; *Kellogg v. Robinson*, 6 Vt. 279; *Moore v. Merrill*, 17 N. H. 81; *Slater v. Rawson*, 1 Met. 450.

a part or parcel of the contract by which, and of the consideration for which, the grant of the land was made; and whoever purchases the one is supposed to pay also for the other, and to become thereby substituted in all respects in the place of the first covenantee, so far as the right of being indemnified for any failure by defect of title.¹*

20. Consistently with the foregoing doctrine, the action for the breach of this covenant should be brought by him who is the owner of the land; and, as such, the assignee of the covenant at the time it is broken.² Such covenant is, moreover, susceptible of divisions into as many parts or interests as the land itself shall be divided into by subsequent successive conveyances; so that, if A convey to B two parcels by one deed with a covenant of warranty, and B sells one of them to C, who is evicted by an elder title of the parcel so purchased by him, he may have covenant in respect to the same [*663] against A.³ * Even if one were to convey with

* NOTE. — Although the subject of covenants running with an estate has been more than once spoken of, it may further be illustrated by examples of a less familiar character than those usually found in the books. Thus one who had laid out a private street from one public street to the land of another proprietor, across his own land, sold a lot bounding upon it, describing it as upon a new way or street now staked out, and to be opened by (the grantor), — feet wide, extending from M Street along on the northerly side of said lot, &c., westerly to land of, &c. It was held to be a covenant, not only that there was and should be a street along by the lot conveyed, but that it should extend from M Street to the other terminus mentioned; and that it was a covenant running with the land of the grantor, and binding his assignee. So that where the grantor had changed the direction of the street, and then sold the soil of it to one who built upon and obstructed it, at a point remote from the plaintiff's premises, he had a right of action therefor against the party causing such obstruction. *Thomas v. Poole*, 7 Gray, 83. See also *Loring v. Otis*, 7 Gray, 563. A covenant, on the part of the grantee of an estate, to maintain a boundary-fence along the side of the premises, is one that runs with the land, and binds subsequent owners claiming under him. *Kellogg v. Robinson*, 6 Vt. 276; *Duffy v. N. Y., Harlem R. R.*, 2 Hilton, 496; *Bally v. Wells*, 3 Wils. 45.

¹ *Hurd v. Curtis*, 19 Pick. 459.

² *Kane v. Sanger*, 4 Johns. 89, 93; *Bickford v. Page*, 2 Mass. 455, 460; 1 Smith, Lead. Cas. 5th Am. ed. 163, 164. See *Niles v. Sawtell*, 7 Mass. 444; *Ford v. Walsworth*, 19 Wend. 334, 337; *Wheeler v. Solier*, 3 Cush. 219, 222; *Griffin v. Fairbrother*, 10 Me. 81; *Thompson v. Sanders*, 5 Mon. 357; *Chase v. Weston*, 12 N. H. 413; *Wallace v. Vernon*, 1 Kerr, N. B. 5, 24.

³ 2 Sugd. Vend., Hamm. ed. 508; *Dickinson v. Hoomes*, 8 Gratt. 353, 406. *Kane v. Sanger*, 14 Johns. 89, 94. See 3 Prest. Abst. 57, 58, *contra*.

covenant of warranty a parcel of land then under mortgage to another, and his grantee were to convey this right of redemption, or it was conveyed by a sheriff upon execution against him, the purchaser, as assignee thereof, may have an action upon the covenant of warranty, if evicted by the mortgagee, or, as it would seem, by any one having a paramount title.¹ Nor would it make any difference in the rights of a subsequent purchaser, as assignee of a covenant running with the land, that his immediate grantor warranted the same to him in his deed.² So it was held to be no bar to an action by covenantee against covenantor, upon a covenant of warranty, that the former, when he purchased the estate, gave the latter a mortgage upon the same for a part of the purchase-money which is now outstanding. It would only go to affect the amount of damages.³

21. An exception, however, to the rule above stated, as to the party to sue for a breach of the covenant of warranty, exists, where the covenantee has himself conveyed the premises with warranty, and his grantee, upon being evicted, sues and recovers of him, instead of suing the original covenantor, as he might have done. In such a case, the first covenantee, upon satisfying the claim of the second, is remitted to his claim against his covenantor upon the original covenant. And this would be true if there had been a succession of conveyances with warranty on the part of any one or more of the successive grantors: the tenant who is evicted may, in such case, sue any prior covenantor; and if he elects any one but the first, and obtains satisfaction for his claim, such covenantor may thereby stand, as to any prior covenantor, in the place he held before he had parted with the estate, and sue upon his covenant as if the breach had occurred during his ownership.⁴ In order to save a succession of suits in such

¹ *White v. Whitney*, 3 Met. 81; *Redwine v. Brown*, 10 Ga. 311, 320; *Brown v. Metz*, 33 Ill. 339; *Devin v. Hendershott*, 32 Iowa, 192.

² *Withy v. Mumford*, 5 Cow. 137; *De Chaumont v. Forsythe*, 2 Penn. 81, 507, 514; *Markland v. Crump*, 1 Dev. & B. 94.

³ *Davis v. Judd*, 6 Wis. 85; vide *post*, pl. 42.

⁴ *Withy v. Mumford*, 5 Cow. 137; *Thompson v. Shattuck*, 2 Met. 618; *Suydam v. Jones*, 10 Wend. 184; *Thompson v. Sanders*, 5 Mon. 357; *Booth v. Starr*, 1 Conn. 244, 249; *Markland v. Crump*, 1 Dev. & B. 94; *Redwine v. Brown*, 10 Ga. 311, 317.

cases, one who is sued in an action upon his covenant of warranty may vouch in, as it is called, his warrantor, and he in turn may vouch in his; and a judgment in such action will be binding upon the rights of any such previous warrantor, so far as the subjects-matter tried in such suit are concerned, who has been properly vouched or summoned in to take the defence of the suit, whether he has done so or not. But it must appear that the same question between the same parties was put in issue and decided, to have the first judgment conclusive in the trial of the second action.¹ Nor is it essential that these notices should be matters of record.² But a covenantee, if sued by one claiming the land, need not call in his warrantor to defend the suit; though, if the plaintiff in such suit recover, the warrantor, when sued, may controvert the title under which the claimant prevailed: but if the covenantee, when sued, give seasonable and actual notice to his warrantor of the suit, and the demandant recovers in such suit, the covenantor would be bound by the judgment therein, and be estopped to deny its validity.³ In one case, a grantor conveyed with warranty, and a third party claimed the right to maintain a drain across the granted premises. The grantee interrupted this use, and the third party sued him for so doing. He gave notice to the grantor, who failed to defend; and the grantee, upon trial, was held to pay damages. In an action upon the covenant, he recovered the damage to his land of having to permit such a drain, and the damages and costs recovered in the former suit.⁴ So where a vendor is sued upon his covenant against incumbrances, if he hold a like deed with covenants from his grantor, and the incumbrance be an existing one at the time of both conveyances, he may vouch in his covenantor, and thus bind him by the judgment against himself in the action.⁵

¹ *Belden v. Seymour*, 8 Conn. 309.

² *Chamberlain v. Preble*, 11 Allen, 373; *Boston v. Worthington*, 10 Gray, 498; *Littleton v. Richardson*, 34 N. H. 187; *Rawle*, Cov. 3d ed. 226; *Andrews v. Gillespie*, 47 N. Y. 487; *Stearns*, Real Act. 136; *Andrews v. Davison*, 16 N. H. 473; s. c. 17 N. H. 413.

³ *Claycomb v. Munger*, 51 Ill. 377; *Somers v. Schmidt*, 24 Wis. 417; *Smith v. Sprague*, 40 Vt. 43; *Merritt v. Morse*, 108 Mass. 276.

⁴ *Smith v. Sprague*, 40 Vt. 43.

⁵ *Andrews v. Davison*, 17 N. H. 416.

22. But a covenantee who has parted with his estate to a second grantee with warranty cannot recover of his covenantor upon his covenant until he shall have satisfied his own covenantee for his damages, so that the first covenantor may not be liable to be twice charged.¹

* 23. It may be added, as a kind of corollary to [*664] what has gone before, that no one can release or discharge a covenant of warranty except the one who then holds the title to the estate, and that such discharge can only affect such subsequent purchasers as have notice of the same when purchasing the estate.² A release by the covenantee to the covenantor, after he has parted with his estate, will have no effect upon the covenant. But, so long as the covenantee retains the estate, a release by him to the covenantor will be binding upon them; but, in order that it should bind the grantee of the covenantee, who becomes such after such release, it must be done by a deed duly recorded, or the grantee should have notice of it before he becomes purchaser.³

24. As the covenant of warranty in American deeds answers in most respects, as has been observed, to the covenant for quiet enjoyment, it has been uniformly held, that, in order to constitute a breach of such a covenant, there must be something tantamount to an eviction of the tenant by some one having a better legal title. But it is not necessary that the act of eviction should affect the whole premises granted. It will be a breach of such covenant if the covenantee is divested of any part of them. Thus, where a house of another person was standing on the land belonging to a grantor, and he sold the land with covenant of warranty, and afterwards the owner of the house removed it, it was held to be a breach of this covenant.⁴ Among other instances of what would be a breach of a covenant of warranty would be an existing

¹ *Wheeler v. Sohler*, 3 Cush. 222, 223; *Booth v. Starr*, 1 Conn. 244; *Markland v. Crump*, 1 Dev. & B. 94.

² *Leighton v. Perkins*, 2 N. H. 427.

³ *Rawle*, Cov. 3d ed. 367, 368; *Devin v. Hendershott*, 32 Iowa, 192; *Field v. Snell*, 4 Cush. 504; *Brown v. Staples*, 28 Me. 500.

⁴ *Funk v. Creswell*, 5 Iowa, 88; *West v. Stewart*, 7 Penn. St. 122. See also *Mott v. Palmer*, 1 Comst. 564, where the covenant of seisin was held to be broken by want of title to a fence on the premises conveyed. *Ante*, pl. 12.

right in another to draw water from the granted premises by an aqueduct.¹ So is the existence of a public or a private way.² So is the right to use a wall standing on the premises as a party-wall.³ But an existing easement of light over the granted premises would not be a breach.⁴ No act of a mere stranger, though under a pretence of title which is not a valid one, will operate as a breach of this covenant.⁵ In applying these general propositions, questions have arisen how far particular acts done by third persons in respect to the estate while in the possession of the covenantee is a breach of the covenant of warranty. Thus it has been held that the exercise of the right of eminent domain by the State, whereby some portion of a purchaser's land is taken, is not a breach of his grantor's covenant of warranty.⁶ And in England, where an entry was made upon a lessee, who held under a lease with a covenant for quiet enjoyment against all persons claiming under the lessor, and his property was seized to satisfy an outstanding land-tax, it was held not to be a breach of the covenant.⁷ On the other hand, if one having a legal claim seeks to enforce it by expelling the tenant in possession, it is not necessary for him to wait for a judgment and actual ouster by process of law. He may yield possession to the one who has this paramount title, and claim for a breach of the covenant.⁸ Thus, in *Sprague v. Baker*,⁹ the tenant yielded to the claim of a prior mortgagee without suit.

¹ *Day v. Adams*, 42 Vt. 510; *Clark v. Conroe*, 38 Vt. 469; *Lamb v. Danforth*, 59 Me. 324.

² *Haynes v. Young*, 36 Me. 561; *Lamb v. Danforth*, *sup.*; *Harlow v. Thomas*, 15 Pick. 66; *Russ v. Steele*, 40 Vt. 310.

³ *Lamb v. Danforth*, *sup.*; but *contra*, *Hendricks v. Stark*, 37 N. Y. 106.

⁴ *Janes v. Jenkins*, 34 Md. 11.

⁵ *Rawle*, Cov. 3d. ed. 165; *Hale v. New Orleans*, 13 La. An. 499; *Norton v. Jackson*, 5 Cal. 262; *Hannah v. Henderson*, 4 Ind. 174; *Kincaid v. Brittain*, 5 Sneed, 124; *Gleason v. Smith*, 41 Vt. 293; *Loughran v. Ross*, 45 N. Y. 792.

⁶ *Bailey v. Miltenberger*, 31 Penn. St. 37, 41; *Ellis v. Welch*, 6 Mass. 246.

⁷ *Stanley v. Hayes*, 3 Q. B. 105.

⁸ *Hamilton v. Cutts*, 4 Mass. 349, 352; *Rawle*, Cov. 3d ed. 240, 247, and note of Am. cases; *Clarke v. M'Anulty*, 3 S. & R. 364, 372; *Peck v. Hensley*, 20 Tex. 673; *Funk v. Creswell*, 5 Iowa, 65, 86; *Loomis v. Bedel*, 11 N. H. 74; *Brandt v. Foster*, 5 Clarke (Iowa), 297; *Kellogg v. Platt*, 4 Vroom, 328.

⁹ *Sprague v. Baker*, 17 Mass. 586. See this limited, *Gilman v. Haven*, 11 Cush. 330.

* In *White v. Whitney*, the only ouster was by the [*665] mortgagee's making an entry upon the premises.¹

So in *Tufts v. Adams*.² So where the covenantee suffered the estate, which had been conveyed to him with covenant of warranty, to be sold upon an outstanding mortgage, and purchased it himself at auction, and then sold his bid to another, to whom the officer who made the sale gave the deed, it was held to be such an eviction as gave him a right to recover upon his covenant.³

25. The covenant of warranty thus far discussed has been the general covenant against the lawful adverse claims of all persons. It does not extend to any pretence of claim or title which has no legal foundation.⁴ But this covenant may be, and often is, limited and restricted to certain persons, or to certain claims. Thus it is very common to insert in American deeds of quitclaim a covenant against all persons claiming by, through, or under the grantor. In this case the covenant does not stand in the way of the grantor's claiming the land against his own covenantee, under and by virtue of a title acquired after the making of his own deed.⁵

26. So the extent of the covenant of warranty is often limited and defined by the subject-matter of the grant; as where the deed only purports to convey the right, title, and interest of the grantor.⁶ And where the grant is thus limited and restricted in its terms, the covenant of warranty is alike restricted; although the grantor covenants that he is seised in fee of the premises, that they are free of all incumbrances,

¹ *White v. Whitney*, 3 Met. 81, 89.

² *Tufts v. Adams*, 8 Pick. 547; *Estabrook v. Smith*, 6 Gray, 572.

³ *Cowdry v. Coit*, 44 N. Y. 382, 392.

⁴ *Gleason v. Smith*, 41 Vt. 296.

⁵ *Constock v. Smith*, 13 Pick. 116; *Rawle, Cov.* 3d ed. 46; *Trull v. Eastman*, 3 Met. 124; *Allen v. Sayward*, 5 Me. 227. The covenant in *Kimball v. Blaisdell*, 5 N. H. 533, though in substance like the above, was held to be equivalent to a general warranty, so far as to estop the grantor, owing to the peculiar circumstances of the case.

⁶ *Blanchard v. Brooks*, 12 Pick. 47, 67; *Raymond v. Raymond*, 10 Cush. 132, 140; *Sweet v. Brown*, 12 Met. 175; *Allen v. Holton*, 20 Pick. 458; *Hall v. Chaffee*, 14 N. H. 215, 226; *Gee v. Moore*, 14 Cal. 474; *Kimball v. Temple*, 25 Cal. 452; *White v. Brocaw*, 14 Ohio St. 344; *Wight v. Shaw*, 5 Cush. 56; *Brown v. Jackson*, 3 Wheat. 452; *Adams v. Ross*, 1 Vroom, 510; *Doe v. Dowdall*, 3 Houst. 380.

and that he will warrant them to the grantee against the lawful, claims of all persons: the "premises," in the case supposed, being what are included in the granting terms of the deed; viz., "the right, title, and interest."¹ So where one holding an equity of redemption, which had been conveyed to him by W., granted the estate and title which W. had conveyed to him, by metes and bounds, with covenants of warranty, it was held not to warrant the title against the mortgage.² And where A conveyed to B a certain parcel of land subject to a certain mortgage, and covenanted that he was seised, and that it was free of incumbrances, it was held that these covenants were limited and qualified by the exception, and that the existence of that mortgage was not a breach of the covenant.³ The court of Iowa, recognizing the doctrine as here stated, makes a distinction between a grant of a specific parcel of land, and a recital that the grantor thereby intends to convey the grantor's right, title, and interest; and this is followed with a general covenant of warranty, and a grant of his right, title, and interest only. In the first, his covenant would extend to the title of the land, and bind him if it should fail: in the other, it is limited to the subject-matter of the grant; viz., to just what interest the grantor had in the premises.⁴ Thus if one "sells, conveys, and quits" a certain parcel of land, and "covenants to warrant and defend" the same, and the title fails in the grantee, the covenantor would be liable upon his covenants.⁵ So it is held in Minnesota.⁶ In the case of *Blanchard v. Brooks*, the grant was of "all the right, title, interest, and estate," &c. The warranty was a general one against all persons, except those claiming under a certain mortgage. The court held that this was only a warranty "of the premises, that is, of the estate

¹ *Hoxie v. Finney*, 16 Gray, 332; *McNear v. McComber*, 18 Iowa, 12; *Freeman v. Foster*, 55 Mo. 508; *Bates v. Foster*, 59 Me. 157; *Merritt v. Harris*, 102 Mass. 328; *Blodgett v. Hildreth*, 103 Mass. 488; *Van Rensselaer v. Kearney*, 11 How. 325, 326.

² *Bates v. Foster*, 59 Me. 157.

³ *Freeman v. Foster*, 55 Me. 508, in which the distinction is made between this and the case of *Estabrook v. Smith*, 6 Gray, 572.

⁴ *McNear v. McComber*, 18 Iowa, 14. ⁵ *Williamson v. Test*, 24 Iowa, 139.

⁶ *Hope v. Stone*, 10 Min. 152.

granted, which was all his right, title, and interest." The cases cited below seem to hold, without qualification, that the thing warranted in such a deed is the land itself, and not simply the right and title of the grantor.¹ And the case cited by the court, of *Brown v. Jackson*, holds this language: "A conveyance of the right, title, and interest in land is certainly sufficient to pass the land itself, if the party conveying has any estate therein at the time of the conveyance."² Nor is it easy to see what the office or purpose of a covenant of warranty can be, when whatever is granted infallibly passes, and can never be lawfully divested by any future lawful act or right of any one. The grantor cannot reclaim or disturb what he has expressly granted; nor could any one acquire any right to disturb his grantee by any deed which the grantor might subsequently make.

27. In *Fowler v. Poling*, the judge, in giving the opinion, states that there is a difference between an eviction under the covenant for quiet enjoyment and one under that of warranty. The former relates only to the possession, and the eviction is merely required to be of lawful right; while the latter relates to the title; and the eviction must be not only by lawful right, but by paramount title. He suggests that this may account for an apparent discrepancy in the authorities upon the subject.³ But, so far as there is a difference in this respect, it is intended to confine what is here said to warranty proper, as before explained. * Thus it has [*666] been held a constructive eviction, where one made a mortgage with covenants of warranty, and then conveyed the same estate absolutely, without notice of the mortgage, to a purchaser who got his deed on record before the mortgage, and thereby defeated the same; and that the mortgagee might maintain an action upon the covenant in his deed, and rely upon those facts as tantamount to an eviction.⁴

¹ *Mills v. Catlin*, 22 Vt. 104; *Funk v. Creswell*, 5 Iowa, 66; *Loomis v. Bedel*, 11 N. H. 74; *Rowe v. Heath*, 23 Tex. 614. See also *Hubbard v. Apthorp*, 3 Cush. 419.

² *Brown v. Jackson*, 3 Wheat. 449.

³ *Fowler v. Poling*, 6 Barb. 165, 170. See also Rawle, Cov. 8d ed. 221, 222. See *ante*, *660.

⁴ *Curtis v. Deering*, 12 Me. 499, 501; *Funk v. Creswell*, 5 Iowa, 66.

28. But the mere existence of a superior title in another, which has never been enforced, cannot amount to a breach of this covenant. The tenant must be disturbed; he must be evicted; but he need not be evicted by legal process: it is enough that he has yielded possession to the rightful owner; or, the premises being vacant, that the rightful owner has taken possession.¹ In New Jersey, it is said that there must be an ouster by means of the prosecution and operation of legal measures.² But the case seems to leave it doubtful whether it is necessary that these proceedings should be under a judgment of court. An eviction by the exercise of eminent domain is not a breach of the covenant of warranty.³ But where one, on the first day of May, made a deed with covenant of warranty, and the premises were sold upon a tax subsequently assessed as of the first of May, it was held to be such an eviction as to work a breach of the covenant, upon the ground that such tax was a lien on the estate.⁴

29. As a general proposition, it is necessary, in order to a recovery upon a breach of a covenant of warranty, that the tenant claiming under the grant should have been evicted by an elder and better title than that which he derives from his warrantor. But, in the case already cited,⁵ an eviction under a deed made by the warrantor, after the deed in which he had covenanted to warrant the land, was held to be a breach of such covenant. This is regarded by Mr. Rawle as a breach of the covenant for quiet enjoyment, which extends to all acts of the covenantor himself, whether tortious or otherwise.⁶

¹ *St. John v. Palmer*, 5 Hill, 599; *Fowler v. Poling*, 6 Barb. 165, 171; *Hamilton v. Cutts*, 4 Mass. 349; *Beebe v. Swartwout*, 3 Gilm. 162, 179. Though he cannot recover on the ground that he was himself in possession when the deed to him was made, *Id.*; *Estabrook v. Smith*, 6 Gray, 572; *Peck v. Hensley*, 20 Texas, 678; *Stipe v. Stipe*, 2 Head, 169; *Bostwick v. Williams*, 36 Ill. 69; *Home Life Ins. Co. v. Sherman*, 46 N. Y. 373.

² *Stewart v. Drake*, 4 Halst. 139, 141.

³ *Peck v. Jones*, 70 Penn. St. 85.

⁴ *Hill v. Bacon*, 110 Mass. 388.

⁵ *Curtis v. Deering*, 12 Me. 499; *Funk v. Creswell*, 5 Iowa, 66.

⁶ *Rawle, Cov.* 3d ed. 167. In an early case in Massachusetts, the deed of a grantee having been accidentally burned before record, his grantor conveyed the same to a second purchaser, whereby the first lost his estate. Wishing to recover the purchase-money which he had paid for the estate, the court held that

30. There is a covenant for further assurance, usually inserted in English deeds, but rarely in those in use in this country, * which is resorted to, when inserted, [*667] rather as a means of enforcing a specific performance of the grantor's agreement to make a good title, than as the ground of a suit at law for its breach.¹

31. A covenant of warranty in a deed of grant often operates to create a title by estoppel in the covenantee, although the covenantor, when making it, had no estate in the granted premises.² In such case, if the warrantor subsequently acquires a title to the premises, it enures, by way of estoppel, in favor of his covenantee. In the language of Field, C. J., "He is not permitted to attack a title, the validity of which he has covenanted to maintain." A statute, moreover, in California is to the same effect, and the principle applies to mortgages as well as absolute deeds.³ The effect of successive conveyances, whether with or without warranty, may be illustrated by the following case: A, having possession, but no title, conveyed lands to B, with a covenant for further assurance. B then quitclaimed to C, with a covenant to stand seised and for further assurance. A then acquired a title to the estate, and conveyed it by a warranty-deed to B, which was duly recorded. B then conveyed the estate to J. S., granting all his right, title, estate, and interest in it, with covenants of warranty; and this was recorded. It was held that J. S. took the estate subject to the rights of C, and that he held it in trust for C, and this without any further notice being requisite than the grant itself being of the right, title, and interest only of B.⁴ In commenting upon the effect of covenants of warranty in creating estates, the court of Illinois

case, and not *assumpsit* for money had, &c., was the form of the action to be adopted. *Curtis v. Nightingale*, Quincy, 256.

¹ Rawle, Cov. 3d ed. 185; Platt, Cov. 353; Colby v. Osgood, 29 Barb. 339

² *Ante*, *475.

³ *Clark v. Baker*, 14 Cal. 612, 630. See also, as to effect of covenants of warranty on title by estoppel, *ante*, pp. *473-*481; Rawle, Cov. 3d ed. c. 9; *Bates v. Norcross*, 17 Pick. 21; *King v. Gilson*, 32 Ill. 353; *Baxter v. Bradbury*, 20 Me. 260; *Cotton v. Ward*, 3 Mon. 304; *Reese v. Smith*, 12 Mo. 344; *Jones v. King*, 25 Ill. 383.

⁴ *Hope v. Stone*, 10 Minn. 141; see *ante*, *660.

remark: "Whether the effect is produced by the way of estoppel, by remitter, or by the operation of the statute of uses, has been a matter of much discussion."¹

32. The effect of a covenant of warranty, by way of rebutter, is illustrated in the case of *Bates v. Norcross*,² already cited, in which the doctrine of lineal warranty, borrowed from the common law, is applied; although, as a general proposition, the ancient doctrine of lineal as well as collateral warranty is exploded in this country. The ground of the decision in such a case is, that by holding the covenant of an ancestor, from whom assets have descended to his heir, to be a rebutter to the claim of the heir to land which the ancestor had wrongfully conveyed with warranty, a circuitry of action is avoided, since, the moment the demandant were to recover the land, the tenant would acquire a right to recover the value thereof from the heir in an action upon the ancestor's covenant of warranty. In the case cited, the facts were, that Bates declared on his own seisin, claiming under Blodgett, who had the freehold of Shaw. The tenant claimed under a deed from Packard, to whom Davison had conveyed with covenants of seisin and warranty. Bates's wife was [*668] the daughter of Davison, and heir, he being dead, * to assets out of his estate. It was held that his (Davison's) warranty descended to her; and that, if Bates recovered the land, the tenant would at once have a claim for the value of the land thus taken from him, which he might recover from her and her husband; and to prevent circuitry of action, the covenant of the ancestor was held to operate as a rebutter to the demandant's claim.³ But heirs are only affected by an ancestor's warranty as to land acquired by descent from him, and never as to land acquired by purchase.⁴

33. What has been said, as well as the bearing of the doctrine upon the question of damages recoverable in an action upon a covenant of warranty, renders it proper to say a few words of "lineal and collateral warranties," which once filled

¹ *King v. Gilson*, *sup.*

² *Bates v. Norcross*, 17 Pick. 144. See also *Cole v. Raymond*, 9 Gray, 217.

³ Co. Lit. 365; *Potter v. Potter*, 1 R. I. 43.

⁴ *Oliver v. Piatt*, 3 How. 412.

so important a place in the English law of real property. The doctrine never was adopted, with all its effects, into American jurisprudence; and in England, after various statute modifications from time to time, it lost its most objectionable features by the statute 4 Anne, c. 16, and finally was altogether abolished by the statute of 3 & 4 Wm. IV. c. 27 and 74. And the same has been done in New York.¹ In Massachusetts, it was once attempted, in 1765, to bar a cross remainder-man in tail by a collateral warranty; but the point was abandoned.² By the early common law, the obligation of warranty, upon a feoffor and his heirs, growing out of tenure, resulted and was implied from the form of the gift itself, whereby the feoffee held of the feoffor and his heirs, and was bound to render services for the same; and they, in turn, were bound to warrant the lands, and to supply others of equal value if the title failed. When the statute of *quia emptores* destroyed this relation of tenure between feoffor and feoffee, though the feoffor was himself bound to warrant, it was a personal obligation, and did not bind his heirs, unless he made an express warranty to that effect. Even before the statute last mentioned, it had become customary to insert such a clause in order to prevent the heir of a feoffor from claiming the land sold, and for this reason: The heir, at one period, was interested with the ancestor so far that the ancestor could not give a good title to lands without the consent of his heir.³ But if the ancestor did so grant and bind himself and his heirs * to warrant, the law presumed that he had [*669] received a full equivalent for the land which would go to his heir upon his death; and therefore held the heir bound by the warranty, by the way of rebutter, so that he could not disturb the grantee. As this heirship might be either by lineal descent from the warranting ancestor, or by collateral relationship, these kinds of warranty took the names of "lineal" and "collateral," according as the heir to be affected by it was lineally or collaterally related to the warrantor; although, in the latter case, the title of the heir to the particular estate affected by the warranty could never

¹ Lator, Real Est. 247; Shelf. Real P. Stat. 228.

² Banister v. Henderson, Quincy, 119.

³ See Wild's case, 6 Rep. 17.

have been derived from the warranting ancestor.¹ The obligation of warranty, as has already been stated, was to give other lands of equal value, if the warrantee were evicted from those granted to him. But in neither lineal nor collateral warranty was the heir bound to do this, unless he received other sufficient lands, by descent, from the warranting ancestor. In the case, however, of lineal warranty, the heir was estopped from claiming the land himself; for, the moment he had done so successfully, he would be in possession of such assets wherewith to make good his ancestor's warranty.² The same thing was *assumed* to be true in case of a collateral warranty; but the injustice and absurdity of the doctrine can best be explained by applying it to a particular case.

The one put by Littleton is this: "If tenant in tail discontinue the tail, and hath issue and dieth, and the uncle of the issue release to the discontinuee *with warranty*, and dieth without issue, this is a collateral warranty to the issue in tail, because the warranty descendeth upon the issue that cannot convey himself to the entail by means of his uncle."³ The circumstances to be regarded here are, first, by reason of the tenant in tail having worked a discontinuance as to his issue by his conveyance before the birth of such issue, the heir in tail was driven to his action to regain possession of his land, upon the death of his ancestor, the tenant in tail; and it was

in the trial of this action that this estoppel by warranty was raised. * That was done in this way, as explained by Lord Coke: The heir's relationship to his uncle was collateral, and he never could have derived any title to the land through him; for, being entailed, it could descend only in direct lineal descent. But, the father being dead, the nephew, upon the death of the uncle without issue, became in theory his heir-at-law; and if, therefore, he recovered from the tenant the land in question, he would, if he had received assets from his uncle, be obliged to make good the uncle's warranty to the tenant, in the same way as the heir of the warranting ancestor in a lineal warranty would be bound

¹ Burton, Real Prop. 255, 256; Co. Lit. 370 a, n., 320; Lit. § 704; Co. Lit 371 a.

² Bl. Com. 300-302; Lalor, Real Est. 247.

³ Lit. § 709.

to do. But as the same doctrine did not apply in the one case as in the other, that the very recovering of the lands would be assets, inasmuch as he was the heir to them through such ancestor, — for he never could have inherited entailed lands through his uncle, — the law *assumed* “that the uncle would not unnaturally disinherit his lawful heir, unless he should leave him greater advancement. *And in this case the law will admit no proof against that which the law presumeth.*”¹ And so he became barred by this *collateral* warranty. Other illustrations might be given, as a release by a younger brother, with warranty to the disseisor of the father, binding the older brother, and barring his claim to the land, if the younger brother died without issue, after the death of the father, leaving the older brother his heir by the rules of descent, though he died penniless.² But these will suffice to show the character of an arbitrary rule of law, by which a beggar might cut off the rightful claim to land, by conveying or releasing it with warranty, merely because, by the accidental order in which two persons to whom he was related died, one became theoretically the heir-at-law of such warrantor.

34. This renders it necessary, too, to add a single word as to the doctrine of implied warranty, which has already been spoken of. So far as covenants are implied in leases, the reader is referred to a former part of this work;³ and in respect * to the effect of the words “give” and [*671] “grant” in a deed implying in England a covenant in law, the late statute of 8 & 9 Vict., c. 106, has declared that these words shall not receive that construction in deeds between individuals.⁴ The same is the law in Maine and in New York: there are no implied covenants in deeds of conveyance. But, in Illinois, the words “grant, bargain, and sell,” are held to be a covenant of seisin against incumbrances done or suffered by the grantor, and for quiet enjoyment against the grantor, his heirs and assigns.⁵ The word “give” is one of the words from which, when used in a deed

¹ Co. Lit. 373 a.

² Lit. § 707; 2 Bl. Com. 302.

³ *Ante*, vol. 1, p. *324; Stearns, Real Act. 128.

⁴ Wms. Real Prop. 368.

⁵ *Bates v. Foster*, 59 M₃. 160; *Sanford v. Travers*, 40 N. Y. 140; *De Wolf v. Haydn*, 24 Ill. 529.

of feofment, the law implies a covenant; and its extent is a covenant of warranty during the life of the grantor.¹ But when used in a deed which derives its effect from the statute of uses, the expression does not imply a covenant.² How far the word "grant" implies a covenant in a deed of conveyance, is considered by Mr. Platt, in his work on Covenants; and he states unqualifiedly, that, in conveyances of freehold estates, the word "grant" will not constitute a warranty, though it does in case of an estate for years.³ But upon an exchange of real estate which is a proper *escambium*, where the word "exchange" is contained in the deeds, there is a warranty of law incident to it,—a condition to give the party a re-entry as well as a warranty, to enable him to vouch and recover over in value.⁴ But if the exchange is effected by mutual deeds of bargain and sale with covenants, the remedy of the party is not by re-entry, but upon the covenants in the deed.⁵ The court in one case held, that it seems now to be settled, that, in conveying by deeds of bargain and sale, the words *granted, bargained, sold, enfeoffed, and confirmed,* have not the effect of covenants in law. But, on the creation of a less estate than a freehold, a covenant of title is implied from the words of leasing. And the court, at the same time, hold that a purchaser who takes a conveyance of real estate must protect himself against a failure of title by appropriate covenants, or take the risk upon himself.⁶ It is held by the courts of Missouri, that the words in a deed, "bargain, sell, release, quitclaim, and convey," are words of release and quitclaim only. They do not raise the covenant which the statute implies from the words "grant, bargain, and sell;" and even those words do not operate, like the ancient common-law warranty, to transmit a subsequently acquired title.⁷

¹ *Frost v. Raymond*, 2 Caines, 188, 193; *Kent v. Welch*, 7 Johns. 258; Stearns, Real Act. 123-126.

² *Allen v. Sayward*, 5 Me. 227; Rawle, Cov. 3d ed. 476; *Bates v. Foster*, 59 Me. 157.

³ Platt, Cov. 47, 48; *Frost v. Raymond*, 2 Caines, 188, 193; Co. Lit. 384 a n. 332.

⁴ *Bixler v. Saylor*, 68 Penn. St. 148; *Dean v. Shelley*, 57 Penn. St. 427

⁵ *Gamble v. McClure*, 69 Penn. St. 284.

⁶ *Phillips v. Hudson*, 30 N. J. Law, 151; 2 Sugd. Vend. & Pur. 424.

⁷ *Gibson v. Chouteau*, 39 Mo. 566; *Valle v. Clemens*, 18 Mo. 486.

But where one granted a watercourse, it was held that he thereby covenanted for its quiet enjoyment, so far as his own act was concerned.¹ A reference to a street or way as a boundary of land granted, though it might estop the grantor from denying the existence of, and a right to use, such street or way by the grantee, provided the grantor were the owner of the land so described as a street or way, would not amount to an implied covenant that it did or would exist as such street or way,² even if it be over the grantor's own land, if the way is not open as a way.³ But granting a lot "bounding *along* the north line" of an alley, which was laid down upon a map of the lots referred to in the deed, was held to convey a right of way over such alley for the use of such estate.⁴ Though bounding a lot by a street laid down on a plan, which had never been opened or accepted as a street, gives the grantee no right to call upon the grantor to open it as a street.⁵ But if one sell city lots for building, bounding them by streets laid down upon a map or plan, but not opened, the purchaser would acquire a legal right, as against the grantor, to have the streets opened to the width delineated on the map, and the land thus included in the street will be dedicated by him to public use.⁶

35. There may be both express and implied covenants in a deed, and both be good.⁷ But an express covenant always supersedes or controls an implied one, when it relates to the same subject-matter of covenant.⁸ This can best be illustrated by a few out of the many cases found in the books. Thus, in

¹ *Pomfret v. Ricroft*, 1 Saund. 321, 322.

² *Howe v. Alger*, 4 Allen, 206; *Bellinger v. Burial Ground, &c.*, 10 Penn. St. 135; *ante*, p. *467. As to how far a party selling by a plan, showing a way upon it, is estopped to close it, or deny its existence, see *Rodgers v. Parker*, 9 Gray, 448; *Thomas v. Poole*, 7 Gray, 83; *Loring v. Otis*, 7 Gray, 563; *Bechtel v. Carslake*, 3 Stockt. Ch. 503; *Brainard v. B. & N. Y. Central Railroad*, 12 Gray, 410; *ante*, *635.

³ *Hopkinson v. McKnight*, 30 N. J. Law, 427; *Harding v. Wilson*, 2 B. & C. 96.

⁴ *Cox v. James*, 45 N. Y. 562.

⁵ *Fonda v. Borst*, 2 Abb. N. Y. Rep. 155; *ante*, *635.

⁶ *Becker v. St. Charles*, 37 Mo. 18. ⁷ *Gates v. Caldwell*, 7 Mass. 68, 70.

⁸ *Kent v. Welch*, 7 Johns. 258; *Vanderkan v. Vanderkan*, 11 Johns. 122 :

4 *Cruise, Dig.* 370; *Line v. Stephenson*, 5 Bing. N. C. 183

one, the covenant was that the covenantee should have the estate "as his own right, &c., free from the claims of all persons whomsoever, to claim the same, or any part thereof, lawfully." Then followed a clause binding the grantor, &c., to warrant and for ever defend the right and title to the land against all legal claims, in virtue of a certain patent. It was held, that the first was a general covenant of warranty, and that it was not limited or restricted by the special covenants. They both were to stand together.¹ So where the words in the deed were "grant, bargain, and sell," which are held in Illinois to constitute an express covenant, and these were followed by an express covenant that the heirs, executors, administrators, and assigns should defend the title against all persons, it was held not to limit the general express covenant which preceded it.² In Mississippi, however, where the same words are held to create an implied covenant, a grantor, after making use of these, added an express covenant to warrant and defend the premises against the claims of all persons. The covenantee sued his covenantor for a breach of covenant of seisin, on the ground that such covenant was implied in the words "grant, bargain, and sell." But the court held, that the express covenant of warranty did away the covenant implied by the words aforesaid, which were intended to operate as covenants only where the parties had omitted to insert covenants in their deed.³ In Missouri, the court sustain the above doctrine of the courts of Illinois and Pennsylvania, and add, "Whilst it is conceded that a special covenant will restrain a general one, where the two are absolutely irreconcilable, yet the courts have inclined very much to let both stand." "Where the particular covenants and the general covenants are entirely independent of each other, and of a different character, they will all stand."⁴ So in Iowa, where the grantor's deed contained the words "grant, bargain, and sell," a covenant was added to warrant and

¹ *Rowe v. Heath*, 23 Texas, 614.

² *Hawk v. McCullough*, 21 Ill. 220, 222. See also *Funk v. Voneida*, 11 S. & R. 109.

³ *Weems v. McCaughan*, 7 S. & M. 422.

⁴ *Alexander v. Schreiber*, 10 Mo. 460, 466.

defend the premises against all persons claiming under him. It was held, that the former words amounted to an express covenant; and that the latter covenant did not restrict their effect, though practically superfluous in its effect.¹ From the introduction of several covenants into the same deed, questions have arisen how far a restriction or limitation as to one of these, on the part of the covenantor, extends to and affects the other covenants. The cases are somewhat numerous, and not easily reconciled. Thus where a grantor covenanted, first, that, notwithstanding any act by him to the contrary, he was seised in fee, and, second, that he had good right to convey, &c., it was held, that, though general in its terms, the limitation of the first extended to the second covenant. So where exceptions have been made in a covenant against incumbrances, of a certain *mortgage, [*672] for instance, and this has been followed by a general covenant of warranty, the question has been made, whether the exception as to the one extended to and limited the effect of the other. And this was the case of *Estabrook v. Smith*, cited below. The question in such cases can ordinarily be determined only by construing the several covenants in their relation to each other, in order to reach the meaning which the law gives to the language of the parties. The rule seems to be, that, in order to have the restriction or limitation annexed to the first affect the second in the like manner, the two covenants must be connected; they must be of the same import, and they must be directed to one and the same object; so that in the case stated of a qualified covenant as to incumbrances, with a general covenant of warranty, the latter was held not to be restricted or limited in its effect by the limitations of the first.² In carrying out their illustration, the court refer to the case of *Howell v. Richards*,³ where it is said, "The covenant for title, and the covenant for right to convey, are connected covenants, generally of the same import and effect, and directed to one and the same object;

¹ *Brown v. Tomlinson*, 2 *Greene (Iowa)*, 525.

² *Estabrook v. Smith*, 6 *Gray*, 572, 577; 2 *Sugd. Vend.* 527 *et seq.*; *Sumner v. Williams*, 8 *Mass.* 162, 202, 214; *Browning v. Wright*, 2 *B. & P.* 13; *Howell v. Richards*, 11 *East*, 634; *Smith v. Compton*, 3 *B. & Ad.* 189.

³ *Howell v. Richards*, 11 *East*, 633. See *Gainsforth v. Griffith*, 1 *Saund.* 51.

and the qualifying language of the one may therefore, properly enough, be considered as virtually transferred to, and included in, the other of them. But the covenant for quiet enjoyment is of a materially different import, and directed to a distinct object." The court go on to say: "That he might, from motives of prudence, be unwilling to subject himself to a suit for the existence of an incumbrance, which he is willing to covenant shall never be suffered to disturb his grantee." In another case, the court lay it down as a general rule, that a general covenant will not be held to be qualified by others, unless in some way connected with them.¹ Thus where the prior covenant in a deed was, that the grantee should hold the premises free from the claims of all persons whomsoever, and was succeeded by one warranting the premises against all legal claims, "in virtue of said C's patent and deed to me," it was held, that the general warranty was not restricted by the limited terms of the second covenant.² But where a collector of taxes sold an estate as such, and covenanted, in his capacity of collector, to warrant and defend the granted premises, it was held, that, as he followed the statute form of conveyance, his covenant was not to be regarded as personal, but made in his public capacity. Had he made the sale as executor or administrator, acting in *alieno jure*, any covenants he should have made would have bound him personally.³ So where the grantor first recited in his deed a declaration of good and full power to sell and dispose of the tract, followed by a covenant to warrant and defend, &c., "all our right, title, claim, &c., against the just claims of all persons," it was held to amount to general covenant of warranty.⁴ And in *Cornell v. Jackson*, where there were covenants of seisin against incumbrances and warranty, with a clause expressly limiting the covenants against incumbrances and warranty to the land within certain points, it was held that the covenant of seisin was not thereby limited or restricted to this portion of the premises.⁵

¹ *Smith v. Compton*, 3 B. & Ad. 189. ² *Rowe v. Heath*, 23 Texas, 614.

³ *Wilson v. Cochran*, 14 N. H. 399. See *Sumner v. Williams*, 8 Mass. 162.

⁴ *Peck v. Hensley*, 20 Texas, 673.

⁵ *Cornell v. Jackson*, 3 Cush. 506, 508; *Funk v. Voneida*, 11 S. & R. 109
Alexander v. Schreiber, 10 Mo. 460.

35 *a.* Of the nature of the foregoing inquiry is the question which sometimes arises under a grant, where there is an outstanding charge like a mortgage upon the premises, and the same are described as being under such charge or mortgage, whether the purchaser thereby assumes, in law or equity, a personal obligation to pay the same. The case is fully considered in *Stebbins v. Hall*, where it is held, that, in order to charge such purchaser personally, the language of the deed should be "subject to the payment" of the outstanding mortgage, or that "it forms a part of the purchase-money which the grantee in the deed assumes to pay," or some equivalent expression, which clearly imports that an obligation is intended to be created by one party, and is knowingly assumed by the other.¹

36. But, by statute in New York, no covenant is to be implied in any conveyance of real estate, whether such deed contains special covenants or not.² But this does not extend to implied covenants in leases, which are left as at common law.³ On the other hand, in several of the States, if one grant land by deed, without any express covenant therein, it is provided by statute that there is thereby an implied covenant on his part that he is seised, that they are free of incumbrances created by him, and, for quiet enjoyment, as against all acts done by the grantor.⁴ In Delaware, "grant, bargain, and sell," unless specially restrained, imply a special

¹ *Stebbins v. Hall*, 29 Barb. 524; *Tillotson v. Boyd*, 4 Saund. 516; *Murray v. Smith*, 1 Duer, 412; *Trotter v. Hughes*, 2 Vt. 74; *ante*, vol. 1, p. *518, *571, *Gage v. Brewster*, 31 N. Y. 221; *Belmont v. Coman*, 22 N. Y. 488.

² 2 N. Y. Rev. Stat. 4th ed. p. 148, § 153; Stat. at Large, vol. 1, p. 689, § 140. So in Minnesota, Comp. Stat. 1858, c. 35, § 1; Stat. at Large, 1873, vol. 1, c. 35, § 1; Oregon, Stat. 1855, p. 519, § 1; Gen. Laws, 1872, p. 515; Wisconsin, Rev. Stat. 1858, c. 86, § 5; Ohio, Walk. Am. Law, 381; North Carolina, *Rickets v. Dickens*, 1 Murph. 343.

³ *Tone v. Brace*, 11 Paige, 566, 569; *Mayor, &c. v. Mabie*, 3 Kern. 160; *Vernam v. Smith*, 15 N. Y. 327, unless the leases are in fee or perpetuity. *Carter v. Burr*, 39 Barb. 59.

⁴ Mississippi, Code, 1857, p. 309, art. 16; Rev. Code, 1871, § 2299; California, Wood, Dig. 1858, pp. 100, 105; Code, 1872, § 1113; Arkansas, Dig. Stat. 1858, c. 37, § 1; Pennsylvania, Purd. Dig. 1857, p. 229, § 65; Do. 1872, vol. 1, p. 472, § 75; Illinois, 2 Comp. Stat. 961; Rev. Stat. 1874, p. 80, § 8; Alabama, Code, 1852, § 1314; 1867, § 1584; Missouri, Rev. Stat. 1855, c. 32, § 14; Stat. 1872, vol. 1, c. 35, § 8; *Drexel v. Miller*, 49 Penn. St. 249.

[*673] warranty against a *grantor and his heirs and all persons claiming under him.¹ In Indiana, a warranty of title must be inserted if intended.² In Iowa, the words "grant, bargain, and sell," in a deed, were, by statute, once construed to be express covenants, 1, of seisin; 2, against incumbrances done or suffered by the grantor, or those claiming under him; and 3, for further assurance. A similar provision was contained in stat. 6 Anne, c. 35, § 30, and is said to have been re-enacted in Pennsylvania, Indiana, Illinois, Alabama, Mississippi, Arkansas, and Missouri.³ But now, by the stat. of 8 & 9 Vict. c. 106, "give" and "grant" are no longer a covenant in law; and such seems to be the effect of the present code of Iowa.⁴ But the ruling of the courts of the different States, as to the extent of the covenants implied from these words, do not seem to be uniform. Thus, in *Gratz v. Ewalt*, the court held that it was a covenant, "that the grantor had done no act nor created any incumbrance whereby the estate granted by him might be defeated; that the estate was indefeasible as to any act of the grantor." Ch. Kent approves of this construction, and expresses an opinion that the same doctrine would apply to the same statutory language in other States; though the subject is now regulated in New York by statute, as already stated.⁵ In Iowa, a general covenant of warranty was held to be, in effect, a covenant against incumbrances, and broken by an existing incumbrance, although no measures may have been taken by the incumbrancer to disturb the grantee in his possession.⁶ In Alabama, the same construction is applied to the covenant created by the words "grant, bargain, and sell," as that of the courts of Pennsylvania. And the same rule applies in Mississippi and in Illinois.⁷ It was held, however, in Illinois, that as the

¹ Del. Code, 1852, c. 83, § 2; Code, 1874, c. 83, § 2.

² Ind. Rev. Stat. 1852, c. 23, §§ 12, 15; 1862, vol. 1, c. 37, §§ 12, 15.

³ *Brown v. Tomlinson*, 2 Greene (Iowa), 527; *Funk v. Creswell*, 5 Iowa, 62, 84; 4 Kent, Com. 474; *Gratz v. Ewalt*, 2 Binn. 95; *Funk v. Voneida*, 11 S. & R. 109; *Alexander v. Schreiber*, 10 Mo. 460.

⁴ *Funk v. Creswell*, 5 Iowa, 85.

⁵ 1 Stat. at Large, 689 c. 1, tit. 2, § 140.

⁶ *Funk v. Creswell*, 5 Iowa, 62, 95.

⁷ *Roebuck v. Dupuy*, 2 Ala. 538; *Latham v. Morgan*, 1 S. & M., Ch. 611; *Prettyman v. Wilkey*, 19 Ill. 249; *Hawk v. McCullough*, 21 Ill. 220.

words "grant, bargain," &c., constituted a statute covenant, an after-acquired title would enure to the benefit of a grantee, in a deed containing these words, to the same extent as if there had been full covenants of warranty;¹ but in Missouri they are regarded as express covenants of seisin, against incumbrances, and of further assurance.²

36 *a*. Sometimes a certain number of acres or quantity of land in the granted premises is intended to be guaranteed or assured to the grantee, and words to that effect have been held to amount to a covenant. The question in the numerous cases which have arisen has been, whether the reference to quantity is a part of the description of what is intended to be granted, or intended as an assurance of the quantity mentioned. It may be stated, generally, that where the number of acres is referred to as an "estimated" quantity, or coupled with the clause of "more or less," or is clearly a matter of description, it is not a covenant.³ So, where the quantity is mentioned in addition to the boundaries in the description of the estate, the quantity yields to the boundaries if they do not coincide.⁴ If, on the other hand, the quantity be "of the essence of the contract between the parties, the covenant is construed relatively to the quantity of land conveyed, and is to be deemed an assurance to the purchaser of the existence of that quantity."⁵ The rule as stated by Gray, J., in its application to executed as well as executory contracts to convey land, is this: "In the agreement for the sale and purchase of lands for an entire sum, either a description of the land by its boundaries, or the insertion of the words "more or less," or equivalent words, will control a statement of the quantity of land, or of the length of one of the boundary-lines; so that neither party will be entitled to relief on account of a deficiency or surplus, unless, in case of so great difference as will naturally raise the presumption of fraud or gross mistake

¹ *D'Wolf v. Haydn*, 24 Ill. 525; *King v. Gilson*, 32 Ill. 353.

² *Alexander v. Schreiber*, 10 Mo. 460.

³ *Hall v. Mayhew*, 15 Md. 551; *Wright v. Wright*, 34 Ala. 194; *Beall v. Burkhalter*, 24 Ga. 564, 567; *Powell v. Clark*, 5 Mass. 355, is regarded as description only in absence of express covenant. See *Mann v. Pearson*, 2 Johns. 37; *Perkins v. Webster*, 2 N. H. 287.

⁴ *Jackson v. Moore*, 6 Cow. 717.

⁵ *Beall v. Burkhalter*, *sup.*

in the very essence of the contract.”¹ And a vendor would be liable for false representations as to the quantity or extent of the premises granted, if accompanied with damage, whether his deed contains covenants or not;² and this would be so for one reason, that a covenant of warranty as to the quantity of land conveyed by deed cannot be raised by parol proof of representations made at the time of executing the deed.³

37. Although the question as to what damages may be recovered for the breach of any of these covenants may, perhaps, belong more properly to the subject of remedy than to that of title to real property, it cannot be out of place to say a few words upon the rules which different courts have considered applicable in deciding such questions. In Pennsylvania, a purchaser with warranty may retain from his purchase-money, if not yet paid, a sum adequate to the loss he may sustain by a breach of the covenant.⁴ While, in respect to some of these, the rule is substantially the same in all the courts, in respect to others there is a great and irreconcilable diversity, which it will be sufficient to state, without an elaborate explanation of the grounds of difference.

38. In the first place, where the covenant of seisin is broken, the measure, with few exceptions, is the purchase-money and interest. The consideration for which the purchase-money was paid having failed, the damages never exceed this.⁵ The sum stated as the consideration in the deed may be controlled by evidence, and shown to be more or less than the sum mentioned.⁶ So the value of what was given as the consideration, if it be land or chattels, may be shown as the ground of dam-

¹ *Noble v. Googins*, 99 Mass. 231. See also *Tarbell v. Bowman*, 103 Mass. 343.

² *Whitney v. Allaire*, 1 Comst. 308. See *Dobell v. Stevens*, 3 B. & C. 623.

³ *Cabot v. Christie*, 42 Verm. 121.

⁴ *Wilson v. Cochran*, 45 Penn. 230.

⁵ *Rawle, Cov.* 3d ed. 58, and note for American cases; 4 *Kent, Com.* 475; *Staats v. Ten Eyck*, 3 *Caines*, 111; *Marston v. Hobbs*, 2 *Mass.* 433; *Sedgw. Dam.* 183; *Nutting v. Herbert*, 37 *N. H.* 346; *Wilson v. Forbes*, 2 *Dev. (Law)* 39; *Brandt v. Foster*, 5 *Iowa*, 295; *Burton v. Reeds*, 20 *Ind.* 93. It is the sum actually paid, and not the sum mentioned in the deed; *Bingham v. Weiderwax*, 1 *Comst.* 513; *Dayton v. Warren*, 10 *Minn.* 237; *Tucker v. Clarke*, 2 *Sandf. Ch.* 96.

⁶ *Belden v. Seymour*, 8 *Conn.* 311, 312; *Lawton v. Buckingham*, 15 *Iowa*, 22

ages.¹ And where the consideration cannot be ascertained, or its value shown, the rule of damages will be the value of the estate at the date of the conveyance.² Damages are allowed, *pro rata*, if the seisin fail as to a part of the granted premises.³ An exception to this rule prevailed where one not seised conveyed with covenants of seisin and warranty, and then acquired a title to the estate; for then, as this enured by force of the covenant of warranty to the benefit of the grantee, it was held that he could no longer maintain an action to recover back the purchase-money.⁴ But if he had been evicted by the rightful owner, he could not have been compelled to accept the newly-acquired title of his grantor, but might have sued for the purchase-money if he chose so to do.⁵ So where the grantee, under a deed with a covenant of seisin, enters and enjoys the estate, and from lapse of time has ceased to be liable for the profits at the suit of the real owner, it would seem, that, in an action to recover back the purchase-money *and interest, he must [*674] allow for the profits so received by him.⁶ So where the covenant was that the grantor was seised of an indefeasible estate in fee, and, there being an outstanding title, the covenantee sues for a breach before he is interfered with by the true owner, on the ground of a breach because the character of the grantor's seisin was not such as answered the terms of the covenant, he will be entitled to recover only his actual damages. So in another case, for a similar breach, nominal damages alone were recovered, because he had been permitted to occupy under his grant until his title had become complete by adverse enjoyment.⁷ In *Kincaid v. Brittain*, where

¹ *Hodges v. Thayer*, 110 Mass. 286.

² *Smith v. Strong*, 14 Pick. 128. In this and the preceding case, the action was upon covenants in respect to lands situate in other States than where the actions were brought.

³ *Morris v. Phelps*, 5 Johns. 49, 55; *Beaupland v. McKeen*, 28 Penn. St. 124, 134; *Lee v. Dean*, 3 Whart. 331; *Rawle*, Cov. 3d ed. 89; *Cornell v. Jackson*, 3 Cush. 510; *Partridge v. Hatch*, 18 N. H. 498.

⁴ *Baxter v. Bradbury*, 20 Me. 260; *King v. Gilson*, 32 Ill. 356.

⁵ *Blanchard v. Ellis*, 1 Gray, 195, 200; *ante*, p. *475.

⁶ *Whiting v. Dewey*, 15 Pick. 428, 435; *Catlin v. Hurlburt*, 3 Verm. 403, 409.

⁷ *Garfield v. Williams*, 2 Verm. 327; *Wilson v. Forbes*, 2 Dev. 30, 35. See *Rawle*, Cov. 3d ed. 74, and note; *Cotton v. Ward*, 3 Mon. 304; *Reese v. Smith*, 12 Mo. 344; *Morrison v. Underwood*, 20 N. H. 369.

the covenant of seisin was considered as a continuing one, the court discuss the question of damages for a breach thereof: "If untrue, it is broken the instant it is made; and an immediate right of action accrues to the purchaser to sue for the breach, and he is entitled to recover damages, the measure of which may be the consideration-money and interest, or a less amount, or mere nominal damages, according to the nature and extent of the breach in the particular case. If the failure of title be only as to part of the land, or if the purchaser has himself extinguished the paramount title, or if his actual possession be of such a character, and continued for such a length of time, as to make the title valid under the statute of limitations, or if, for other cause, the breach be merely a technical one, the purchaser will not be entitled to have the damages measured by the consideration-money and interest. Such is the proper measure of damages, only where there is an entire failure of title, or where the purchaser has the right to treat it as such; and in the latter case, the effect of a recovery of an equivalent in damages would be to entitle the bargainor to a reconveyance."¹ In *Cornell v. Jackson*, the grantor was disseised of a part of the granted premises, so that no actual seisin passed to the grantee. The grantee, some years after, and before any seisin regained, conveyed the part in possession of the disseisor to a third person by release. The first grantee sued on the covenant of seisin in his deed, and recovered. His grantor had, in the mean time, sued for and recovered seisin against the disseisor; so that the title to the part recovered enured by way of estoppel to his grantee, under the covenant of warranty in the original deed. It was held, that the plaintiff, in the action upon the covenant of seisin, was entitled to recover the purchase-money and interest, *pro rata*, according to the value of the part of which the seisin failed compared with the value of the whole premises, deducting the value of the part which had enured to him by estoppel.² It may be added, that when one recovers, under a covenant of seisin, the consideration paid and inter-

¹ *Kincaid v. Brittain*, 5 Sneed, 123, 124; *Brandt v. Foster*, 5 Iowa, 294-296.

² *Cornell v. Jackson*, 3 Cush. 506.

est, it is the true amount thus paid, and not merely what is stated as the consideration in the deed.¹

39. As the covenant against incumbrances is one of indemnity, the covenantee can recover only nominal damages for a breach thereof, unless he can show that he has sustained actual loss or injury thereby, or has had to pay money to remove the incumbrance.² Thus, if the incumbrance be of a permanent character, such as a right of way or other easement which impairs the value of the premises, and cannot be removed by the purchaser, as a matter of right the damages will be measured by the diminished value of the premises thereby occasioned, to be determined by a jury.³ So, if it consist of an outstanding mortgage which the covenantee has paid and discharged, he will be entitled to recover the amount so paid, and interest, provided it is less than the value of the land.⁴ But, until he shall have removed such incumbrance, the grantee can recover only nominal damages, for the obvious reason, that, if another person is liable for the mortgage-debt, the holder of the mortgage may never avail himself of his mortgage lien upon the land, or disturb the purchaser in the enjoyment of the premises.⁵ If the incumbrance be an attachment upon the land, which is *af- [*675] terwards enforced by levy upon it, the measure of damages will be the amount for which the same was so levied upon, and by which the judgment was satisfied; for the purchaser, in such a case, has actually been dispossessed, and must pay that sum to regain his possession and estate.⁶ If the incumbrance is of a kind which admits of being removed, and the purchaser shall have extinguished it, he may recover upon

¹ *Bingham v. Weiderwax*, 1 Comst. 514; *Sedgw. Damages*, 3d ed. 172.

² *Rawle, Cov.* 3d ed. 134; *Morrison v. Underwood*, 20 N. H. 369; *Funk v. Creswell*, 5 Clarke (Iowa), 62.

³ *Harlow v. Thomas*, 15 Pick. 66; *Batchelder v. Sturgis*, 3 Cush. 201, 206; *Lamb v. Danforth*, 59 Maine, 322; *Haynes v. Young*, 36 Maine, 557; cases of existing highways, *ante*, *659, pl. 14.

⁴ *Prescott v. Trueman*, 4 Mass. 627; *Norton v. Babcock*, 2 Met. 510, 516; *Estabrook v. Smith*, 6 Gray, 572.

⁵ *Wyman v. Ballard*, 12 Mass. 304; *Tufts v. Adams*, 8 Pick. 547; *Funk v. Voneida*, 11 S. & R. 112.

⁶ *Barrett v. Porter*, 14 Mass. 142; *Wyman v. Brigden*, 4 Mass. 150.

his covenant what he may have fairly and reasonably paid for such extinguishment.¹ So he may recover whatever actual damage he may have sustained by the incumbrance, although the covenantor may have removed it before action brought.² But it seems that the purchaser is not bound to redeem; and if the incumbrance, by a failure to redeem, grows into an absolute estate, and the purchaser thereby loses his title altogether, he may recover in damages the purchase-money and interest.³

40. The following principle, applicable as well to an action upon a covenant of seisin as to that against incumbrances and of warranty, seems now to be settled: If such covenantee recover and receive of the covenantor full satisfaction in damages for the value of the premises, equal to the purchase-money and interest, his covenantor and grantor is thereby remitted to his right and title to the granted premises as he held them before he had granted them away, and the covenantee would be estopped, by such a judgment, to set up his title-deed against his grantor.⁴

41. In the matter of the rule of damages for the breach of the two covenants thus far considered, there does not appear to be substantially any difference between the several American courts. But in respect to the covenant of warranty, or for quiet enjoyment, there would be found differences of a most decided character. This depends upon the theory which they adopt in applying the law. In some of the States, the covenant of warranty is assumed to take the place of the ancient warranty of the feudal law; and by [*676] that, if the vassal was evicted of his * lands by a better paramount title, he received from his lord other lands

¹ Rawle, Cov. 3d ed. 138, and note of American cases; *Morrison v. Underwood*, 20 N. H. 369; *Funk v. Creswell*, 5 Iowa, 62, 64; *Funk v. Voneida*, 11 S. & R. 113, 114, 117.

² *Wetherbee v. Bennett*, 2 Allen, 429.

³ Rawle, Cov. 3d ed. 148; *Blanchard v. Ellis*, 1 Gray, 195, 203; *Chapel v. Bull*, 17 Mass. 213.

⁴ *Porter v. Hill*, 9 Mass. 34, 36; *Stinson v. Sumner*, Id. 147, 150; *Blanchard v. Ellis*, 1 Gray, 195, 203; *Parker v. Brown*, 15 N. H. 176, 188; *Kincaid v. Britain*, 5 Sneed, 124.

as a substitute, of the *same value as those he had lost, computed as at the time of the warranty*. As the thing recovered now is money, instead of land, the same idea is carried out by giving to the party who has lost his land the money he paid for it, and interest, so as to restore him to his original condition in that respect.¹ And in such action, if the conveyance and covenant be made to two persons as tenants in common, they may sue separate actions for the breach thereof in respect to his own interest and freehold.² Where one purchased land with covenant of warranty, which was under mortgage, and he yielded to a foreclosure thereof by sale of the premises, wherein he became purchaser, he recovered as damages, in his action upon the covenant, what he had to pay to satisfy the mortgagee's claim.³ In other States the covenant is regarded as one of indemnity, and the rule of damages is to restore to the covenantee what he shall have lost by the failure of the other party to keep his covenants; and therefore the measure of damages is the value of the premises at the time of the eviction. This, of course, covers improvements made by the occupant, and the increased value of the premises arising from the general rise of property, or any other circumstance.

41 *a*. In Illinois, the court gave effect to a covenant of warranty, although the grantor, when he made the deed, was out of possession, and had no title to the land granted; and held that the grantee might sue upon it, without first making an entry or being ousted. If he enter under his deed, and convey the land to a third party, this covenant of warranty attaches to the land, and runs with it, so that his grantee or any subsequent purchaser may sue upon it as running with the land. And the court favor the idea, as a general proposition, that if a grantor or covenantor have neither title nor possession, and convey with covenant of warranty, any grantee under his grantor, however remote, may sue the covenant, and the covenantor would be estopped to deny that he had

¹ Rawle, Cov. 3d ed. 313; *Brandt v. Foster*, 5 Iowa, 298.

² *Lamb v. Danforth*, 59 Maine, 324.

³ *Claycomb v. Munger*, 51 Ill. 377.

whole subject, such as how deeds may be avoided, either by the parties or creditors, and how they are to be construed, and the like. But to do this would extend this work altogether beyond its proposed limits; and the reader must be referred for these to treatises upon deeds and conveyancing, which are easily accessible to any one desirous of pursuing the investigation.

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* CHAPTER VI.

TITLE BY DEVISE.

1. History of devises of land in England.
2. Statute of wills, 32 and 34 Henry VIII.
3. No witnesses necessary under statute of wills.
4. Wills ambulatory till testator's death.
5. Witnesses to wills to testify of testator's capacity.
6. Witnesses must subscribe in testator's presence.
7. Witnesses must be competent when attesting.
8. Forms of wills of land governed by *lex rei sitæ*.
9. How many witnesses to a will required.
10. Effect of probate of a will on title to land.
- 11, 12. At what point of time wills speak.
13. Qualifications of testator as to capacity.
14. Wills of *femes covert*.
15. What constitutes a "sound and disposing mind."
16. Who may be devisees.
17. Of devises to charitable uses by 43 Elizabeth.
18. How far such devises good before the statute of Elizabeth.
19. What may be devised as real estate.
20. Devisee may take advantage of condition broken.
21. To whom lapsed devises go.
- 21 a. Lapse as to one does not defeat a second devise.
22. Of devise of right of entry by a disseisee.
23. Intention of testator affects the quantity of estate devised.
- 23 a. Of changing words in construing devises.
24. What terms in a devise pass a fee.
25. A personal charge creates a fee in land devised.
26. Devise of wild land conveys a fee.
27. When a devise in trust passes a fee.
28. Cases where fees are created by implication.
29. An absolute right of disposal implies a fee.
30. Devise of rents and profits same as of land itself.
31. Interest of devisee vests on death of testator.
- 31 a. Of devises to beneficiaries not named.
32. How devises may be defeated.
- [*679] *33, 34. Revocation of a will by change of estate.
35. Conveyance of land revokes a devise of it.
36. Effect of marriage on will of a *feme sole*.
- 37, 38. Effect of marriage and birth of child on a will made.
39. Effect of omitting to name children in a will.

40. Of the revocation of a prior will by a new one.
41. O! devise to an heir of what would descend to him.
42. How a will once revoked may be revived.
43. No devise takes effect against assent of devisee.

1. It remains to speak of title by Devise, though necessarily in brief terms. The necessity of any thing beyond a general outline of what is requisite to constitute a good devise, and the rules of construction which are applied in giving it effect, is obviated by extended treatises upon the subject, which are readily accessible to the reader, especially the work of Mr. Jarman, with the full and discriminating notes of the American editor, Mr. Perkins, and that of Judge Redfield, which supply all that can be reasonably desired by any one who may have occasion to pursue the inquiry. In tracing the history of devises, from their first introduction into England, it is ascertained that wills of land were in use among the Saxons. But upon the introduction of the feudal system by William I., A. D. 1060, they were abrogated, for various reasons. In the first place, livery of seisin, the ordinary *indicium* of title and ownership, could not be adopted, since a will never took effect until the death of the testator. In the next place, a free disposition of a feud by the last will of the tenant thereof might bring in an enemy of the lord to fight his battles and do his services. This continued to be the law, except in particular localities, until the general statute of wills passed in the 32 and 34 Henry VIII., A. D. 1541. The custom of disposing of lands by means of last wills and testaments had, however, become very general, not by law, but rather against it, by means of Uses, whereby the principle of the feudal law was evaded. This, as has been before explained when treating of uses, was effected, among other ways, by conveying lands to such uses as the feoffor should declare by his last will, in which case the legal estate passed by the feofment, while chancery enforced the use which the feoffor might declare, in the form * pointed [*680] out by him when making the feofment. When, by the statute of 27 Henry VIII., called the Statute of Uses, the seisin was at once united to the use in the transfer of estates, its effect was to destroy the power of devising lands by the

way of uses ; and they accordingly became undevisable, and remained so until the statute of wills, above mentioned, of the 32 and 34 Henry VIII.¹

2. The act of 32 Henry VIII., c. 1, authorizes any person holding lands by socage tenure “to give, dispose, will, and devise, as well by his *last will and testament in writing*, or otherwise by any other act or acts lawfully executed in his life,” all his lands at his free will and pleasure. The statute 34 and 35 Henry VIII., c. 5, is explanatory of the first, and, by the fourteenth section, expressly declares “women covert,” persons within the age of twenty-one years, idiots and persons *de non sane* memory, incompetent to make a will.

This, it will be perceived, was about two hundred and fifty years after lands had become freely alienable by deed by virtue of the statute of *Quia Emptores*, 18 Edward I. It will also be perceived that the statute requires the will to be in writing ; but it does not say by whom it is to be written, nor does it require the writing to be signed by the testator, or attested by witnesses. This led to such loose and often corrupt practices in palming off wills written by other persons as those of the supposed testators, after their deaths, that the subject was provided for in the famous statute of frauds of 29 Charles II. c. 3. In one case, the will was written down from statements of witnesses, and before the writing was completed the testator had become insensible, and so remained till he died ; and yet the will was sustained, though, in respect to some of its clauses, the witnesses did not agree as to what the testator did declare.² The case, which is said to have

been the cause of inserting the clause as to wills in [*681] the statute of frauds, was *Stephens v. Gerrard*,³ * where the testator dictated a will and caused it to be interlined, and it was prepared to be signed and sealed by him, and he said he intended to write it over again, but that in the mean time it should be his will, though he refused to sign it. The testator dying, it was established as a will.

¹ Wright, Ten. 171-173 ; Wild's case, 6 Rep. 16 b ; 4 Kent, Com. 504 ; 6 Cruise, Dig. 3-5.

² *Lawrence v. Kete*, Aleyn, 54.

³ *Stephens v. Gerrard*, 2 Keble, 123 ; Roberts, Frauds, 307.

3. By that statute, a will devising lands was required to be in writing, signed by the party making the devise, or by some person in his presence and by his direction, and attested and subscribed in his presence by three or four credible witnesses. By a recent statute in England, a will devising lands there must be signed at the bottom of the will by the testator, or some one by his direction and in his presence, and be attested by at least two witnesses, who must subscribe it in the testator's presence.¹ No particular form is required to make a testamentary writing. If the instrument vest no present interest, but only appoint what is to be done after the death of the maker, it is a testament. Nor does it make any difference that the parties intended it to be a deed. The instrument, in the case under consideration, was an indenture between a father and son purporting to convey an estate, but held to be a testamentary paper or will.² The requirement of *signing* by the testator is held to be complied with by the testator's *making his mark*, even in New York, where the statute uses the word *subscribed*.³ The mark, as the court observe, is the important thing: the signing the name around it is not material; nor is it material when it is done, or whether done at all, if the mark be proved to be made by him.⁴ Two cannot join in making a will of their separate property to a third person; and where a husband and wife joined in executing a will of their separate property, it was not admitted either as the will of each or of both.⁵ But wills mutually made by two testators in favor of each other may be good so far, that, upon the death of one, his will will take effect, and the other be defeated. So two may join in making a will of the property of one of them; since, so far as one of the makers is concerned, it is without effect.⁶ The question of mutual wills made by two persons, and how far they are

¹ Wms. Real Prop. 168; Stat. 7 Wm. IV. and 1 Vict. c. 26.

² Turner v. Scott, 51 Penn. St. 126; Burlington University v. Barrett, 22 Iowa, 60; Wall v. Wall, 30 Miss. 91.

³ Van Hanswyck v. Wiese, 44 Barb. 494.

⁴ Jackson v. Jackson, 39 N. Y. 153.

⁵ Walker v. Walker, 14 Ohio St. 157. But see Dufour v. Pereira, 1 Dick. 419.

⁶ Ib.; Lewis v. Scofield, 26 Conn. 452; Evans v. Smith, 28 Ga. 98; Roger's Appeal, 11 Me. 303.

valid or may be enforced, has come up in different courts in England and in this country; and the result seems to be this: From the very nature of a will, and its being ambulatory during the life of the maker, such wills are revocable by either party during the life of the other: but if either dies without a revocation of his will, and thereby the will of the deceased takes effect, that of the other, if unrevoked till then, becomes a compact, which will, in equity, bind the assets covered and disposed of therein; and the same will be enforced as a trust in favor of whoever was intended to be benefited thereby. The same would be the effect of two persons executing a joint will, where one of them dies before either shall have revoked it;¹ but if the agreement as to making mutual wills be oral, and is intended to include real estate, it is within the statute of frauds, and either party may revoke a will made to carry out such agreement.² A will made on Sunday is valid.³

4. The same disposition which favored devises of lands in England was introduced into this country at its settlement, and the system has always been in operation here. The formalities required in executing such wills vary according to the statute provisions of the several States, though these will be found to be substantially the same in every State.

But, before examining these provisions in detail, there are a few general principles which may be noticed, as applicable in all the States, as well as the English law. And, in the first place, a will is always ambulatory, as it is called, always inchoate, and may, at any time, be altered or destroyed by the testator during his life. It is only operative and effectual at and after his death.⁴

5. The witnesses to a will are, in the theory of the law, placed around the testator when executing it, as judges of his capacity to make it; and when called upon to testify in respect to this capacity, they are, unlike all other witnesses who do not come within the class of "experts," at liberty to

¹ *Day ex parte*, 1 Bradf. R. 478; *Dufour v. Pereira*, 1 Dick. 419, a case of a mutual will of husband and wife, which she proved after his death. *Schumaker v. Schmidt*, 44 Ala. 454, 467; 1 Redfield, Wills, 183, pl. 25; 4 Am. L. Rev. 658.

² *Gould v. Mansfield*, 103 Mass. 408.

³ *Bennett v. Brooks*, 9 Allen, 118; *George v. George*, 47 N. H. 27.

⁴ *Vynior's case*, 8 Rep. 82 a; 2 Bl. Com. 502; 4 Kent. Com. 520.

express an opinion upon the subject, which is to be taken as competent though not conclusive evidence by the court or jury.¹ It is *not necessary for the witness [*682] to see the testator sign, if he requests the witness to attest it, and he does so in the testator's presence.² But it does not matter upon what part of the instrument the witnesses subscribe their names, nor need they sign in each other's presence: if done in that of the testator, it is sufficient. The attestation clause appended to a will is no part of the instrument; nor is it important that it should recite the details of its execution, though useful, if the witness is dead, to show why he subscribed it.³ It may be by mark, instead of writing the name.⁴ It will be sufficient if there are three genuine names attested to the will, although neither of them recollects the act of signing his name.⁵ But it is essential that the attestation should be made *after* the testator has signed the will. It will not be sufficient that the witness subscribes his name first, though the testator knows and intends to adopt his signature as an attestation.⁶ But if the court are satisfied that the testator's signature was upon the paper when he asked the witnesses to attest it, though they did not see the signature, nor see him sign it, it will be sufficient.⁷

6. The witnesses must subscribe their names, attesting the will in the presence of the testator. What shall be a "presence" depends somewhat on circumstances. But it seems to be necessary, first, that the witnesses, when subscribing, should be in such a situation that the testator could see the act done, and know whether the paper which they attested was his will; and, second, the attestation must be made while the testator is in a conscious state. If subscribed in his bodily presence, while he is insensible, it is a void attestation.⁸ But a mark

¹ 1 Greenl. Ev. § 440.

² Tilden v. Tilden, 13 Gray, 103, 110; Nickerson v. Buck, 12 Cush. 332, 341.

³ Jackson v. Jackson, 39 N. Y. 159.

⁴ Redfield, Wills, 229, 231, 233.

⁵ Eliot v. Eliot, 10 Allen, 357.

⁶ Chase v. Kittredge, 11 Allen, 49. But see Vaughan v. Vaughan, &c., Redfield's note, 13 Am. L. Reg. 735, 741; Jackson v. Jackson, 39 N. Y. 153. It is not enough if the testator sign immediately after the witness's attestation.

⁷ Beckett v. Howe, L. R. 2 Preb. & D. 1; Roberts v. Welsh, 46 Vt. 164.

⁸ 2 Greenl. Ev. § 678.

made by the testator in place of his name, if intended as a signature, will be a good execution of a will.¹

7. In the next place, the witnesses must be competent to testify at the time of attestation. In some States they are required to be *credible*; in others, *competent*. But the meaning of the terms is the same.² One named as executor in a will is a competent witness;³ and so is an heir-at-law who is disinherited by the will.⁴ A wife may not be a witness to her husband's will;⁵ nor is she a competent witness to a will containing a devise to her husband.⁶

8. The law of the place where the land is situate governs in the matter of the forms and solemnities requisite to give effect to a will designed to operate upon the same; though in a majority of the States, as is the case in Massachusetts, a will made according to the forms of the other State where the testator dwells may be admitted to probate in the State where the land is situate.⁷

9. The number of attesting witnesses required to give validity to a will of lands, is, in fourteen of the States, at least three. In seventeen of the States, two witnesses are [*683] sufficient. * The laws of Louisiana on the subject are peculiar. In Arkansas, Kentucky, Mississippi, Texas, and Virginia, an exception is made in respect to requiring attesting witnesses where the will is what is called a *holograph*, wholly written and signed by the testator himself. The States requiring three witnesses, as stated by Mr. Thornton, and as will be found by reference to the statutes of those States, are Connecticut, Florida, Georgia, Maine, Maryland, Massachusetts, Michigan, Mississippi, New Hampshire, New Jersey,

¹ Nickerson v. Buck, 12 Cush. 332, 341.

² 2 Greenl. Ev. § 691; Hawes v. Humphrey, 9 Pick. 350; Haven v. Hilliard, 23 Pick. 10. See also the cases of Windham v. Chetwynd, 1 Burr. 414, and Hindson v. Kersey, 4 Burns, Eccl. Law, Phill. ed. 116, for the celebrated conflict of opinion between Lord Mansfield and Lord Camden upon the point of time in respect to which this competency relates, whether the making or the probate of the will. Warren v. Baxter, 48 Me. 193.

³ Wyman v. Symmes, 10 Allen, 153.

⁴ Sparhawk v. Sparhawk, 10 Allen, 155.

⁵ Pease v. Allis, 110 Mass. 157.

⁶ Sullivan v. Sullivan, 106 Mass. 474.

⁷ Story, Conf. Laws, § 474; Mass. Gen. Stat. c. 92, § 8; United States v. Crosby, 7 Cranch, 115; Thornt. Conv.

North Carolina, Rhode Island, South Carolina, Vermont, and Wisconsin. Those requiring two are Alabama, Arkansas, California, Delaware, Illinois, Indiana, Iowa, Kentucky, Minnesota, Missouri, New York, Ohio, Tennessee, Texas, and Virginia. In Vermont and New Hampshire, a seal is required to give validity to a will. But though very frequently adopted by testators in other States, it is not, it would seem, necessary in any other State to the validity of a will. In Pennsylvania, it seems, while it is necessary to prove a will by at least two witnesses, it is not requisite that they should have attested and subscribed the same in the testator's presence. Besides these general requirements, there are more or less stringent rules adopted in most of the States, in respect to the presence of the witnesses at the execution of the will, as to how far they must see the testator sign in order to attest its execution, and how far the testator, when executing it, must make an express declaration or publication that it is his will, &c., which it is not deemed important to detail in a work which does not profess to treat of the practical forms of conveyancing. To obviate the incompetency of a legatee or devisee to be a witness to a will, it is declared, in most of the States, that such legacy or devise shall be void.¹ By the English law, a legacy or devise to a subscribing witness is void; but if, after the making of such a will, the testator make a codicil to it, which is attested by the proper number of disinterested witnesses confirming his former will, it will give validity to the legacy to the attesting witness.² In New York, a devise to a subscribing witness is void if the will cannot be proved without his testimony; but if there are a sufficient number of other witnesses to establish the will without the testimony of this legatee, his legacy will be valid.³ If one make a testamentary paper which is ineffectual as a will for the want of a second witness, and then make a new paper, properly attested, in which he declares it to be a codicil to his last will, it will have the effect to republish and

¹ 4 Kent, Com. 508. North Carolina and Tennessee are exceptions. *Gass v. Gass*, 3 Humph. 278; N. H. Rev. Stat. c. 156, § 6; Gen. Stat. 1867, c. 74, § 8.

² *Anderson v. Anderson*, L. R. 13 Eq. 381.

³ *Cromwell v. Wooley*, 1 Abb. N. Y. R. 442.

give effect to the first paper as a will ; and it may be shown by parol that it was the paper intended and referred to in the codicil.¹ If one named as a legatee in a will attest a codicil to this will in which he is not named as a legatee, it does not affect his right as a legatee under the will. So if there be a residuary devise to one in a will which he did not attest, and he did attest a codicil which revoked a legacy given in the will, whereby the residuary portion given therein is enlarged, the fact that the legatee attested the codicil will not invalidate the devise given him by the will.² The English law, unlike that of New York, holds that a legacy given to a subscribing witness to a will, although his testimony is not necessary to establish the will by reason of there being the requisite number of subscribing witnesses besides him, would be void.³

10. In respect to the effect of admitting a will to proof, a different rule prevails in most if not in all the States from that in England. In the latter, wills of the personalty are filed and admitted to proof in the proper probate court, and when so proved become valid to all intents, and are received [*684] as such * in the trial of all collateral questions depending upon their validity. But, there being no provision for the probate of wills of real estate, it is necessary to establish their execution by proof whenever any question arises in courts involving the inquiry ; whereas, in this country, provision is made in the several States for establishing a will by a general probate thereof, when it becomes, like a judgment of court, conclusive evidence of its own due execution in the trial of any matter involving such an inquiry in any other court.⁴

11. Though wills speak, as it is called, at the death of the testator, and have no operation until then, it often becomes necessary to inquire when they were made, in order to determine questions involving their validity and effect ; as, for instance, whether at that time the testator was of competent age, of sane mind, and the like, and also whether the will

¹ *Allen v. Maddock*, 11 Moore, P. C. 427-461.

² *Gurney v. Gurney*, 3 Drew, 208.

³ *Cozens v. Crout*, 21 Week. Rep. 781 ; *Gaskin v. Rogers*, L. R. 2 Eq. 295.

⁴ 1 Greenl. Ev. § 518.

operated upon property of which the testator may be in possession at his death. Thus, while at common law a will operated upon whatever personal property the testator might have at the time of his death, such was not the case with his real property, of which only so much passed by the will as the testator was seised of at the time of making his will, and continued to be seised of at the time of his death. After-acquired real property did not pass by such will, even if acquired by an exchange for what he did then own. And if the testator should have sold a parcel of the land which he held at the time of making his will, and afterwards repurchased the same, it would come within his after-acquired property.¹ So if he had changed his interest as mortgagee into an absolute ownership by foreclosure.²

12. But now, by the present English law upon the subject, a will speaks as if made at the testator's death; and whatever he may then have which is within the terms of the will, and is intended to be devised, passes thereby. And such is substantially the law in several of the United States by statute; namely, *New York, Vermont, Massachu- [*685] setts, Pennsylvania, Virginia, Maine, Connecticut, New Hampshire, North Carolina, and Illinois.³ There is, besides, a class of cases, where, though the devise takes effect at the death of the testator, it may be partially postponed as to its complete effect, as where it is to a class of individuals, such as the children of A. If there be no particular or intermediate estate interposed between the death of the testator and the coming into possession by the devisees, only such of A's children as shall have been born at the testator's death can take, excluding after-born children. But if there be a particular estate interposed, as to A for life, and then to the

¹ Wms. Real Prop. 172; 1 Jarm. Wills, 1st Am. ed. 43; 4 Kent. Com. 510.

² Brigham v. Winchester, 1 Met. 390; Ballard v. Carter, 5 Pick. 112.

³ Wms. Real Prop. 173; 4 Kent, Com. 512; Mass. Gen. Stat. c. 92, § 4; Me. Rev. Stat. 1857, c. 74, § 5; 1871, c. 74, § 5; Conn. Gen. Stat. p. 401, § 1; 1875, c. 11, § 11, p. 368; N. H. Gen. Stat. c. 74, § 2; Vt. Rev. St. p. 254; Append. 1870, p. 376, c. 49, § 2; No. Car. Rev. Stat. p. 607, § 5; Battle's Revisal, 1873, c. 119; Willis v. Watson, 4 Scam. 64; 1 Jarm. Perk. ed. 85, 86, note; McNaughton v. McNaughton, 41 Barb. 50.'

children of A, it will include all who shall have been born during the life of A, vesting in such as were born before the testator's death, and opening to let in such as are born afterwards; or, if all are dead except one, without leaving issue, the survivor takes the whole. So if, for any cause, one only can take, such would be the law as to time.¹

13. The general qualifications of a testator or testatrix for making a good will are age, mental capacity, and freedom from legal disability. The statute of wills excludes persons from making wills who are infants, *femes covert*, idiots, and persons of non-sane memory. The law, in requiring a testator, if a male, to be of the age of twenty-one years, in order to be competent to make a valid will of real estate, is believed to be uniform in nearly all the States; but, in several, females of the age of eighteen years are made competent to devise lands. Such is the case in Maryland, Illinois, and California; and, by statute of the latter State, the same rule as to age applies to males. The same is the rule in Connecticut.²

14. The capacity of *femes covert* to make wills is derived from statute. Among the States where the common law, in this respect, is altered, are Ohio,³ Massachusetts,⁴ Arkansas,⁵ California,⁶ Missouri,⁷ Kentucky,⁸ Connecticut,⁹ Wisconsin,¹⁰

¹ 1 Jarm. Perk. ed. 296, 297; 2d do. 55, 56; Redfield, Wills, 386; Handberry v. Doolittle, 38 Ill. 202; Campbell v. Rawdon, 18 N. Y. 415; Downing v. Marshall, 23 N. Y. 374, 375.

² Maryland, Code, vol. 1, p. 685; Illinois Stat. ed. 1858, p. 479; Rev. Stat. 1874, c. 14, § 1; Cal. Stat. 1850-1853, p. 140, § 1; Code, 1872, § 1270; Conn. Gen. Stat. 1875, p. 369.

³ May devise lands held in her own right. Allen v. Little, 5 Ohio, 65; Swan, Stat. 1024, § 1; S. & C. Stat. 1860, vol. 2, pp. 1615, 1616.

⁴ Gen. Stat. c. 103, § 9, may make a will of her real estate like a *feme sole*.

⁵ Dig. Stat. p. 1073, § 3, limited to such power as is secured by marriage settlement on, or authority in writing from her husband before, marriage.

⁶ Stat. 1850-1853, p. 140, § 2, may make a will without her husband's consent. Code, 1872, § 1273.

⁷ Gen. Stat. 1866, c. 115, every person of the age of twenty-one years and of sound mind. Stat. 1872, vol. 2, c. 145, § 1.

⁸ Rev. Stat. p. 694, may dispose, by will, of property secured to her separate use. Gen. Stat. 1873, c. 113, § 4.

⁹ Gen. Stat. 1866, c. 401, in the same manner as any person; 1875, p. 369.

¹⁰ Rev. Stat. p. 577; Laws, 1870, c. 3, p. 10, extends the right to married women of the age of eighteen years.

Mississippi,¹ Rhode Island,² Alabama,³ Illinois,⁴ Indiana,⁵ Maine,⁶ Michigan,⁷ *New Hampshire,⁸ Penn- [*686] sylvania,⁹ Tennessee,¹⁰ Vermont,¹¹ Maryland, and Kansas.¹²

15. In respect to the other qualification of a testator, — namely, what is called “a sound and disposing mind and memory,” — it is impossible to draw a precise line between such as are and such as are not thus qualified. The difficulty is in fixing and applying any thing like a uniform test or standard. In a case in Vermont, the court, Redfield, J., uses this language: “He must undoubtedly retain sufficient *active* memory to collect in his mind, without prompting, particulars or elements of the business to be transacted, and to hold them in his mind a sufficient length of time to perceive at least their more obvious relations to each other, and to be able to form some rational judgment in relation to these.” Among these *elements* he mentions the number of the testator’s children, their deserts with reference to conduct and capacity, what he had done for them relatively to each other,

¹ Rev. Code, 1871, § 2388.

² Rev. Stat. 1857, c. 136, § 12, may make a will like any person; 1872, c. 171, § 1.

³ Code, 1867, § 2378, has a general power of devising by will.

⁴ Stat. 1855, c. 110, § 1, has full power of disposal by will; Rev. Stat. 1874, c. 148, § 1.

⁵ By Stat. 1859, has full power to devise her lands without the concurrence of her husband. *Noble v. Enos*, 19 Ind. 72; Stat. 1862, vol. 2, p. 551.

⁶ Rev. Stat. 1857, c. 61, § 1, may devise by will as if sole; 1871, c. 61, § 1.

⁷ Rev. Stat. 1864, c. 68, § 1; 1871, vol. 2, c. 154, § 1, requiring assent of the husband.

⁸ Gen. Stat. 1867, c. 164, § 12, may devise, saving husband’s rights by marriage contract.

⁹ Dunlop, *Laws*, pp. 996, 997, and Act 1855, No. 456, may devise her estate by will executed in presence of two witnesses other than the husband. *Purd. Dig.* 1872, vol. 2, p. 1474.

¹⁰ Stat. 1852, c. 180, § 4, may devise any estate secured to her separate use.

¹¹ Gen. Stat. 1863, c. 71, § 17, *Append.* 1870, c. 49, § 1, and c. 71, § 17, has general power of devise of her own lands.

¹² Code, Maryland, 1860, p. 686, with consent of husband subscribed to will; Gen. Laws, Kansas, 1860, c. 141, § 4; 1868, c. 117, §§ 1, 35; but shall not bequeath away from her husband more than one-half of her property, both real and personal, without his consent in writing. In Nebraska, with husband’s consent. *Rev. Stat.* 1866, p. 81; 1873, c. 17, § 123. In Nevada, the same as if she were sole. *Rev. Stat.* 1866, p. 290; *Comp. Stat.* 1873, p. 200, § 813.

and the amount and condition of his property, &c.¹ In another case, in Connecticut, the court held that it was not essential to the legal capacity of a testator to make a will that he should be capable of managing business generally. It is sufficient, if, in making his will, he understands what he is doing.² The question of the mental capacity of a testator to make a will has reference to the point of time when it is made. If sane then, it makes no difference that he was, at the time, under guardianship as an insane person;³ nor that he committed suicide shortly after, since that act is only in the nature of evidence bearing upon the point.⁴ Among the

most remarkable cases where a will made by a lunatic [*687] was held to be * made in a lucid interval is that of

Cartwright *v.* Cartwright,⁵ where the testatrix's hands were untied by the person who had charge of her as a furious lunatic, and she sat down and wrote her own will, which was so proper and consistent in all its parts, that the court sustained it. On the other hand, though, as to most subjects, the testator may be sane, yet if, in respect to one or more subjects, he is under an habitual insane delusion, and makes his will under the influence of such delusion, and its terms are modified or controlled thereby, such will would be invalid. An instance illustrative of this partial insanity or monomania in the testator, which avoids a will, was the case of Mr. Greenwood, a lawyer, whose will was made while he was in full practice at the bar, and was set aside on account of an insane delusion in respect to a brother, under the influence of which he disinherited him.⁶

16. In respect to the question, who may be devisees, there is scarcely any limit except such as is created by statute, as in England, by those against mortmain. In some of the United States, as, for instance, in New York, corporations may be devisees only to a limited extent prescribed by statute. So, in Delaware, a church may not be a devisee; but *femes*

¹ *Converse v. Converse*, 21 Vt. 170.

² *Kinne v. Kinne*, 9 Conn. 102. See *Stewart v. Lispenard*, 26 Wend. 255.

³ *Breed v. Pratt*, 18 Pick. 115.

⁴ *Brooks v. Barrett*, 7 Pick. 94.

⁵ 1 Phillim. 90. See 1 Jarm. Wills, 1st Am. ed. 29, notes of American cases.

⁶ See 1 Wms. Exrs. 27, and 3 Add. 96, 97, and Erskine's speech in Hadfield's case.

covert, infants, aliens, and persons of non-sane memory, may be devisees, and take accordingly.¹

17. There is one class of devises authorized by statute, where the ordinary requirement that there should be some distinct person or class of persons named as the devisees, who are capable of taking, in order to have the devise effective, is dispensed with. These are devises "to charitable uses," which are the subjects of the statute of 43 Eliz. c. 4, which has been substantially, though not by re-enactment, adopted as the law of many of the United States. The preamble to that statute recites the nature and classes of these * devises, such as those for the maintenance of the [*688] sick, of schools of learning, of education, and for the preferment of orphans, and a great variety of other public or benevolent objects, in which no persons or corporations are named, or trustees created, to hold and manage the property. or, if named, the beneficiaries are not designated. In cases like these, devises would, at law, be utterly void for want of a person of sufficient capacity to take as devisee.² And, as the law still is, a bequest for such "benevolent" purposes as trustees may agree upon does not come within the rule of "charitable devises."³ But where the word "benevolence" was coupled with "charity," or used in connection with it, it was held to limit and define the nature of the charity, but not to impair the effect of the devise.⁴ Under this statute, courts of chancery are empowered to appoint commissioners to superintend the application and enforcement of such charities, so that the devises are made to take effect; and if, from any cause, the charity cannot be applied precisely as the testator has declared, such courts exercise the power in some

¹ 4 Kent, Com. 506, 507; 1 Jarm Wills, 1st Am. ed. 57, and notes; Willard, Real Est. 475; 1 Jarm. Wills, 59, and Perkins's note; Ferguson v. Hedges, 1 Harring. 524. No general statute of mortmain exists in the United States, except in Pennsylvania. 6 Cruise, Dig. 128, note.

² Story, Eq. Jur. §§ 1146, 1160, as to how far devisees must be designated to have devise take effect. See 6 Cruise, Dig. 133, note; Vidal v. Girard, 2 How. 127, 193; Baptist Asso. v. Hart, 4 Wheat. 33-49. Levy v. Levy, 33 N. Y. 102; Loring v. Marsh, 27 Law Rep. 377; 6 Wall. 337.

³ James v. Allen, 3 Meriv. 17; Chamberlain v. Stearns, 111 Mass. 267.

⁴ Saltonstal v. Sanders, 11 Allen, 470.

cases of appropriating it, according to the principles indicated in the devise, as near as they can, to the purpose expressed. And this is called an application *cy pres*.¹ But still, if the charity be of a general, indefinite, and mere private nature, or not within the scope of the statute of Elizabeth, it will be treated as utterly void.² A case occurring in Massachusetts may serve to give a general idea of the nature of these devises. A testator gave estate, real and personal, "to the cause of Christ, for the benefit and promotion of true evangelical piety and religion." He directed his executors to collect his property, &c., and pay it over to A, B, and C (naming them), "to be distributed in such divisions, and to such societies and religious charitable purposes, as they may think proper." One of the heirs brought a real action to recover a share of the testator's real estate, on the ground that a sale by the executor, for the purpose of paying over the proceeds to A, B, and C, was void. It was held, that the statute 43 Eliz., c. 4, was in force in Massachusetts; and, after referring to several cases of analogous devises which had been [*689] sustained, the court * held that this case came within the principle of the statute, and sustained it as a good devise: the sale by the executor, for the purpose of executing it, was also held good. In another case, the devise was to A and B, to manage, invest, and reinvest the property according to their best discretion; and that they or their successors should select three persons, who should determine how, by payments to incorporated charitable institutions, the testator's wish to benefit the poor might be best carried into effect. One of the two persons named died in the life of the testatrix; and the survivor, after her death, appointed the three who were to designate the charitable institutions as mentioned in the will. It was held that this power of selection survived as a part of the trust; and that, as a charitable trust, the devise took effect in favor of the institutions selected.³ It is stated, that though the statute was never in force in Pennsylvania, as that State had no court of chan-

¹ Attorney-General *v.* Bower, 3 Ves. 714; Story, Eq. Jur. §§ 1169, 1176. See *Bliss v. Am. Bible Society*, 2 Allen, 334.

² Story, Eq. Jur. § 1183.

³ *Loring v. Marsh*, 6 Wall. 337

cery, a principle like it was incorporated into the common law.¹ In Pennsylvania it has been held that property *vested* in a religious society, whether incorporated or not, is a charitable use, whether the donors be one or many; and, if the corporation or society should undertake to divert the funds, equity would raise some other trustee to administer them and apply them according to the intention of the original donors or subscribers.²

18. There were two statutes of Elizabeth relating to charitable uses, — one 39 and 40 of that reign, c. 5 and 6; the other 43 and 44, c. 4. But it is chiefly in relation to the last that reference is herein made. The subjects embraced in this statute will be found recited in the note below.* But, being of a highly remedial nature, the courts have been very liberal in extending it to various related matters not enumerated in the act itself;³ and not only so, but, by adopting the doctrine of *cy pres*, a devise for one object has been applied to another whose relation was exceedingly remote from, if not altogether foreign to, that named in the devise. In respect to the extent to which this statute of the 43 Elizabeth has been incorporated into the jurisprudence of this country by re-enactment or otherwise, it is stated by Mr. Perkins, in his note to Jarman on Wills,⁴ that it is in force in North Carolina and

* NOTE. — "Relief of aged, impotent, and poor people; maintenance of sick and maimed soldiers and mariners, schools of learning, free schools, and scholars in universities; repairs of bridges, ports, havens, causeways, churches, sea-banks, and highways; education and preferment of orphans; relief stock or maintenance for houses of correction; marriage of poor maids; supportation, aid, and help of young tradesmen, handicraftsmen, and persons decayed; relief or redemption of prisoners or captives; and for aid or easement of any poor inhabitants concerning payment of fifteens, setting out soldiers and others." See *Jackson v. Phillips*, 14 Allen, 551, 552, enumerating what are embraced under charitable trusts, that these were borrowed from the Civil Law, 554; and defining what a charity is in a legal sense, 556.

¹ *Going v. Emery*, 16 Pick. 107-119; 1 Jarm. Wills. 197, 1st Am. ed. notes; 4 Kent, Com. 508, and American cases cited in note; *Vidal v. Girard*, 2 How. 127, 192; *Zimmerman v. Anders*, 6 Watts & S. 218; *Witman v. Lex*, 17 S. & R. 88; *Baptist Asso. v. Hart*, 4 Wheat. 1. See *Green v. Dennis*, 6 Conn. 292, 299; *Dexter v. Gardner*, 7 Allen, 246; *Earle v. Wood*, 8 Cush. 430.

² *Schnorr's Appeal*, 67 Penn. St. 146; *Rashi's Appeal*, 69 Penn. St. 467.

³ See *Tappan v. Deblois*, 45 Me. 128; *Jackson v. Phillips*, 14 Allen 580.

⁴ 1 Jarm. 197, n.; 4 Kent, 8th ed. 567, note.

Kentucky; that the principle and substance of it are a part of the law of Massachusetts, and a part of the common law of Pennsylvania, where it is practically acted upon, though not technically in force;¹ that it has been repealed in Virginia, and is not in force in Maryland; while it is doubtful how far it is in force in Mississippi. In Virginia and New York, as it now seems, charitable devises and bequests stand upon the same footing as other trusts.² In Massachusetts, the statute of 43 Elizabeth is in force; and, among other things, a gift to encourage learning, science, and the useful arts, though it have no reference to the poor.³ A corporation, having accepted a donation as a charity, cannot renounce it, but may be compelled to hold and apply it. If a trustee declines to accept such a donation, other persons will be appointed for that purpose, and the legacy will not revert to the heirs of the donor.⁴ Where there is a trust which cannot be strictly and literally observed, the court may cause it to be fulfilled as nearly in conformity with the intent of the donor as practicable; and upon this the court are to exercise their discretion. Thus the trustees of Count Rumford's fund were authorized to appropriate a part of the income, not needed for the purposes expressed in the donation, to the purchase of books, philosophical apparatus, and to procuring lectures, although the objects proposed were the promotion of discovery and improvement in light and heat.⁵ Mr. Dwight, in his argument referred to in the note below,* cites authorities showing that

* NOTE. — The question has been more than once raised and discussed with great learning and research, whether, and how far, courts of chancery in England had jurisdiction of and enforced trusts for charitable purposes before the statute of Elizabeth, or whether it derived this jurisdiction from the provision of these acts. Without attempting to give in their chronological order the cases in which this question has been raised, it will be sufficient to refer to some of them, with the remark, that upon no subject in American jurisprudence will there be found more elaborate investigations into the ancient law of England than into the administration of charities before the statute referred to.

In 1833, the question was raised in the case of *Magill v. Brown* [*Sarah Zane s*

¹ *Fontain v. Ravenel*, 17 How. 386.

² *Gallego v. Attorney-General*, 3 Leigh, 450; *Levy v. Levy*, 33 N. Y. 137; *Holmes v. Mead*, 52 N. Y. 332, 339.

³ *Sanderson v. White*, 18 Pick. 333.

⁴ *Wilkinson v. Lindgren*, L. R. 5 Ch. Ap. 570.

⁵ *American Academy v. Harvard College*, 12 Gray, 582.

the doctrine of charitable uses has been recognized in Maine, Vermont, New Jersey, Ohio, Iowa, South Carolina, Georgia,

will], (Brightly's Rep. 346-411), and decided by Baldwin, J., of the Circuit Court of the United States. The same subject was discussed in *McCartee v. Orphan Asylum*, in 1827 (9 Cowen, 427-535). It was examined most elaborately by Mr. George Wood, of counsel, and Chancellor Williams, in *Executors of Burr v. Smith*, in 1835 (7 Vt. 241-319). A part of the head-note to that case is, "Courts of chancery had jurisdiction of bequests to charitable uses before the statute of 43 Elizabeth, by virtue of their equity jurisdiction." It was again raised in Massachusetts, by Wilde, J., in 1839, in *Burbank v. Whitney* (24 Pick. 152, 153); and very eminent counsel were, in the same year, engaged before the court of Ohio, more or less directly, in a similar discussion in the case of *Trustees of McIntire Poor School v. Zanesville C. & M. Co.* (9 Ohio, 203-290).

Chancellor Kent says, "The weight of English opinion and argument would seem to be in favor of an original and necessary jurisdiction in chancery, in respect to bequests and devises in trusts, to persons competent to take for charitable purposes, when the general object of the charity was specific and certain, and not contrary to any positive rule of law;" and he adds, "It would appear from the preamble to the statute of Elizabeth that it did not intend to give any new validity to charitable donations, but rather to provide a new and more effectual remedy for the breaches of these trusts" (2 Com. 287-289; 4 Com. 508). See also *Shotwell v. Mott*, 2 Sandf. Ch. 46. Mr. Perkins, in his note to *Jarmin on Wills* (197), has collected a large number of cases in which the question was raised, and reaches a conclusion in favor of an original jurisdiction in the court of chancery, independent of the statute of Elizabeth; and the same doctrine is sustained by Judge Story, in his last edition of *Equity Jurisprudence* (§§ 1154 e and 1154 d), in which he states, that, in the case of Mr. Girard's will, the Supreme Court of the United States held "that there was a jurisdiction in chancery over charitable trusts antecedent to the statute of Elizabeth." (See *Beall v. Fox*, 4 Ga. 404; *Moore v. Moore*, 4 Dana, 357.) And the question of the existence of such a jurisdiction anterior to and independent of the statute is now regarded as settled. *Jackson v. Phillips*, 14 Allen, 577. In *Potter v. Thornton*, 7 R. I. 263, the court say, "It is conceded that chancery jurisdiction over charities is not conferred, either here or in England, by statute, but existed prior to any statute on the subject. And the court of Texas say, that opinions similar to those above expressed by Ch. Kent appear to have been held in Massachusetts, New York, Pennsylvania, Kentucky, Tennessee, and Mississippi; but they do not decide whether equity there will enforce a donation to charitable uses, where the donees are uncertain, or where the beneficiaries and objects of the trust are uncertain and indefinite. But there would be no doubt where there is an ascertained trustee competent to take, though the beneficiaries themselves are not known. *Bell Co. v. Alexander*, 22 Tex. 362, 364.

But the then fullest and most able discussion of the point had been in what is often spoken of in the courts as the "great argument" of Mr. Binney, in *Vidal v. Girard's Executors* (2 How. 146-164), in which he maintained that such uses as were declared in Mr. Girard's will were good at common law in England; that such trusts were entitled to protection in equity, upon the general principles of equity jurisdiction; that they enjoyed the protection, before the 43 Elizabeth, by the original jurisdiction of that court; and that the 43 Elizabeth

and Louisiana.¹ It is also in force in Maine.² In New Jersey, the limitations in respect to charitable trusts are these:

was only an ancillary remedy. The importance of maintaining these consisted in the admitted fact, that, as a statute, the 43 Elizabeth had no validity or operation in Pennsylvania; and consequently, if the will was to be sustained, it must be by virtue of the common law, independent of that statute. As stated above by Judge Story, the Supreme Court sustained the will in a very learned and elaborate opinion. See also *Inglis v. Trustees of Sailors' Snug Harbor*, per Johnson, J., 3 Pet. 140. But in New York the question has come up in a somewhat different form; but, in the opinion of very able counsel, has never been fully settled there. The Revised Statutes of that State (part 2, c. 1, tit. 1, art. 2, § 46) abolished uses and trusts, with certain exceptions. If, therefore, charitable uses and trusts were included in this clause, they could no longer be sustained. The question came up in the court of appeals, in 1853, in the case of *Williams v. Williams* (4 Seld. 525-558; see also Lalor, Real Est. 130-163), in which the court, Denio, J., says, among other things, "From a careful examination of these authorities, I have come to the conclusion that the law of charities was, at an indefinite but early period, ingrafted upon the common law;" "and that the statute of charitable uses was not introductory of any new principle, but was only a less dilatory and expensive method of establishing charitable donations which were understood to be valid by the laws antecedently in force." The conclusion of the court was, that "the law of charitable uses, as it existed in England at the time of the Revolution, and the jurisdiction of the court of chancery over these subjects, became the law of this State on the adoption of the Constitution of 1777; that the law has not been repealed," &c. But the doctrine here stated is reviewed by the same court in *Bascom v. Albertson*, 34 N. Y. 618, and a directly contrary conclusion reached, confirming the opinion of Selden, J., in *Owens v. Missionary Society*, 14 N. Y. 380. So that the law in New York now seems to be settled as stated in the text.

But the question had not been distinctly raised, whether there was a difference between real and personal estate in the application of the principles laid down in the case last mentioned and others cited. This arose, first, in the case of *Beekman v. Bonsor* (23 N. Y. Rep. 298-318); and again, in *Rose v. Rose Beneficent Association*, in the same court. In both these cases, Mr. Noyes maintained the doctrine, that, as to carry out the provisions of the wills required the establishment and management of trusts, the right and power to do this were abolished by the statute of New York, above cited. His first argument is printed at length in the 23 N. Y. Rep. (575-639), presenting an array of argument and authority which would have seemed to be exhaustive of the subject.

¹ *Trustees, &c. v. Zanesville C. & M. Co.*, 9 Ohio, 203; *Griffin v. Graham*, 1 Hawks, 96; *Gallego v. Attorney-General*, 3 Leigh, 450; *Gass v. Wilhite*, 2 Dana, 170; *Going v. Emery*, 16 Pick. 107; *Vidal v. Girard's Ex'rs*, 2 How. 146; *Burr's Ex'rs v. Smith*, 7 Vt. 241; *Dashiel v. Attorney-General*, 5 H. & Johns. 392; *Tappan v. Deblois*, 45 Me. 122, 128, 131; *Miller v. Chittenden*, 2 Iowa, 315; *Beall v. Fox*, 4 Ga. 404; *American Bible Soc. v. Wetmore*, 17 Conn. 181. See also *Baptist Asso. v. Hart*, 4 Wheat. 1; *Shotwell v. Mott*, 2 Sandf. Ch. 46; Lalor, Real Est. 126-154.

² *Howard v. Am. Peace Soc.*, 49 Me. 302; *Drew v. Wakefield*, 54 Me. 295.

If no trustee is interposed, and no person in issue is capable of taking, or the charity is of an independent nature, or its

But, in the later case, a further argument of sixty-nine pages resumes the discussion, and develops still further the early and minute history of the law, with an examination of the decided cases. Referring to his former argument, he states what he proposes to sustain in the present one, — “that, conceding that the English court of chancery did, prior to the statute of Elizabeth for charitable uses, take cognizance of trusts for charities in some cases, yet those statutes were held to authorize the interference of that court in an entirely new class of cases, and introduced a new set of principles; and that the court of chancery did not exercise jurisdiction over trusts for charities or over charitable uses prior to those statutes, except in cases where gifts of personal estate were made by act *inter vivos* to persons capable of taking for definite charitable purposes, or where lands or the uses of lands were, by will or deed, directed to be applied for the like purposes, and only there under its general power to enforce the performance of trusts, and between persons competent to sue.”

These points are labored with great thoroughness and ability; and it must be deemed as unfortunate for the ascertainment of the law of New York, that the question remains undecided by the court, inasmuch as the cases in both instances turned upon other matters than the effect of abolishing uses and trusts upon charitable trusts in lands. But so far as the entire learning upon the subject, and an exhaustive argument upon its application and legal merits, can supply the want of a judicial decision, they are to be found in the arguments of the counsel in those cases, especially the last. Mr. Dwight, in the *Rose Will* case, devotes an argument of 389 pages to establish the validity of the devise therein made to a charitable use, in which he reviews the reports of the English commissioners of charities in thirty-seven folio volumes, the calendars of the courts of chancery in the time of Elizabeth in three volumes, and the calendars of the Duchy of Lancaster in three volumes; and, among other things, insisted that where uses and trusts were coupled together, in legal phrase, they implied private trusts, and did not intend public charities; that permanent trusts for charities existed long before the statute of uses; and that the law of charities admitted perpetuities, as well as the doctrine of *cy pres*; while private trusts spring out of the statute of uses, and are modern in their character. See also 2 Kent, 334, 8th ed. note. It is now settled in New York, that charitable trusts are within the statute against perpetuities. *Beekman v. Bonsor*, 23 N. Y. 316; *Bascom v. Albertson*, 34 N. Y. 620. But, in Massachusetts, they do not come within the restriction against perpetuities. *Jackson v. Phillips*, 14 Allen, 550. In Pennsylvania, it is said a present gift to a charity is never a perpetuity, though intended to be inalienable. *Philadelphia v. Girard*, 45 Penn. St. 26. Besides the cases thus collected, Mr. Dwight also referred to many other early and later cases, and a series of early statutes from the 6th of Edw. I. to the 4 and 5 James I., which are printed in what is called “an appendix” to his argument, forming a volume of nearly 500 pages.

Nor will it be thought misplaced, it is hoped, upon a subject so important as that of public and charitable trusts, to have occupied so much space in reviewing some of the leading cases which bear upon the rules which limit and govern them. Nor, in the absence of decided cases, and in view of the regret expressed by Chancellor Kent, that, “in the recent revision of the laws of New York, this

execution, according to the original purpose, is or has become impracticable, the doctrine of charitable uses prevails so as to give effect to the devise; but if the charity is definite in its object, lawful in its creation, and capable of being executed under the direction of the donor, and is to be executed and regulated by trustees, whether private individuals or a corporation, it does not come under the statute of charitable uses. A charity, moreover, which is eleemosynary in its character, is always unsectarian, unless the terms of the devise are expressly otherwise.¹ And the case of *Williams v. Williams*, cited in the note below, shows that it was received as a part of the law of New York. But, in subsequent cases in that State, the courts have shown an inclination to doubt at first, and afterwards to disavow altogether, the doctrine of indefinite charitable trusts which have prevailed in England under the statute of 43 Elizabeth. In arriving at this conclusion, the rulings in *Williams v. Williams* have been modified, and, so far as they sustain the English system of indefinite charitable uses, overruled. The subject is now regarded as within the provisions of the revised statutes in respect to uses and trusts.² The doctrine is thus stated in *Bascom v. Albertson*: "Under our law, a bequest which does not vest in definite donees, either in law or equity, on the death of the testator, or within a period thereafter measured by lives in being, can never vest" (p. 596). And whatever doubt, if any, remained of the law of New York upon this subject, is removed by the case of *Holmes v. Mead*, where the court say, that, by the case of *Bascom v. Albertson*, "it is very satisfactorily demonstrated that the system of charitable uses, as recognized in England, has no existence in this State; that the courts cannot sustain a trust or a use which is not within our statute of uses and trusts." "They do not include perpetual trusts for charity, or for the benefit of classes or of

very interesting and vexatious question was not put at rest by an explicit provision," can it be ill-timed to lay before the reader the views of eminent counsel who have made the subject a matter of thorough investigation and profound research and reflection.

¹ *Attorney-General v. Moore*, 4 C. E. Green, 503, 514.

² *Bascom v. Albertson*, 34 N. Y. 584, 590, 620; *Levy v. Levy*, 33 N. Y. 97, 122, 132, 133; *Downing v. Marshall*, 23 N. Y. 366; *Jackson v. Phillips*, 14 Allen, 589.

corporations." "A devise to a corporation is prohibited, except in cases where, by the law of its creation or some other law of the State, *the particular corporation* is authorized to take by devise." "A *cestui que trust* need not necessarily be described by name: any other designation or description by which he may be identified will do as well.¹ The doctrine of *cy pres*, which has formed so important a part in the English courts in carrying out the law of charitable uses, does not necessarily enter into the administration of the doctrine of the law itself in this country; and the manner in which it has been exercised in England would be likely to render courts here slow in assuming such an authority. Not to multiply illustrations, one may serve as an example. Money had been bequeathed to found a Jews' synagogue; and, in executing the devise as a charity, the court transferred it to the benefit of a *foundling hospital*!² In some of the States, it is held to be a power not to be exercised by the courts;³ in others, it is treated of as of doubtful validity;⁴ while in others, the court exercise it, if at all, in strict conformity to the purposes expressed in the instrument creating the trust.⁵ In Kentucky, it can only be applied to the mode of carrying into effect a charity; to an identified and ascertainable object, where the mode of exercising it is inadequate, illegal, or inappropriate.⁶ It was held by Clifford, J., that the prerogative power of the English courts as to the doctrine of *cy pres* is not within the jurisdiction of the United States court.⁷ In Pennsylvania, this power of *cy pres* is one by which a well-defined charity, or one where the means of definition are given, may be enforced in favor of the general intent, even where the means or mode provided for by the donor fail by reason of their inadequacy or unlawfulness. It is the doc-

¹ Holmes v. Mead, 52 N. Y. 338, 339, 343.

² Story, Eq. § 1169.

³ Beekman v. Bonsor, 23 N. Y. 308, 310; McAuley v. Wilson, 1 Dev. Ch. 276; Moore v. Moore, 4 Dana, 357; Holmes v. Mead, 52 N. Y. 344.

⁴ Brown v. Concord, 33 N. H. 285.

⁵ Harvard College v. Society, &c., 3 Gray, 283. See 7 Ves. Sumner's ed. 36, note; Jackson v. Phillips, 14 Allen, 492, 493; Saunderson v. White, 18 Pick. 333.

⁶ Cromie's Heirs v. Louisville Home Soc., 3 Bush, 376.

⁷ Loring v. Marsh, 27 Law Rep. 390. See Fontain v. Ravenel, 17 How 369.

trine of approximation, and is not confined to the administration of charities.¹ Where a trust is created for a charitable use, it is no objection to its validity that it creates a perpetuity.²

[*690] * 19. In respect to what real property may be devised, there seem to be few or no restrictions by law. Every thing that would descend to the testator's heir upon his death, whether a legal or equitable interest, may be devised; and while this would exclude the interest of a joint-tenant which goes to a survivor, it includes executory interests in real estate, or possibilities coupled with an interest, but not mere possibilities.³ Thus, where a devise was upon a condition subsequent, with a general devise by a residuary clause in the testator's will, and the first devisee forfeited his estate by failing to perform the condition, it was held that the right to enforce the condition, and to take the estate thereby forfeited, passed by such devise to the residuary devisee, and did not descend to the testator's heirs.⁴ So, if one grant an estate-tail, he has still a reversion in him which may [*691] * possibly take effect by failure of issue of his grantee, and is the subject of devise by the grantor.⁵

20. So where one granted lands on condition subsequent, upon the breach of which the grantor or his heirs might enter and regain the estate, and the grantor then made his will containing a general residuary clause, it was held that the devisee therein named took thereby a right to enforce the condition as to said land, and recover the same for a breach

¹ Philadelphia v. Girard, &c., 45 Penn. St. 28; Methodist Church v. Remington, 1 Watts, 226; Fontain v. Ravenel, 17 How. 389.

² Gass v. Wilhite, 2 Dana, 183; Griffin v. Graham, 1 Hawks, 181; Jackson v. Phillips, 14 Allen, 550; Odell v. Odell, 10 Allen, 8. See Mr. Dwight's argument, cited in note, p. 421; Miller v. Chittenden, 2 Iowa, 362; Hillyard v. Miller, 10 Penn. St. 335; Lewis, Perpet. 687, 689; *contra*, Levy v. Levy, 33 N. Y. 130, 132; Bascom v. Albertson, 34 N. Y. 598; Beekman v. Bonsor, *sup.*; Rose v. Rose, 4 Abb. N. Y. R. 112.

³ Kean v. Roe, 2 Harring. 112.

⁴ 1 Jarm. Wills, 2 Am. ed. 40-44; Hayden v. Stoughton, 5 Pick. 528; Brigham v. Shattuck, 10 Pick. 306. See 4 Kent, Com. 511, 513. The reader is referred to Mr. Hare's discussion of this subject, and his comments upon the cases above cited. 1 Smith, Lead. Cas. 114.

⁵ Steel v. Cook, 1 Met. 281; 1 Jarm. Wills, 42, Perkins' note.

thereof.¹ Any possibility coupled with an interest is the subject of devise.²

21. Cases like the above are to be distinguished from those of lapsed devises, which occur when the person to whom the testator gives the land dies before the testator. Such devise, at common law, would lapse; though in several if not in all the States, if it is made to a son or grandson of the testator, it takes effect, by force of statute, in favor of the heirs of such son or grandson, if he die before the testator.³ In Massachusetts, if a devise be made to a child or *other relative*, and the devisee die in the lifetime of the testator, it will go to the heirs of the devisee. But the wife is not a relative within the meaning of the statute.⁴ In Pennsylvania, where a devise was to several, with a proviso, that, if any of them died in the lifetime of the devisor, it should go to the heirs of such devisee, and he made his will and died in the lifetime of the original devisor, it was held that his heirs, and not his devisees, took the devise of the first devisor.⁵ But a devise which fails by lapsing does not go to the residuary devisee, but to the heir-at-law of the testator, on the ground that the intent of the testator is to be taken as things stood when the will is made, and that he is not to be presumed to have intended to give to his residuary devisee what he had already given to one whom he expected to survive him, and what he would have taken if the will had taken effect at its date.⁶ But if the devise is void *ab initio*, either because the devisee is dead before the will is made,⁷ or is by law incapable of taking the devise, — as would be the case at common law where the devise is to a monk,⁸ or, as in some cases, if made to cor-

¹ *Austin v. Cambridgeport Parish*, 21 Pick. 215. *Contra*, *Southard v. Central R. R. Co.*, 2 Dutch. 13, 21. Such rights made devisable by Stat. 1 Vict. 26; 1 Jarm. Perk. ed. 85.

² *Den v. Manners*, 1 Spencer, 142.

³ 6 Greenl. Cruise, Dig. 128, note; 1 Jarm. Wills, Perk. ed. 301, note; *Moore v. Dimond*, 5 R. I. 121. *Sheets v. Grubbs*, 4 Met. (Ky.) 340.

⁴ Gen. Stat. 101, c. 92, § 28; *Esty v. Clark*, 101 Mass. 38.

⁵ *Clark v. Scott*, 67 Penn. St. 446.

⁶ *Doe v. Underdown*, Willes, 298; *Doe v. Scott*, 3 Maule & S. 300; *Hayden v. Stoughton*, 5 Pick. 528, 537; *Gravenor v. Hallum*, Ambli. 645; *Austin v. Cambridgeport Parish*, 21 Pick. 224.

⁷ *Doe v. Sheffield*, 13 East, 526.

⁸ *Perkins*, §§ 566, 567.

porations under the prohibitions of statutes,¹— in [*692] such cases there seems *to be a diversity in the law as to who shall take such void devise, whether the heir-at-law or the residuary devisee. The English cases, and an American case cited above, are inclined to construe a devise by the residuary clause of what the testator has not before devised to intend all his estate which his will would not have effectually passed if it had taken effect at its date, excluding, as above stated, any devises that may have lapsed between the making of the will and the death of the testator. A residuary devisee cannot take a lapsed devise; but a residuary legatee takes every thing that lapses.² The weight of American authority, however, is in favor of such devises going to the testator's heirs, on the ground, that, by his having in terms devised it in a particular manner, he clearly indicated his intent that it should not pass to his residuary devisee, although he was mistaken in the capacity of the legatee named to take. In *Doe v. Stewart*, the devisee being dead when the will was made, the estate devised went to the residuary devisee, and not to the heir. The case given in *Perkins* was of a devise to a monk for life, remainder to a stranger in fee, which was held to be a present estate in possession in the stranger. In the case of *Ferguson v. Hedges*, the devise was to a church which was incapable to take, the devise being void by the statutes of Delaware. The court held, that the estate passed to the residuary devisee; and the court rely upon the above cases of *Doe v. Underdown*, *Doe v. Sheffield*, and *Doe v. Scott*. And the language of the court in *Hayden v. Stoughton* clearly favors this doctrine. But the rule which seems to be settled in *Van Kleek v. The Dutch Church* seems to be, that, by the common law, a residuary devisee of real estate takes only what was intended for him *at the time of making the will*, though a different rule prevails in respect to personal estate; and, consequently, though the devise may not take effect from the disability on the part of the devisee to take, the estate devised will go to the testator's heirs-at-

¹ *Ferguson v. Hedges*, 1 Harring. 524; *Van Kleek v. The Dutch Church*, 20 Wend. 427; *State v. Whitbank*, 2 Harring. 18.

² *L. & Dalzell, Eq. Conv.* 104.

law.¹ The same principle is maintained in *Green v. Dennis*² and *Lingan v. Carrol*.³ In Massachusetts, by statute, a residuary devisee takes real as well as personal estate, if the devisee is unable to take.⁴ In Maine, where the devise was to one upon a condition precedent, which failed for the non-performance of the condition, it was held that the devise passed to the residuary devisee under the residuary clause.⁵

21 *a.* If an estate be devised to A for life, with a remainder over, after his death, to B, and A die in the lifetime of the testator, the estate will go directly to B upon the death of the testator; the lapsing of the devise to A, in this case, leaving the will to take effect as if it had not been contained in it.⁶ A devise was to a wife for life in lieu of her dower, remainder to a daughter. The wife declined to accept the devise, and it was held that the daughter took the estate at the death of the devisor.⁷

* 22. Upon the principle, that what is descendible [*693] is devisable, it has been held, in some cases by force of statute, and in others upon general principles, that the right of a disseisee to enter and regain the seisin of lands may be devised, and that the devisee may avail himself of the right so acquired.⁸*

23. In construing devises in respect to the estate or interest intended to be given to the devisee, much greater regard

* NOTE.—The foregoing cases have been referred to, by way of example, as to the kinds of interest which a testator may dispose of by last will; and, for a further statement of the law upon the subject, the reader is referred to pp. *291, *367, *368, *ante*, and 4 Kent, Com. 511.

¹ *Van Kleek v. The Dutch Church*, 20 Wend. 457.

² *Green v. Dennis*, 6 Conn. 292.

³ *Lingan v. Carrol*, 3 Harr. & M'H. 333. See also 1 Jarm. Wills, Perk. ed. 302, note; *Brewster v. McCall's Devisees*, 15 Conn. 297.

⁴ *Prescott v. Prescott*, 7 Met. 146.

⁵ *Drew v. Wakefield*, 54 Me. 297.

⁶ *Lawrence v. Hebbard*, 1 Bradf. 250; *Goodall v. McLean*, 2 Bradf. 306; *Prescott v. Prescott*, 7 Met. 141.

⁷ *Macknet v. Macknet*, 9 C. E. Green, 277.

⁸ 1 Jarm. Wills, 43, 1st Am. ed. and notes; Mass. Gen. Stat. c. 92, § 3. This is said to be the law in New York, Vermont, Pennsylvania, Virginia, Kentucky, Maine, Alabama, Connecticut, North Carolina, Illinois, and Ohio. 4 Kent, Com. 512.

is had to the intention of the testator than in case of deeds. One reason is, the strong desire there is in all courts to carry out the intention of devisors when the same can be ascertained by reasonable construction; and another, that, as wills do not owe their origin to the feudal law, the rule of construction is not necessarily governed by the analogy of that law. It is accordingly held, that, in a will, "issue" is either a word of *purchase* or *limitation*, as will best answer the intention of the devisor, though in a deed it is universally taken as a word of *purchase*.¹ But still, except where otherwise provided by statute, under a general devise of a parcel of land to one without any words of inheritance or limitation, he takes only an estate for life.² There would be an exception to the above rule in those States where the limitation of an estate by deed, in indefinite terms, carries a fee.³ Where there was a devise to two as executors, "in and for the consideration" of paying over the rents, &c., to a wife for life, it was held to pass only an estate for life to the devisees named.⁴

23 *a*. In construing wills, it is often necessary, in order to carry out the intention of the testator, for courts to change the words of the will by substituting one for another. Thus a devise upon certain contingencies to "all" the children of *each* of said sons has been held to mean "any." So the word "several," when applied to the death of testator's children, has been held to intend the death of such children "respectively."⁵ But the most frequent application of this rule has been in the words "or" and "and," substituting the one for the other. Thus a devise to A and his heirs, and in case of his death under twenty-one, "or" without issue, then over, has been held to mean "and;" it being the obvious intention

¹ *Doe v. Collis*, 4 T. R. 299.

² 2 Jarm. Wills, 124, 2d Am. ed. Perkins' note of American cases; 4 Kent, Com. 537.

³ See *ante*, vol. 1, p. *29; Mass. Gen. Stat. c. 92, § 5. For the application of the rule in Shelley's case to devises, see *ante*, c. 4, § 8.

⁴ *Bird v. Harris*, L. R. 9 Eq. 204.

⁵ See *Turner v. Withers*, 13 Am. Law Reg. 723-733, as to "survivor" when applied to several children in a devise, meaning "other." In *Dexter v. Gardner* the court held "preparatory" to be the same as "preparative" in describing the object of a devise. 7 Allen, 243.

of the testator that the estate should go over only in case the first-named devisee died without issue, under the age of twenty-one. Mr. Jarman gives numerous instances of this change in the cases which he has collected; and Mr. Perkins, in his note, has added largely to the number. As an illustration of the converse of the above proposition, there may be mentioned the case of a devise over, if the legatee first named die unmarried "and" without issue, where it was held to intend "or" without issue.¹ So where the devise was to a third person, "if my daughter die before arriving at lawful age, or have no lawful issue;" but if she have lawful issue, then he leaves the whole to her in fee. She died without issue, but not till after arriving at age; and it was held, that, upon her arriving at age, she took a fee.² A will reciting the intention of testator to go to Cuba, and a wish to make a disposition of his estate if he should not return, and disposing of his property in form, was held a valid testament, although he returned from Cuba, and died leaving his will unchanged.³ But it was held otherwise in England; as where a testator recited in his will, that, being about to leave England for China, he declared, that, if any thing happened to him while abroad, he wished whatever might be in his possession "at that time" might be disposed of in the mode pointed out. He returned to England, and died there. It was held to be a conditional will, depending upon his dying abroad. The court distinguish the case from other English cases which they cite by the testator fixing the *time* when his will is to take effect, — at his death while abroad.⁴

24. If the terms of a devise clearly indicate an intention in the deviser to dispose of his entire estate in the property devised, it will be construed to convey a fee.⁵ Among the forms

¹ 1 Jarm. Perk. ed. 414-425; Holcomb v. Luke, 1 Dutch. 605; Grim v. Dyar, 3 Duer, 354; Jackson v. Topping, 1 Wend. 396; Jackson v. Blanshan, 6 Johns 54.

² Johnson v. Simcock, 7 H. & Norm. 344.

³ Damon v. Damon, 8 Allen, 192.

⁴ Goods of Porter, L. R. 2 P. & D. 22, citing as not opposed to this; Goods of Dobson, L. R. 1 P. & D. 88. See also the case of Goods of Robinson, L. R. 2 P. & D. 171, confirming that of the Goods of Porter, *sup.*, and Goods of Thorne, 4 Swab. and Trist. 86.

⁵ Fox v. Phelps, 17 Wend. 398; s. c. 20 Wend. 487; 2 Jarm. Wills, 2d Am ed 171, note; Baker v. Bridge, 12 Pick. 27.

of expression, which, when applied to *estates* by a devisee, have * been held to indicate such intention, are [*694] “all my estate,” &c., where the term is not used as a mere description of the premises, but as relating to the ownership of them.¹ So my “landed property” in, &c.,² to “A in fee-simple,” to “A for ever,” to “A and his assigns for ever,” “all my right,” and “all my right and title,”³ would pass a fee.

25. So where the testator charges upon the devisee the payment of money in respect to the property devised to him, if it is a personal charge, the law will deem the interest that he takes to be a fee, because it assumes that the testator intended to benefit the devisee; whereas, if he only had a life-estate, he might die before he had derived any beneficial fruits of the devise.⁴ But still it would not receive that construction if the estate devised was expressly a life-estate.⁵ Where one devised lands to his wife, and directed that all his children should be educated and settled according to her discretion, it was held to create a personal charge upon her, and to give her a fee in the same; ⁶ but it would be otherwise if the payment were charged upon the estate, and not upon the devisee personally.⁷

26. The devise of wild or uncultivated land in Maine or Massachusetts, and probably elsewhere, where the common law prevails, would be construed to pass a fee in the same; for a mere tenant for life might be guilty of waste in clearing, or might have no benefit in fitting it for cultivation.⁸

¹ 4 Kent, Com. 540; 2 Jarm. Wills, 2d Am. ed. 181, and Perkins' note of American cases; *Brown v. Wood*, 17 Mass. 68; *Den v. Wood*, Cam. & N. 202; *Kellogg v. Blair*, 6 Met. 322.

² *Fogg v. Clark*, 1 N. H. 163; *Roe v. Pattison*, 16 East, 221; *Mitchell v. Mitchell*, 1 Ired. 257; 6 Cruise, Dig. 217.

³ 2 Jarm. Wills, 2d Am. ed. 180; Id. 192, and Perkins' note. And see cases collected in Greenleaf's note to 6 Cruise, Dig. 211.

⁴ 2 Jarm. Wills, 2d Am. ed. 172, and note; 4 Kent, Com. 540; *Bell v. Scammon*, 15 N. H. 390.

⁵ *Moore v. Dimond*, 5 R. I. 121; 2 Jarmyn, 126, Park. ed.

⁶ *Lloyd v. Jackson*, L. R. 2 Q. B. 273.

⁷ *Jackson v. Martin*, 18 Johns. 31; *Jackson v. Bull*, 10 Johns. 148; *Lindsay v. McCormack*, 2 A. K. Marsh. 229; *McLellan v. Turner*, 15 Me. 436.

⁸ *Russell v. Elden*, 15 Me. 193; *Sargent v. Towne*, 10 Mass. 303.

27. Whether a devise in trust shall create a legal estate of inheritance in the trustee or not, depends upon the nature of the trust. If the trust is one which requires him to take a fee, it will be construed accordingly.¹ A devise to an executor to sell is of this class.²

28. A fee may be given, by implication, when the estate bears such a relation to some other estate as to render such a * construction a reasonable one; as where the [*695] devise was to one "after the death of the testator's wife," it was held to be a remainder in fee to him, and an estate for life, by implication, to the wife. So where the devise was to A, if B died before he was twenty-one years of age: the estate to B was held to be a fee by implication, if he attained the age of twenty-one.³

29. A devise to one in such a form as implies an absolute right to dispose of the property at pleasure gives a fee; ⁴ unless the right of disposal is given as a *power* incident to the estate given her. If it is, it does not enlarge the estate given, if less than a fee, into one of inheritance.⁵

30. A devise of the rents and profits of land, or the income of land, is equivalent to a devise of the land itself, and will be for life or in fee, according to the limitation expressed in the devise.⁶ So a devise of testator's tenements and hereditaments passes a perpetual rent which had been reserved to the testator.⁷ So it is competent for a testator to create a charge upon land he may devise in favor of a third person; and whoever takes the estate would become chargeable there-

¹ 4 Kent, Com. 540; *ante*, p. *186.

² *Inman v. Jackson*, 4 Me. 237.

³ 4 Kent, Com. 541, 542; *Butler v. Little*, 3 Me. 239; 2 Jarm. Wills, 2d Am. ed. 175; *Ellis v. Essex Bridge*, 2 Pick. 243.

⁴ *Ramsdell v. Ramsdell*, 21 Me. 288; *Ide v. Ide*, 5 Mass. 500; *Attorney-General v. Hall*, Fitzg. 314.

⁵ *Surman v. Surman*, 5 Mad. 123; *Larned v. Bridge*, 17 Pick. 339; *Kuhn v. Webster*, 12 Gray, 16.

⁶ *Anderson v. Greble*, 1 Ashm. 136; *Reed v. Reed*, 9 Mass. 372; *Blanchard v. Brooks*, 12 Pick. 63; *Blanchard v. Blanchard*, 1 Allen, 225; *South v. Allaire*, 1 Salk. 228; 2 Jarm. Perk. ed. 380, *aod* note; *Schermerhorne v. Schermerhorne*, 6 Johns. Ch. 70; *Kerry v. Derrick*, Cro. Jac. 104; *Earl v. Grim*, 1 Johns. Ch. 499; *Fox v. Phelps*, 17 Wend. 402; *Diameat v. Lore*, 30 N. J. Law, 222; *Wood v. Griffin*, 46 N. H. 234; *McClure v. Melendy*, 44 N. H. 469.

⁷ *Van Rensselaer v. Read*, 26 N. Y. 558.

for, or take the estate charged with the legacy.¹ But the question in such cases turns upon whether the charge is a personal one on the devisee, or is upon the land devised. In the one case, it is no charge upon the land; and in order to create such a charge, it must be clearly declared to be such.² And where the devise was to H., by willing that she should take so many acres of land, and pay so much money for it to other persons named, it was held to be a personal charge only, and not a charge upon the land.³ So the word "produce," when applied to a trust of real and personal estate, may be construed to signify whatever the estate will yield by sale or otherwise.⁴ But in these cases there would be an exception to this rule, if the rents, &c., were given for a limited period only.⁵

31. The interest of a devisee vests immediately on the death of the testator; and, when the will is duly proved, it relates back to that point of time.⁶ If, therefore, it be in terms a present one, and nobody is *in esse* capable to take at the testator's death, it is void, as if it be the heirs of J. S., and J. S. be then living; but if it had been in terms deferred to the death of J. S., as to the heir of J. S. after his death, the devise would have been good as an executory devise.⁷

31 *a.* In view of the law which requires devisees to be sufficiently described to be identified in order to take under a devise, and the invariable doctrine which declares that "undoubtedly every part of a will should be in writing,"⁸ questions have arisen how far parol evidence is competent to establish either a devise or a devisee, or both. In one case, parol evidence was admitted to show that by "my nephew

¹ Steele's Appeal, 47 Penn. St. 437; Swasey v. Little, 7 Pick. 296; Felch v. Taylor, 13 Pick. 133.

² Buchanan's Appeal, 72 Penn. St. 448.

³ Hamilton v. Porter, 63 Penn. St. 334.

⁴ Newland v. Shepherd, 2 P. Wms. 194.

⁵ Fox v. Phelps, *sup.*; Earle v. Grim, *sup.*

⁶ *Ex parte* Fuller, 2 Story, 327; Ives v. Allyn, 13 Vt. 629.

⁷ *Ante*, p. *343.

⁸ Trustees, &c. v. Hart, 4 Wheat. 1; Swinburne, pt. 7, § 7; Hoge v. Hoge 1 Watts, 214.

J. G.," mentioned in a will, was meant J. G., the nephew of the testator's wife, and not J. G., the son of his brother.¹ And where a testamentary gift is made to take effect in possession immediately, the objects to whom it was intended to go under the general description in the will are to be ascertained in reference to the time of the death of the testator; but where it is postponed beyond the time of his death, then those who come within the description before the period or event upon which the gift is to take effect, or the distribution to be made, will ordinarily be included as within the probable intention of the testator.² The rule requires express words, or a necessary implication, to take an estate from the heir-at-law, and give it to a devisee, under a will. But it is often found, that, while the devise is in definite terms adequate to describe a person who is to take as devisee, there are extraneous circumstances which render it doubtful who is meant by this description; and, in such case, recourse is often had to parol evidence to ascertain who was intended as the devisee. Thus in a devise to "The Congregational Society in A," and there is more than one, evidence may be offered to show that the testator meant the "first" of these, and the like. So a devise to "The Congregational Foreign Missionary Society" was shown to mean the American Board of Commissioners for Foreign Missions.³ The question grows out of the nature of trusts and powers. Thus, suppose the devise be to A: how far can it be shown that he takes it as trustee for another who is really the object of the testator's bounty? Or suppose it be given to A in trust, with power to distribute it to persons not named in the will, which have been or are to be indicated by the testator, or to such persons as the devisee shall think best. It would, perhaps, be difficult to collect from decided cases a ready answer to all the hypothetical questions; and yet many of them seem to have been settled. In the first place, great latitude is allowed in creating trusts in this way in favor of charitable purposes, where the discretion of the devisee in trust is to be exercised in desig-

¹ *Grant v. Grant*, L. R. 2 P. & D. 8.

² *Worcester v. Worcester*, 101 Mass. 132.

³ *Howard v. Am. Peace Soc.*, 49 Me. 288

nating those who are to take beneficially under the devise.¹ There is a greater difficulty in defining how far this may be done in case of private and personal trusts. Nor is there any difference whether a devise be immediate to an indefinite object, or to a trustee for the use and benefit of an indefinite object. If it be immediate to an indefinite object, the property is not disposed of, and the trust results for the benefit of those to whom the law gives the property in the absence of any disposition of it by the testator.² It seems, that if a devise be made for the purpose of creating an unlawful trust, as one, for instance, in violation of the law against mortmain, although the same be not declared in the will, the heir-at-law may file a bill against the devisee; and, upon the fact being established, he will be declared to be a trustee for the heir-at-law of the testator.³ So if the devisor intended the devise to enure to the benefit of a particular person, but omitted to name him, in consequence of the one to whom he intended to devise the estate in trust agreeing to hold the property for such intended *cestui que trust*, it would be a fraud on the part of the devisee to claim it as his own; and, upon a bill in equity for that purpose, he would be declared to be trustee for the intended *cestui que trust*.⁴ If, on the other hand, the devise be to one absolutely, to be disposed of by him as he shall see fit, or according to the wishes of the testator orally expressed to him, the devise is an absolute gift to him, and he can, if he choose, retain the same as his own.⁵ The difference between the cases being this: In the two former cases, there were the elements of illegality or fraud in

¹ *Tainter v. Clark*, 5 Allen, 66; *Story*, Eq. §§ 1165, 1166; *Chapman v. Brown*, 6 Ves. 410.

² *Dashiell v. Attorney-General*, 5 H. & Johns. 400; *Levy v. Levy*, 33 N. Y. 103; *Morice v. Bishop of Durham*, 9 Ves. 400; *Shep. Touch.* 509.

³ *Tiffany & Bullard, Trust.* 196, 197; *Muckleston v. Brown*, 6 Ves. 52, 67; *Lewin, Trusts*, 39; *Hill, Trusts*, 164.

⁴ *Hoge v. Hoge*, 1 Watts, 214; *Lewin, Trust.* 39, that if trustee agrees to hold upon such trusts as devisee shall declare, and he makes no declaration, he is held to be a trustee for the heir; *Hill, Trust.* 227, 230; *Tiffany & Bullard, Trust.* 189; *Morey v. Herrick*, 18 Penn. St. 128.

⁵ *Wells v. Doane*, 3 Gray, 201; *Tiffany & Bullard, Trust.* 209, 218; *Maskeleyne v. Maskelyne*, Am'v. 750; *Barford v. Street*, 16 Ves. 135; *Hill v. Kingston*, 1 Meriv. 314; 2 Sugd. Pow. 173, 3d Am. ed. and note.

the gift upon which a court of equity might attach a constructive trust; whereas, in the latter, there was no fraud; and, under the statute of frauds, the trust, not being declared in writing, is not susceptible of proof, and of course leaves him with the uncontrolled property and possession of the subject-matter of the devise. There is still a somewhat different class of cases, which partake of the character of powers as well as of trusts, where, perhaps, the cases are not as distinct and satisfactory; as where, for instance, the devise is to a trustee named, expressly in trust that he shall dispose of it to such purposes as the testator had or should indicate orally to him, or to such persons and in such proportions as the trustee should judge would best meet the wishes of the devisor, or words to that effect, but without indicating them specifically. Now, by the familiar doctrine of powers, if such devise creates a proper power, and the same be properly executed, the appointee, to whom the trustee shall appoint the estate, takes it under the will as if named therein. And authorities may readily be referred to upon the effect of such a devise. Thus, under the first proposition above stated, it is said, in the authority cited "in the case of an individual, if an estate is devised to such person as the executor shall name, and no executor is appointed, or if, one being appointed, he dies in the testator's lifetime, and no other is appointed, the bequest becomes a nullity; yet such a bequest, if expressed to be for a charity, would be good." In respect to the third proposition, the court, in the case cited, say: "The trust insisted upon here, however, owes its validity, not to the will or the declaration of the testator, but to the fraud of the devisee. It belongs to a class in which the trust arises *ex maleficio*, and in which equity turns the fraudulent procurer of the legal title into a trustee to get at him, and there is nothing in reason or authority to forbid the raising of such a trust from the surreptitious procurement of a devise." The case cited of *Wells v. Doane* gives a full illustration of more than one of the above propositions. The will contained two devises, — one, of the rest and remainder of testator's estate, real and personal, to S. W. during life, and after his death "in such charities as shall be deemed most useful by the executor or administrator

of S. W.:" the other was, "that S. W. may dispose of the furniture, &c., absolutely, as he may deem expedient, in accordance with my wishes as otherwise communicated by me to him." In speaking of this last, the court say: "No party denies that he had power to dispose of them by giving them absolutely during his life." The only question was as to the part which he left undisposed of; and it was held that he had an absolute property in these. As to the other bequests, the court say: "We have no doubt that the bequest to charities is valid." They also recognize that there might have been a devise to him for life, with a power of disposal. In *Brown v. Kelsey*, the devise was "for the promotion of such religious and charitable enterprises as shall be designated by a majority of the pastors composing the Middlesex Union Association." They met, and made the appointment; and the devise was sustained accordingly.¹ So a devise to and among the different institutions, or to any other religious institution or purposes as A and B might think proper, was held to be a good charitable bequest, and not void for uncertainty.² In respect to the other part of the subjects above suggested, where property is devised to one expressly in trust, but the persons in whose favor it is intended are not named, or have been only orally named, it is not proposed to do more than refer generally to the authorities. In treatises upon trusts, there are chapters upon the "discretionary powers of trustees," under which numerous cases are collected. Thus, in *Tiffany & Bullard on Trusts*, c. 6, p. 728, it is said: "In the language of Lord Eldon, there is not only a mere power and a mere trust, but there is likewise known to the court a power with which a party is intrusted, and is required to execute. Such cases arise where the donor has intrusted the party with money or property to be used according to his judgment or discretion, for the use of certain persons or for a class of persons, but nevertheless to be used for others than himself. The discretion of the trustee is not absolute, but confined to the time, manner, or the *particular* individuals of a class." This covers the case of trusts in favor of a class

¹ *Brown v. Kelsey*, 2 Cush. 243.

² *Wilkinson v. Lindgren*, L. R. 5 Ch. Ap. 570.

named, but does not, in terms, reach cases where neither classes nor individuals are named in the will as the intended beneficiaries. The reader is also referred to the authorities cited below.¹ And though most if not all of the cases referred to may have been those where the class is mentioned, among whom the discretion is to be exercised, it would seem to be a fair inference, from settled principles and decided cases, that if the property is given to persons named, with a general power of appointing to whom they pleased, or to such as the testator may have orally recommended, the property would vest in them, and the devise would not be void for uncertainty. If no trust was declared, it might leave the matter discretionary with the devisees, and in that way make them the absolute owners. But if it was expressly declared to be in trust that they should appoint, it would create a trust which a court of equity would compel them to execute; which, if they failed to do by reason of death or other disability, the devise would probably fail, and go to the testator's heirs-at-law, unless the class were indicated who were to take, where the court might execute the trust.² If it be given as a trust, but the objects as beneficiaries are too indefinite to be ascertained, the trustee will not take as owner, but the trust will fail altogether.³

32. There are various ways in which a devise may be rendered void or inoperative during the life of the testator; a will, as already stated, being, while the testator lives, ambulatory and inchoate: the will itself may be cancelled or destroyed; its terms as to particular provisions may be changed or annulled by a codicil which is nothing more than an additional will, enlarging or modifying the first, and which must be executed in all respects like the principal will itself; or particular devises in the will may be abrogated or annulled by the act of the testator in respect to the subject of the devise itself. It seems that a testator, having made his will, may

¹ Lewin, Trust. 430, 431; 2 Sugd. Pow. 3d Am. ed. 161, 162, note; *Brown v Higgs*, 8 Ves. 574; Hill, Trust. 67-69, and note.

² See *Bull v. Bull*, 8 Conn. 47; Hill, Trust. Whart. ed. 91; *Withers v. Yeaton*, 1 Rich. Eq. 324, 332; 2 Sugd. Pow. 3d Am. ed. 162, note.

³ *Ellis v. Selby*, 1 Myl. & Craig, 299.

make a codicil, and give his wife therein a right to add it to his will at her pleasure; and if she declines to do so, it will be rejected.¹ Acts like these are called "acts of revocation," and the revocation is said to be complete or partial according to the nature of the act. But to revoke a will requires the same exercise of intelligent intention on the part of [*696] the testator as the making the instrument at *first.²

A case is stated in the *Law Intelligencer* of Dec. 6, 1867, of a will upon which the testator had indorsed in his own handwriting "cancelled," without signing it. He left it in that state, but not among his other valuable papers, where it was found. It was held to be a revocation. The court, in the case cited, define "revocation" to mean any act done to the will, which, in common understanding, is regarded as a cancellation when done to any other instrument.³ A similar decision was made by the court of Vermont.⁴ But in an earlier case, the testator had written against one of the bequests, and upon the face of the will, "obsolete;" and it was held not to work a revocation.⁵ In a case in Ohio, the testator, who was blind, called for his will, which was sealed up; and it was handed to him. He felt of the seal; then handed it to another, and told him to put it in the fire, and burn it. He pretended to do so, burned another piece of paper to make the testator think he had done it, told him he had, but kept it, and put it in his pocket. After testator's death, the will was produced and allowed, and held not to be revoked, as the testator had done none of the acts, which, by statute, are declared sufficient to revoke a will.⁶ A class of cases ought to be noticed in this connection, where testators have attempted to dispose of property by devise by reference

¹ *Goods of Smith*, L. R. 1 P. & D. 717.

² 1 *Jarm. Wills*, 1st Am. ed. 115, and *Perkins'* note; 4 *Kent, Com.* 532; *Jackson v. Holloway*, 7 *Johns.* 81, was a case where the testator altered his will by interlineations, and a memorandum on the back attested by two witnesses, when three were necessary to a will, and held to be no revocation as to any part of the will. *Ford v. Ford*, 7 *Humph.* 92, was a case where testator, in an insane fit, destroyed his will, and it was held no revocation.

³ *Evans's Appeal*, 58 *Penn. St.* 244; *Goods of Frazer*, L. R. 2 P. & D. 40.

⁴ *Warner v. Warner*, 13 *Am. L. Reg.* 351.

⁵ *Lewis v. Lewis*, 2 *W. & Ser.* 455.

⁶ *Kent v. Mahaffey*, 10 *Ohio St.* 204.

in the will to other papers not executed in conformity to the rules prescribed as to wills, defining who should take, or the description of the property which is to pass by the will, and the like. Thus, in *Habingham v. Vincent*, a testator made his will, giving a remainder to such person as he should appoint by deed. The next day he made a deed reciting his will, and appointing to the sons of C, &c. It was held, that nothing passed under and by the will, and that the deed must be valid in itself, or of no effect.¹ The same doctrine was held in the same case in chancery. Wilson, J., says, "I believe it is true, that if a testator in his will refers expressly to any paper already written, and has so described it that there can be no doubt of the identity, and the will is executed in the presence of three witnesses, that paper, whether executed or not, makes a part of the will, and such reference is the same as if he incorporated it." And the same doctrine is maintained by the court of Pennsylvania.² "But when a man declares he will, in some future paper, do something; he says he will make a will as far as his intention is then known to himself, but he will take time to consider what he shall do in future; as a will it is void, because not properly executed." And Buller, J., says, "This last instrument (the deed) must be considered as a codicil;" and then goes on to show that a codicil, to be valid, must be executed in the presence of the requisite number of witnesses.³ The question was fully examined in *Johnson v. Ball*, where it was definitely settled that a testator cannot by his will reserve a power to dispose of an estate at a future time by an instrument not executed as required in the case of wills, so as to take effect under his will.⁴ In Massachusetts, * the statute [*697] points out what acts shall operate as a revocation of a will, but expressly declares that the section shall not prevent a revocation implied by law from subsequent changes in the condition or circumstances of the testator.⁵

¹ *Habergham v. Vincent*, 5 T. R. 92. See *Goods of Gill*, L. R. 2 P. & D. 3.

² *Thompson v. Lloyd*, 49 Penn. St. 129.

³ 2 Ves. Jr. 204, 228, 231.

⁴ *Johnson v. Ball*, 5 De Gex & S. 85; s. c. 9, Eng. L. & Eq. 159.

⁵ Mass. Gen. Stat. c. 92, § 11

33. One mode of revocation of a devise in a will has already been alluded to; and that is, by an alteration of the estate which is the subject of the devise. If, therefore, the testator, after making his will, convey away the whole or a part of an estate devised therein, it is an entire revocation, or one *pro tanto*, according to the extent of such alienation.¹

34. The doctrine upon the subject seems to be, that any change in the estate in the lands devised by the act of the testator, such as a conveyance, though it be to his own use, or though he take back the same estate as he originally held, and continues seised till his death, it will be a revocation. And in one case, where the subject was discussed at length, there was held to be a revocation in equity of the devise of an estate, which the testator, after devising it, contracted to sell to a third party, but which, the sale never having been consummated, remained in the testator's hands unchanged till his death.² The conveyance in the one case, and the bargaining away the estate in the other, are regarded as evidence of an intent to revoke the devise as to such property; and it then becomes requisite, in order for the land to be again the subject of the will, that a republication of this should be made after the testator shall have again acquired the estate.³ So, where a testator holding, among other property, a mortgage of real estate, made his will, devising thereby all his estate, real and personal, to A B, and subsequently entered [*698] upon the premises and foreclosed *the mortgage, it was held to change the nature of the property so as to constitute it after-acquired estate, working a revocation *pro tanto*, and not to pass under the devise.⁴ This was before the statute in relation to devises operating upon after-acquired estate.

35. So a conveyance of the land devised may operate a

¹ 1 Jarm. Wills, 1st Am. ed. 130; *Hawes v. Humphrey*, 9 Pick. 350, 361; *Carter v. Thomas*, 4 Me. 341.

² *Walton v. Walton*, 7 Johns. Ch. 258, 269, 271; 1 Jarm. Wills, 1st Am. ed. 133; *Darley v. Darley*, 3 Wils. 6, 13; s. c. *Ambl.* 653; 4 Kent, Com. 527; *Arthur v. Bockenham*, Fitzg. 240; *Kean's case*, 9 Dana, 25.

³ *Walton v. Walton*, 7 Johns. Ch. 258, 270. But see *M'Craine v. Clarke*, 2 Murph. 317, as to contract of sale if not executed by death of owner.

⁴ *Brigham v. Winchester*, 1 Met. 390.

revocation of a devise, as indicating an intention on the part of the testator, although, from some defect in the form of proceeding, it becomes inoperative, as where livery is omitted to be made in a feofment, or the deed in a bargain and sale is not enrolled, and the like. The estate so devised will, in such a case, go to the testator's heir-at-law.¹

36. Without undertaking to enumerate every thing that may be sufficient on the part of the testator to revoke his will, a revocation of the will of a *feme sole* is implied by the common law by her subsequent marriage. As a married woman, at common law, could neither make nor revoke a will, it was held that it would defeat the ambulatory character of such an instrument, if a will, made by a *feme sole* before marriage, were to remain valid during coverture.²

37. The marriage of a testator does not have this effect unless followed by the birth of a child. The concurrence of these two events, after the making of a will, is supposed to create such a change in the circumstances of the testator that he cannot intend to have his will, as formerly made, stand. But this is only a doctrine of presumed revocation, which, at the common law, may be controlled by the character and terms of the will itself.³

38. The matter is regulated in several of the States by positive law. Thus, in South Carolina, marrying, and having children who are living at the testator's death, operates as a revocation *of a prior will.⁴ In Georgia, [*699] marrying, or having a child or children, revokes a will, unless subsequently altered by the testator.⁵ In California, a marriage revokes a will if the wife survives the testator,

¹ 4 Kent, Com. 529.

² 4 Kent, Com. 527. A similar rule is established by statute in California. Stat. 1850-1853, p. 140, § 13; Code, 1872, § 1300. So in Illinois, Stat. 1858, p. 1179, § 9; Rev. Stat. 1874, c. 39, § 10; 2 N. Y. Rev. Stat. p. 64; Stat. at Large, vol. 2, p. 64, § 44.

³ 2 Greenl. Ev. § 684; 1 Jarm. Wills, 1st Am. ed. 106; 4 Kent, Com. 521, 523; *Havens v. Van Den Burgh*, 1 Denio, 27. See *Warner v. Beach*, 4 Gray, 162.

⁴ 5 So. Car. Stat. 106; 1873, c. 86.

⁵ Cobb, Dig. Stat. 347, 1128; Code, 1873, § 2477. In both South Carolina and Georgia the rule as above stated is applied, unless provision is made in contemplation of such an event.

unless provision is made for her by a marriage contract or in the will.¹ And, in Arkansas, marriage and issue revoke a will, unless provision is made for them in the will or by a marriage settlement.² In Pennsylvania and Iowa, the birth of a child which survives the testator revokes a will previously made.³

39. Besides these, there are provisions in the statutes of many if not all of the United States for posthumous children, where none is made in the will of the testator, in some cases avoiding the will altogether; and also in some cases for children not named in the will, when the omission is accidental. But a testator may omit, if he sees fit, to make any provision for any or all of his children, and the will, nevertheless, be a valid one, if he clearly indicates thereby that such was his understanding and intention.⁴ But where a child is omitted in a will, the burden of proving that it was intentionally done is on the devisee who claims under the will.⁵ A devise to a child or children does not include a grandchild or grandchildren, unless indispensably necessary to effectuate the intent of the testator.⁶

40. A new will may operate to revoke a former one, if it contain words to that effect, or if the disposition of the property thereby made is incompatible with that made in the prior will; but should the prior will remain uncanceled, and the latter one be destroyed, it may operate to give effect to the first as a will, if the testator leaves it unrevoked by any new act.⁷ But if one make a will, and then by a second will revoke the first, it can only be revived by republishing it. A cancelling of the second will, under such circumstances, does

¹ Stat. 1850-1853, p. 140, § 12; Code, 1872, § 1298.

² Dig. Stat. 1073.

³ *Tomlinson v. Tomlinson*, 1 Ashm. 224; *McCullun v. McKenzie*, 26 Iowa, 510; *Carey v. Baughn*, 36 Iowa, 542.

⁴ 4 Kent, Com. 412; *Id.* 521, note, 525, 526; Mass. Gen. Stat. c. 92, §§ 25, 26; *Bancroft v. Ives*, 3 Gray, 367; *Loring v. Marsh*, 27 Law Rep. 377; *Wilson v. Fosket*, 6 Met. 404; *Converse v. Wales*, 4 Allen, 512.

⁵ *Ramsdill v. Wentworth*, 106 Mass. 320.

⁶ *Sheets v. Grubbs*, 4 Met. (Ky.) 341; *Churchill v. Churchill*, 2 Met. (Ky.) 466.

⁷ 4 Kent, Com. 528, 531. See, as to reviving a revoked will by revoking the latter, *Bohanon v. Walcot*, 1 How. (Miss.) 336.

not revive the first; and, in such a case, the deceased was held to have died intestate.¹

41. It may be remarked, that, at common law, a devise to an heir-at-law of the same estate in quantity or quality as he would take by descent would be void, and he would take by descent, and not by purchase. The rule of law is now altered by the statute 3 and 4 Wm. IV., c. 106, § 3, and the heir, in England, takes, in such case, under the devise.² A devise by a testator of an estate-tail to his heir-at-law does not affect a descent of the same estate to him in fee as heir.³ The difference between the present English law and the Roman law is, that whoever takes as devisee or legatee, takes as purchaser; whereas, by the Roman law, the effect of a will was, not to pass the estate of itself, but to designate the person who should take as heir, but who did not take as purchaser.⁴ But, in Massachusetts, a devise to an heir-at-law, of the same estate which he would take by descent as heir, is simply void.⁵ Where the words "heir," "heirs-at-law," &c., are used in a devise, and it becomes necessary to apply the term, it is held that "heir" intends the person "appointed by law" to succeed to the real estate in case of intestacy, and "heirs-at-law" intend the persons to take, and the shares to be taken, by the statute of distribution of the State, whether this distribution shall be *per stirpes* or *per capita*. Upon this latter point, if a devise be to A and the children of B, they take *per capita*, and not *per stirpes*. So where the devise is to several persons "equally," or "share and share alike," &c., they take *per capita*.⁶

* 42. A will which has been once revoked by impli- [*700] cation by any of the modes above mentioned, except cancellation, may be revived by a republication of such will. This may be done in various ways. Thus, if one make a valid

¹ *Brown v. Brown*, 8 E. & Black. 876, 888; *Wood v. Wood*, L. R. I. Prob. & Div. 309.

² *Wms. Real Prop.* 181; *Whitney v. Whitney*, 14 Mass. 88, 90; *Parsons v. Winslow*, 6 Mass. 169; 4 Kent, Com. 506; *Van Kleek v. Dutch Church*, 20 Wend. 469; *Willard*, Real Est. 477; *Ellis v. Paige*, 7 Cush. 161; *Sedgwick v. Minot*, 6 Allen, 174; *ante*, p. *393, *409.

³ *Posey v. Budd*, 21 Md. 489.

⁵ *Sedgwick v. Minot*, 6 Allen, 171.

⁴ *Kaimes' Tracts*, 122.

⁶ *Richards v. Miller*, 62 Ill. 424.

codicil to such will, recognizing it in any manner as an existing valid one, it will amount to a republication; or it may be by express republication, as by a re-execution in a form as solemn as that required for its original publication.¹ In Iowa, it requires the same formality to republish a will which has been once revoked as to execute it at first.² So, as has been above stated, the cancellation of a second will may revive a prior uncancelled will. But, by the statute of New York, such will not be the effect unless expressly declared to be so intended by the testator.³ The effect of a republication of a will by means of a codicil is the same as if the will was made anew of that date.⁴

43. It is hardly necessary to add, that no one can make another the owner of an estate against his consent by devising it to him, so that, if the devisee named disclaim the devise, it becomes inoperative, and goes to the heir; though it seems to be doubtful whether a mere parol refusal or disclaimer of a devise will be sufficient to prevent the person named as devisee from subsequently claiming it. The difficulty of doing this by any thing short of a deed grows out of the presumptive vesting of the devised interest in the devisee before entry.⁵ The law presumes an acceptance by a devisee of the devise, if the same is apparently beneficial to him, unless he expressly renounces it; and, if he enters upon it, he takes it with all its conditions.⁶

¹ 1 Jarm. Wills, 1st Am. ed. 174 and 175, and Perkins' note of cases; 6 Cruise, Dig. 114, 116; *Haven v. Foster*, 14 Pick. 534, 543, 544.

² *Carey v. Baughn*, 36 Iowa, 540; see *Jackson v. Potter*, 9 Johns. 312; 1 Redf. Wills, 374, and cases cited.

³ 4 Kent, Com. 532. For the general principle, see 6 Cruise, Dig. 121; 1 Jarm. Wills, 1st Am. ed. 123; Stat. 1 Vict. c. 26, § 22. A will once revoked, to have effect, must be re-executed, or made effective by codicil. The law of New York, Ohio, Indiana, Missouri, and Arkansas, is the same. 6 Cruise, Dig. 121, note.

⁴ 6 Greenl. Cruise, Dig. 116, n.

⁵ Co. Lit. 111 a; *Wilkinson v. Leland*, 2 Pet. 627, 655; *Doe v. Smyth*, 6 B. & C. 112; *Townson v. Tickell*, 3 B. & Ald. 31, 36; 4 Kent, Com. 533; *Webster v. Gilman*, 1 Story, 499; *Ex parte Fuller*, 2 Story, 327. That a deed is required, *Bryan v. Hyre*, 1 Rob. (Va.) 94; 6 Cruise, Dig. 134, and Greenl. note; *Pickering v. Pickering*, 6 N. H. 120; *Tole v. Hardy*, 6 Cow. 340.

⁶ *Perry v. Hale*, 44 N. H. 365.

APPENDIX.

* IN view of what has been said from time to time, in the [*701] body of this work, there seems to be a propriety in presenting for the consideration of the reader the substantial parts of one of the forms of marriage settlement which have, for many years, been in use in England. These have been copied from Atkinson's Forms of Conveyancing (p. 428). Though, by the changes of the law in England, as well as by the statute provisions of many of the States, the occasion for limiting the estate to trustees to preserve contingent remainders is obviated, the form, in that respect, is retained for convenient reference. So the phraseology of the English form is preserved, although much less brief and simple than that usually adopted in similar instruments in this country. The one selected is that employed where the father makes a settlement of a freehold estate in favor of a daughter and her intended husband, with provisions for children of the marriage; and one object in inserting it is to make it an opportunity for showing the application of the doctrine of *uses* in the modes of conveying lands, in raising *springing* and *shifting uses*, and in creating *powers* and providing for the execution of trusts and the like. With such notes of explanation as are appended, it is hoped it may furthermore serve to furnish hints to guide in framing a class of legal papers which have not hitherto been of frequent use in this country. "This," says Judge Kent, "requires the introduction of powers of leasing, selling, exchanging, and charging the lands, and with the reservation of a power to alter and modify the dispositions in the settlement, as exigencies may require. It is done by a general power of appointment in the first instance, or by adding to the limitations a power of revocation and new appointment. Powers are the mainspring of this machinery."¹

¹ 4 Kent, Com. 380.

[*702] * SETTLEMENT ON MARRIAGE,

MADE BY THE FATHER OF THE LADY AND THE INTENDED HUSBAND.

(1) This indenture, made, &c., between A. B., [the father] of, &c., of the *first* part, C. D., daughter of said A. B., of the *second* part, E. F., [the intended husband] of, &c., of the *third* part, and J. D. and J. S., of, &c., [the trustees] of the *fourth* part: Whereas a marriage hath been agreed upon, and is intended shortly to be duly had and solemnized, between the said C. D. and E. F.; and whereas, upon the treaty for said intended marriage, it was agreed that the messuages, lands, and hereditaments hereinafter mentioned, &c., respectively, should be conveyed and settled to the uses, upon and for the trusts, interests, and purposes, and with, under, and subject to the powers, provisos, agreements, and declarations, hereinafter expressed and declared of and concerning the same: —

(2) *Now, this indenture witnesseth*, that in pursuance and performance of the said agreement on the part of the said A. B., and for the considerations aforesaid, the said A. B. hath granted, bargained, sold, aliened, released, and confirmed, and by these presents doth, &c., unto the said J. D. and J. S. and their heirs, all that, &c. (estate); to have and to hold the same messuages, lands, and hereditaments, &c., to the said J. D. and J. S., and their heirs, to the uses upon and for the trusts, intents, and purposes, and with, under, and subject to the provisos, agreements, and declarations, hereinafter expressed and declared, of and concerning the same.

[*703] * (3) And it is hereby agreed and declared by and between

(1) This part includes the parties to the indenture, and the consideration upon which it is entered into. "Trustees are almost always necessary in marriage settlements; and where they are parties, powers for changing them, and clauses for their indemnity, and the reimbursing their expenses, should always be inserted in the settlement." "All persons having any estate or interest in the property to be settled should be parties to the deed, and all persons intended to be bound by the deed." "It is always proper in marriage settlements to describe the parties fully." "The marriage is alone a sufficient consideration for the settlement where it is executed before marriage, or made in pursuance of articles which were executed before the marriage." 7 Bythew. Conv. 355; 2 Sugd. Pow. 3d Am. ed. 228.

(2) This is called the *operative part* of the indenture, whereby the party, whoever he is, conveys, usually, to trustees in the nature of feoffees to use, or as here, by bargain and sale, *habendum* to the intended uses and subject to the powers and trusts prescribed by the parties. In this case, it will be perceived, the legal estate granted is a fee-simple. 7 Bythew. Conv. 354.

(3) This and the following clauses contain the declarations of the uses and trusts in the indenture. *First*, to the use of the grantor and his heirs till the intended marriage of the daughter. The effect of this is, that, if the marriage never takes place, all ulterior uses fail, the use in him never shifts, and he is left, to all practical purposes, the owner of the original estate in fee, the seisin being united with the use limited to him.

the said parties to these presents, that the grant, &c., hereinbefore contained, and hereby respectively made as aforesaid; shall operate and enure to the use of the said A. B., his heirs and assigns till the intended marriage shall be duly had and solemnized; and from and (4) immediately after the solemnization thereof, to the use of the said J. D. and J. S., and the survivor of them, and the executors and administrators of such survivor, for and during the natural life of the said C. D. (5) In trust, nevertheless, to collect, get in, and receive the rents, issues, and profits of the said messuages, lands, and hereditaments, as and when the same shall become due and payable, and to pay the same to such person or persons for such estates or interests, intents, and purposes, and in such manner, as the said C. D. shall from time to time, notwithstanding her coverture, by any writing or writings under her hand (but so as not to dispose of or affect the same by way of sale, mortgage, or otherwise, in the way of anticipation), direct or appoint; and (6) in default of such direction or appointment, to pay the same into her own hands for her sole and separate use and benefit, independently and exclusively of her said intended husband, the said E. F., and without being in any wise subject to his debts, control, interference, and engagements; and the receipt of said C. D. or of her appointees, notwithstanding her coverture, to be from time to time a sufficient discharge for the same; (7) and from and * immediately [*704] after the decease of the said C. D., then, in case the said E. F. shall survive her, to the use of the said E. F. and his assigns for and during the term of his natural life; (8) and from and immediately after

(4) *Second*, upon the marriage, the use springs or shifts from the grantor to the trustees themselves, and the seisin granted to them unites with this use, creating a legal estate in them; but, being intended for the benefit of the wife, it is limited to them for her life only; and at the same time there is an active trust created in favor of the wife, whereby the legal estate is to remain in the trustees so long as the active trust is to continue. *Ante*, pp. *186, *187, *283, *286.

(5) This clause defines the trusts in favor of the wife for which the estate is to be thus held, and also gives to her the power of appointing to whose benefit the estate shall be held and the rents thereof paid, with a clause, which may or may not be inserted, as the settler may choose, withholding from her the power of anticipating the rents by mortgage or otherwise. *Clancey, Husband and Wife*, 328-330; *Jackson v. Hobhouse*, 2 *Meriv.* 483. As to the effect of such clause, see *Hill, Trust.* 424.

(6) By this clause the trustees are authorized to pay over the rents to the wife without the control of the husband, or liability on account of his debts, &c.

(7) Upon the decease of the wife in the foregoing settlement, the use in the trustees ceases and shifts to the husband, and this clause limits such use to him during his life, from and after her death, with a provision in case of forfeiture, and to prevent a defeat thereby of the contingent remainder to the children, for a limitation of the estate to the same trustees and their heirs, to support the contingent remainder during the life of the husband.

(8) Is the usual form in which such trust to support contingent remainders may be and formerly was created.

the determination of that estate by forfeiture or otherwise in his lifetime, then to the use of the said J. D. and J. S. and their heirs. In trust to support the contingent uses and estates hereinafter limited from being defeated or destroyed; and, for that purpose, to make entries and bring actions as occasion shall require, but nevertheless (9) to permit and suffer the said E. F. and his assigns, during his life, to receive and take the rents, issues, and profits of the said messuages, lands, and hereditaments to and for his and their proper use and benefit; and from and immediately after the decease of the survivor of them the said E. F. and C. D., (10) to the use of all and every the child and children of the said C. D. by the said E. F. lawfully to be begotten, who, being a son or sons, shall live to attain the age of twenty-one years, or, being a daughter or daughters, shall live to attain that age or marry, which shall first happen, their heirs and assigns as tenants in [*705] common. (11) And * in case there shall be no child or children

(9) This clause declares the trust in such case for which the trustees are to hold the estate: in this case, it is in favor of the husband or his assigns.

(10) By this clause, immediately upon the death of the husband, the use shifts from the trustees to such child or children of the marriage as the settler may prescribe: in this form, it is limited to such child or children in fee.

(11) This clause is the last of the series of limitations in the settlement by the way of shifting uses, whereby, if the husband and wife die, and no child or children of such marriage shall live to attain a vested interest in the premises, the use shifts in favor of the settler or his heirs or assigns in fee. In following the prescribed form, and confining these explanations to what is found there, it is not proposed to anticipate questions which may be raised by particular modes of expression. And yet it seems almost necessary to allude to a series of cases which have recently arisen in the English courts upon the point, whether in limitations substantially like that given above, in favor of the children of the marriage, the estate vests in each child successively as soon as born, opening to let in children subsequently born; or whether the vesting is postponed till the child attains the age of twenty-one years, or, if a daughter, is married. Other questions connected with this, as to subsequent limitations, whether they are remainders or executory devises, have also been raised, which it is not necessary to examine here. In *Bromfield v. Crowder*, 1 B. & P. n. s. 313, the limitation was by will to A. and B. successively for life, and, at the death of the survivor, to C., if he should attain twenty-one; but if he died before that, and D. survived him, then to D., &c. It was held that C. took a vested fee determinable upon the contingency of his dying under twenty-one years of age. This seems to be in accordance with *Blanchard v. Blanchard*, 1 Allen, 223. In *Festing v. Allen*, 12 M. & W. 279, the limitation was by will to J. for life, and after her death to the use of all and every the child and children of J. who should attain the age of twenty-one years, and their respective heirs. And for want of such issue, &c., J. married and had three children, and died leaving them all infants; and it was held, that J. had a life-estate with a contingent remainder to such of her children as should attain the age of twenty-one, which was defeated by her dying before any of them attained that age. In *Riley v. Garnett*, 3 De Gex & S. 629, the devise was to trustees for the benefit of a married woman for life; after, in trust for all her children who should attain twenty-one years, or, being daughters, should attain that age or marry, and their heirs. It was held, to give vested estates to all her children as they came into being, subject to be divested on their deaths under twenty-one, and, if daughters, unmarried. This was in

of the said intended marriage who shall live to attain a vested interest or vested interests in the *said hereditaments and [*706] premises under the provisos aforesaid, then to the use of the said A. B., his heirs and assigns for ever.

(12) Provided always, and it is hereby agreed and declared between and by the said parties to these presents, that it shall and may be lawful for the said J. D. and J. S., and the survivor of them, and the executors, administrators, or assigns of such survivor, during the lives of the said E. F. and C. D., and the life of the survivor of them, and also during the minority of any son or sons, or the minority or until the marriage of any daughter or daughters, of the said intended marriage, who shall be entitled to the said messuages, lands, and hereditaments under the limitations hereinbefore contained, but with the consent in writing of

accordance with the doctrine of the case of *Doe v. Nowell*, 1 M. & S. 327. In *Browne v. Browne*, 3 Smale & G. 568, the devise to the children was to his child or children who should attain twenty-one, as tenants in common in fee; and if only one child, &c., for such child in fee. Held, that upon the tenant for life dying, leaving only one child, an infant, he took a vested fee-simple, but liable to be divested upon his dying under age. In *re Mid. Kent Railw. Act*, Johns. Eng. Ch. 357, the limitation was substantially like that in *Riley v. Garnett*, above cited, with a like limitation as in *Browne v. Browne*, if there were only one child. It is left undecided whether the remainders were vested or contingent, after commenting upon *Festing v. Allen*, above cited, and the case of *Doe v. Hopkinson*, 5 Q. B. 223, which the Vice-Chancellor says it is extremely difficult to reconcile with it. The case of *Duffield v. Duffield*, 3 Bligh, N. S. 260, might also be referred to. But it would be extending this note to too great a length to attempt to analyze these and the other related cases, since there could be no hope of arriving at any simple and intelligible rule of general applicability. It may be sufficient to add, that the tendency of late seems to be to hold a limitation like that given in the foregoing form, as creating a vested estate in the children at the times of their birth, as they may successively be born, and to assume that such would be the construction unless varied or controlled, as in *Duffield v. Duffield*, by some peculiar form of expression in the terms creating it. There would, moreover, be an insuperable objection to limiting estates by way of the shifting of uses or execution of powers beyond the period of a life or lives in being, and twenty-one years and a fraction more, because of the rule of law prohibiting perpetuities. 1 Sngd. Pow. 3d Am. ed. 178; *ante*, *297. Thus, in the present case, the limitations were in effect to the settler in fee, unless the marriage of a daughter then living takes place, then to the daughter and husband for life, then to their children who should attain twenty-one years, in fee; and it is only in case that no child attains that age that the final limitation over to the settler in fee takes effect, bringing all these limitations clearly within the rule. But inasmuch as it is often desirable to make dispositions of the estate for the benefit of parties contemplated by the settlement, which no mere owner of a life-estate could make, nor one having an interest in a contingent remainder therein, clauses are usually inserted in these settlements creating powers of revocation and appointment to new uses by sale, lease, or otherwise, to serve the wants and necessities of families, some of which are as follow in the next clause of the above settlement.

(12) This clause creates a power in the trustees to sell part or all of the estate in fee, subject to such restriction, as to the consent of the parties interested, as the settler may see fit to impose.

the said E. F. and C. D., during their joint lives, or of the survivor of them during his or her life, or at the discretion of the said J. D. and J. S., after the decease of such survivor, to dispose of and convey, by way of absolute sale, all or any part of said messuages, lands, and other hereditaments hereinbefore, &c., and the inheritance thereof in fee-simple, to any person or persons whomsoever, for such price or prices in money as to them the said J. D. and J. S., or the survivor of them, or the executors or administrators of such survivor, shall seem reasonable; and that (13), for the purpose of effecting such dispositions and conveyances, it shall and may be lawful to and for the said J. D. and J. S., and the survivor of them, and the executors or administrators of such survivor, with such consent and approbation as aforesaid, by any deed or deeds, instrument or instruments in writing, to be by them sealed and delivered in the presence of and to be attested by witnesses, absolutely to revoke and make void all and every or any of the uses, trusts, powers, and provisions hereinbefore limited, expressed, or declared of and concerning the same messuages, lands, and other hereditaments respectively, or any part or parts thereof; (14) and [*707] by the same or any other deed or *deeds, instrument or instruments, in writing, to be executed in like manner, and with such consent, or at such discretion as aforesaid, to limit, declare, direct, or appoint any use or uses, estate or estates, trust or trusts, of the said messuages, lands, and other hereditaments, or any part or parts thereof, which it shall be thought necessary or expedient to limit, declare, direct, or appoint, in order to effectuate any such sale, disposition, or conveyances aforesaid; and also (15), that upon payment of the money arising by sale of the said messuages, lands, and other hereditaments, or of any part or parts thereof, it shall and may be lawful to and for the said J. D. and J. S., and the survivor of them, and the executors or administrators of such survivor, to sign and give receipts for such money, and that such receipts shall be sufficient discharges to the person or persons to whom the same shall be given for the money, in such receipts respectively expressed or acknowledged to be received; and that such person or persons, his, her, or their heirs, executors, administrators, or assigns, shall not afterwards be answerable or accounta-

(13) By this clause, the form of the deed and mode of executing the power may be prescribed.

(14) This clause provides for authorizing the trustees to limit and appoint new uses or estates, or trusts of the premises, in carrying the power of sale into effect.

(15) This clause authorizes the trustees to receive the purchase-money on such sales, relieving the purchaser from liability on account of the application of the purchase-money. As to the law upon this latter point, see Laussat, Fonbl. Eq. 415, and note; Field v Schiffin, 7 Johns. Cl. 150, 160.

ble for any loss, misapplication, or non-application of such money, or be obliged or coerced to see to the application thereof.

(16) And it is hereby decreed and declared that the said J. D. and J. S., or any future trustee or trustees of these presents, shall stand possessed of the money to arise from such sale or sales, in trust, with such consent, or at such discretion as the case may be, as aforesaid, to lay out and invest the same in the purchase of other messuages, lands, and hereditaments, either freehold or leasehold; and shall settle and assure, or cause to be settled and assured, the messuages, lands, and hereditaments so to be purchased in the names of the said J. D. and J. S., or the survivor of them, or any future trustee or trustees of these presents, to such and the same uses, upon such and the same trusts, to and for such and the same intents and purposes, and with, under, and subject to such and the same powers, provisions, conditions, agreements, and declarations, as are hereinbefore expressed and declared, of and concerning the hereditaments and premises so to be sold, or as near thereto * as the deaths of parties, and other inter- [*708] vening accidents, will then admit of.

(17) Provided also, and it is hereby agreed and declared between and by the parties to these presents, that it shall and may be lawful to and for the said J. D. and J. S., or any future trustee or trustees of these presents, as aforesaid, during the lives of the said E. F. and C. D., and the life of the survivor of them, and also during the minority of any son or sons, or during the minority or until marriage of any daughter or daughters, of the said intended marriage, who shall be entitled to the said messuages, lands, and hereditaments, under the limitations hereinbefore contained, but with the consent in writing of the said E. F. and C. D. during their joint lives, and of the survivor during his or her life, and at their or his own discretion after the decease of such survivor, and by any deed or deeds, writing or writings, to be by them or him sealed and delivered in the presence of, and to be attested by, &c., to demise and lease all or any part or parts of the said messuages, lands, and hereditaments, to any person or persons, for any term or number of years absolute, not exceeding, &c., to take effect in possession, and not in reversion, or by way of future interest, so that there be reserved on every such demise or lease the best or most improved yearly rent, to be payable during the continuance thereof, to be inci-

(16) This clause provides for the expenditure and application by the trustees of the moneys arising from such sale, by purchasing other lands, &c., and the uses to which the lands thus purchased shall be limited, varying, of course, so as to accomplish the object and intent of the settler.

(17) This clause provides for making leases, by the trustees, of the premises, prescribing the mode, length of the term, and the like.

dental to the immediate reversion of the hereditaments so to be demised or leased, that can or may be reasonably had or gotten for the same, so that there be contained in every such lease all clauses and provisions usual and proper in leases of the like nature.

(18) Provided also, and it is hereby agreed and declared between and by the parties hereto, that it shall and may be lawful to and for the said J. D. and J. S., or the survivor of them, or for any future trustee or trustees for the time being of these presents, with such consent or at such discretion as aforesaid, by any deed or deeds, instrument or instruments in writing, either during the life of the said E. F. and C. D., or the survivor of them, and the minority of any son or sons, or during the minority or until the marriage of any daughter or daughters, of the said intended marriage as aforesaid, by sale, mortgage, or other disposition of the whole or any part of the said [*709] messuages, lands, and hereditaments, * to levy and raise any sum or sums of money not exceeding — part of the principal share or shares of any such child or children, and to give receipts valid and effectual to the person advancing the same, who shall not be answerable for the application thereof, and do and shall apply the money so to be raised in or towards the preferment or advancement in the world of the child or children for whom the same shall be respectively raised, as aforesaid.

(19) Provided also, and it is hereby agreed and declared by and between the said parties to these presents, that if the trustees hereby appointed, or to be appointed as hereinafter mentioned, or either of them, shall die or decline, or become incapable to act in the execution

(18) This clause authorizes the trustees to raise moneys, by sale or mortgage of the premises, for the benefit of any of the children, &c., exonerating the person advancing the money from responsibility as to its application.

(19) This is an important clause, creating a power for supplying trustees upon the death or resignation, &c., of those named in the settlement, prescribing by whom and in what form and manner this may be executed, and providing for a conveyance and assignment of the trust-estates to such new trustee or trustees. The language of a writer of authority upon the subject is, "Every well-drawn deed of settlement and will, creating trusts, which may, by possibility, endure beyond a very short period, contains powers enabling any of the trustees for the time being to relinquish the trust, as well as provisions for supplying by fresh nominations the vacancies to be occasioned by the resignation or the death or incapacity of any trustee." (Hill, Trust. 176.) "In framing these powers, the greatest care should be taken to provide for every possible contingency in which a change or new appointment of trustees may become necessary or desirable, so as to obviate the expense and trouble of an application to the court of chancery." (Ibid.) "The instrument of appointment will not, of itself, vest the estate in the trust-property in the newly appointed trustee: for that purpose, it must be accompanied by a conveyance or assignment of the property to the new trustee, or to him, jointly, with the surviving or continuing trustee, if any." (Ib. 186.)

of the trusts hereby created, then, and in such case, and so often as the same shall happen, it shall be lawful to and for the said E. F. and C. D. during their joint lives, and for the survivor of them during his or her life, and after the decease of the survivor for the surviving or continuing trustee, his executors or administrators, by any deed or writing under their or her hands and seals, or hand and seal, and to be attested, &c., to nominate, substitute, and appoint any person or persons to be a trustee or trustees in the stead of them or either of them so dying, declining, or becoming incapable to act as aforesaid; and that thereupon all the trust-estates, moneys, and premises, which shall be then vested in the trustees or trustee so dying, declining, or becoming incapable to act, shall be with all convenient speed conveyed, assigned, and transferred unto such new trustees or trustee, either jointly or solely, as occasion shall require, to the same uses and upon and for the same trusts hereinbefore declared, of and concerning the same trust-estates, moneys, and premises, or such of * them as shall be then subsisting or capable of taking effect; [*710] and that every such new trustee shall have the same powers, authorities, and discretion, in all respects, in the execution of the trusts hereby created, as if he or they had been originally nominated a trustee or trustees in and by these presents.

(20) Provided also, and it is hereby further agreed and declared between and by the parties to these presents, that the trustees hereby nominated and appointed, or to be nominated and appointed by virtue of the proviso hereinbefore contained, and each and every of them, shall be charged and chargeable, respectively, only for such moneys as he or they shall respectively actually receive by virtue of the trusts hereby in them reposed, notwithstanding his or their or any of their giving or signing, or joining in giving or signing, any receipt or receipts for the sake of conformity; and any one or more of them shall not be answerable or accountable, &c., for any loss or damage which may happen in the execution of the aforesaid trusts, or in relation thereunto, unless the same shall happen by or through their own wilful default respectively.

(21) Then follows a clause providing for a reimbursement of the trustee's costs, charges, &c., incurred and expended in executing the trust.

(22) Then a clause, wherein the father covenants that he has full

(20) This is a clause exempting each trustee from responsibility, except for his own fault or for what he actually receives; though, for form, he may sign receipts, in the execution of the trusts. (See the law on this subject, *ante*, p. *207; Hill on Trusts, *Am. ed.* 309, and note of *Am. cases.*)

(21, 22) State the usual clauses providing for reimbursing trustees for their costs, &c.

power to limit, appoint, grant, &c., the premises to the uses, &c., expressed, and for further assurance, &c.; closing with the usual *in testium* clause. See also a form in several respects like the foregoing, in 7 Bythewood on Conveyancing, 451, 497.

Stripped of its redundancy of verbiage, and reduced to its simple elements, the foregoing settlement amounts to this: namely, the estate is thereby limited, 1st, to the settler himself, the seisin through the trustees being executed to the use in him; 2d, by shifting the use to the trustees themselves, and the seisin is executed to the use in [*711] them, but, the gift *being intended to be to the use of the daughter, they become seised as trustees proper during her life; 3d, at her death, the trust ceasing, the use shifts to the husband for life, and the seisin is executed to the use in him; 4th, a remainder in case of forfeiting his life-estate is limited to the same trustees, as trustees to preserve contingent remainders, during the husband's life; 5th, at his death, the use shifts again to the child or children of the marriage, if any, and the seisin is executed to the use in them, in fee, if they arrive at the age of twenty-one years, or otherwise acquire vested estates in possession; and 6th, the use shifts again to the settler, if no child takes the fee, and the seisin is executed in him in fee. So far, this settlement works a succession of shifting uses. In the next place, it raises and creates the following powers in the trustees named, and to be by them executed: namely, 1st, to sell and pass the estate in fee, and limit and prescribe new uses; 2d, to collect and reinvest the proceeds of such sale in new estates; 3d, to make leases of the estate; 4th, to raise money for minor children by sale or mortgage of the estate; and 5th, to appoint new trustees with similar powers, and with power to convey the estate to them. And such is the ductile and plastic character of uses when applied to conveyances, that, in carrying out the foregoing settlement, the same persons named as trustees are made to play successively the several parts of feoffees to use, active trustees, trustees to preserve contingent remainders, and donees of powers of sale, of revocation and appointment, of leasing, and of creating new trustees with similar and equal powers with their own.

and the ordinary covenants for title on the part of the settler. It may be added, that in this country, inasmuch as a trustee may claim compensation for his services as such, it would seem that the twenty-first in the foregoing form might be omitted. (1 Greenl. Cruise, Dig. 456, note.)

I N D E X.

I N D E X.

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NOTE.—Should a discrepancy of a page or two, in some cases, be found to have arisen between the pages indicated by the Index and those in the volumes, it is to be ascribed to accident in transferring these from one edition to another, arising from additional matter in some of the paragraphs upon the pages of the latter occupying more space than upon the former.